

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion, U.S. Court of Appeals for the Seventh Circuit (June 10, 2024).....	1a
Judgment in a Criminal Case, U.S. District Court for the Northern District of Illinois (March 8, 2023).....	15a
Memorandum Opinion and Order on Motion to Suppress, U.S. District Court for the Northern District of Illinois, Eastern Division (July 28, 2021)	18a

OTHER DOCUMENTS

Suppression Hearing, Transcript of Proceedings (February 5, 2022)	32a
--	-----

**OPINION, U.S. COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
(JUNE 10, 2024)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff-
Appellee,*

v.

MARCOS MENDEZ,

*Defendant-
Appellant.*

No. 23-1460

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division.

No. 16-cr-163 — Mary M. Rowland, Judge.

Before: HAMILTON, BRENNAN, and ST. EVE,
Circuit Judges.

ST. EVE, *Circuit Judge*. Marcos Mendez was passing through customs at O'Hare International Airport after a trip abroad when a customs agent pulled him aside for inspection, unlocked and scrolled through his cell phone, and found child pornography in the photo

gallery. Customs agents then seized the phone, downloaded its contents, and discovered additional illicit images and videos of children.

After the district court denied Mendez’s motion to suppress this evidence, Mendez pled guilty to producing child pornography but preserved this appeal of the district court’s suppression-motion ruling. He now argues that the searches of his phone, in light of the Supreme Court’s decisions in *Riley v. California*, 573 U.S. 373 (2014), and *Carpenter v. United States*, 585 U.S. 296 (2018), required a warrant, probable cause, or at least reasonable suspicion.

The “longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ has a history as old as the Fourth Amendment itself.” *United States v. Ramsey*, 431 U.S. 606, 619 (1977). That history leads us to join the uniform view of our sister circuits to hold that searches of electronics at the border—like any other border search—do not require a warrant or probable cause, and that the kind of routine, manual search of the phone initially performed here requires no individualized suspicion. We affirm.

I. Background

A. Factual Background

Just shy of midnight on February 20, 2016, Marcos Mendez landed at O’Hare International Airport following a trip to Ecuador. He was traveling alone. Along with his baggage, Mendez carried with him three electronic devices: a personal cell phone, a work phone, and a work iPad.

Customs and Border Protection (“CBP”) had issued a child-pornography-related “lookout” for Mendez based on his arrest record and prior travel history. Mendez had a 2010 arrest relating to indecent solicitation of a child and child pornography, leading to a 2011 conviction for endangering the life or health of a child. Additionally, CBP previously had inspected Mendez in 2014 after he returned from Mexico. During that inspection, he claimed to have been kidnapped, robbed of his electronic devices, and told to leave the country. And on this particular trip, Mendez was returning from Ecuador, which CBP officers classified as a potential child-trafficking source country. Mendez also fit the profile for child-pornography offenders: a single adult male traveling alone.

Together, this information prompted CBP Investigating Officer Richard Callison to pull Mendez aside for secondary inspection after his arrival at O’Hare. Within the first thirty minutes of the inspection, Mendez gave Callison his cell phone and its passcode. Callison manually unlocked the phone and navigated to its camera roll. There he found thousands of pornographic images, including what appeared to be child pornography. Using the phone’s passcode, Callison also opened a protected application called “iSafe,” where he discovered more illicit images.

Callison then moved Mendez to a private location, where he conducted a more extensive, “forensic” examination of Mendez’s devices. CBP agents used a data extraction technology called “DOMEX” (Document and Media Exploitation) to download a copy of the devices’ photos and videos. The forensic examination took about two hours and revealed more child pornography.

Officers seized Mendez’s cell phone but released Mendez, who, in the days after his arrest, remotely wiped the contents of his phone and traveled by car into Mexico with his mother. Meanwhile, a Homeland Security Investigations (“HSI”) team extracted the metadata—creation dates, geolocation information, and so on—from the files that had earlier been downloaded from Mendez’s cell phone. That data revealed that several of the child pornography images were taken near Mendez’s residence in Rosemont, Illinois.

B. Procedural Background

A grand jury indicted Mendez on two counts of producing child pornography, in violation of 18 U.S.C. § 2251(a), one count of transporting child pornography, in violation of 18 U.S.C. § 2252A(a)(1), and one count of possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). He was extradited to the United States in January 2020.

Mendez moved to suppress the evidence found on his cell phone, arguing the searches violated the Fourth Amendment because they were unsupported by either a probable-cause supported warrant or reasonable suspicion. After an evidentiary hearing in which Officer Callison and other investigating officers testified, the district court denied the motion. Relying in large part on our decision in *United States v. Wanjiku*, 919 F.3d 472 (7th Cir. 2019), the district court held that the searches did not violate the Fourth Amendment because customs agents had reasonable suspicion by the time they began looking through Mendez’s phone.

Mendez pled guilty to one count of producing child pornography but preserved his right to appeal the

district court's suppression ruling. He received a 300-month sentence, followed by a ten-year term of supervised release. We now consider that preserved issue, reviewing the district court's findings of fact for clear error and questions of law de novo. See *United States v. Ostrum*, 99 F.4th 999, 1004 (7th Cir. 2024).

II. Analysis

The Fourth Amendment commands that searches and seizures be reasonable. U.S. Const. amend. IV. Ordinarily, “[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.” *Riley*, 573 U.S. at 382.

One such exception is the border search exception. “Congress, since the beginning of our Government, ‘has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.’”¹ *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). The government’s unquestionable authority to search persons and effects at the border is rooted in “the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country.” *Ramsey*, 431 U.S. at 616; see also *id.* at 619 (“Historically such broad

¹ We treat the customs area of O’Hare International Airport as “the functional equivalent of an international border for the purpose of inspecting persons and articles arriving on international flights.” *Wanjiku*, 919 F.3d at 480 (citing *United States v. Yang*, 286 F.3d 940, 944 (7th Cir. 2002)); see also *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.”); *Flores-Montano*, 541 U.S. at 152 (noting that the border exception rests on the government interest in “preventing the entry of unwanted persons and effects”). The “Fourth Amendment balance between the interests of the Government and the privacy right of the individual is . . . struck much more favorably to the Government at the border.” *Montoya de Hernandez*, 473 U.S. at 540. When the government acts under its “inherent authority to protect . . . its territorial integrity,” its interest is “at its zenith.” *Flores-Montano*, 541 U.S. at 152–53. In contrast, a traveler’s expectation of privacy at the border is simply “less.” *Montoya de Hernandez*, 473 U.S. at 539.

Accordingly, border searches have long been exempted from warrant and probable cause requirements, and ordinarily “are reasonable simply by virtue of the fact that they occur at the border.” *Flores-Montano*, 541 U.S. at 152–53 (quoting *Ramsey*, 431 U.S. at 616). “Routine” searches of people and effects at the border—which have included examining the contents of a person’s purse, wallet, or pockets, *United States v. Carter*, 592 F.2d 402 (7th Cir. 1979), opening mail, see *Ramsey*, 431 U.S. at 620, and disassembling and reassembling a vehicle’s fuel tank, see *Flores-Montano*, 541 U.S. at 155—are “per se reasonable” and require no particularized suspicion at all. *Yang*, 286 F.3d at 944 (citing *Ramsey*, 431 U.S. at 616); see also *Montoya de Hernandez*, 473 U.S. at 538 (“Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant.”); *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993).

Even highly intrusive, so-called “non-routine” border searches need only reasonable suspicion. *See Montoya de Hernandez*, 473 U.S. at 541. But the Supreme Court has recognized this “non-routine” category only in searches of a suspect’s person. It held, for example, that a 16-hour detention for monitored bowel movement of a person suspected of “smuggling contraband in her alimentary canal” requires reasonable suspicion given the personal dignity and privacy interests at stake. *Id.* at 541. And in this circuit, “we have confronted border searches and seizures that we characterized as *arguably* non-routine”—including pat downs, partial strip searches, visual body cavity searches, and the dismantling of luggage and have applied the reasonable suspicion standard. *Wanjiku*, 919 F.3d at 482–83 (emphasis added); *see also Yang*, 286 F.3d at 944, 949; *Kaniff v. United States*, 351 F.3d 780, 784–85 (7th Cir. 2003); *Johnson*, 991 F.2d at 1291–94.

Routine or otherwise, searches at the border “never” require a warrant or probable cause. *Ramsey*, 431 U.S. at 619 (“There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause.”). At most, border searches require reasonable suspicion. *See Wanjiku*, 919 F.3d at 481; *United States v. Molina-Isidoro*, 884 F.3d 287, 291 (5th Cir. 2018) (“For border searches both routine and not, no case has required a warrant.”). In more than 200 years of border search precedent, neither the Supreme Court nor we have ever found a border search unconstitutional.

Mendez argues that *Riley* and *Carpenter* upended that precedent by recognizing that cell phones fundamentally differ from other types of personal effects.

See *Riley*, 573 U.S. at 393; *Carpenter*, 585 U.S. at 318. Yet our caselaw highlights why neither case supports altering the long-settled rule exempting border searches from warrant and probable cause requirements: *Riley* and *Carpenter* had nothing to do with the border context. See *Wanjiku*, 919 F.3d at 484; *United States v. Wood*, 16 F.4th 529, 533 (7th Cir. 2021) (“Given the context-specific nature of the Fourth Amendment, *Riley* is not readily transferable to scenarios other than the one it addressed.”).²

² *Wanjiku* and a later decision, *United States v. Skaggs*, 25 F.4th 494 (7th Cir. 2022), resolved the identical issue of electronic device searches at customs under the Fourth Amendment’s good faith exception to the warrant requirement. “[N]o court,” we observed in *Wanjiku*, “had ever required more than reasonable suspicion for any search at the border.” 919 F.3d at 479. And because we found that law enforcement had reasonable suspicion to search the defendant’s phone, “[g]iven the state of the law at the time of the[] searches,” we concluded that law enforcement had “an objectively good faith belief that their conduct did not violate the Fourth Amendment.” *Id.* at 485–86. While we left the merits of the Fourth Amendment issues open in those cases, we go on to reach those merits issues here to provide clarity to law enforcement and the public on the burgeoning practice of electronic device searches. See *Molina-Isidoro*, 884 F.3d at 293 (Costa, J., specially concurring) (“Courts should resist the temptation to frequently rest their Fourth Amendment decisions on the safe haven of the good-faith exception, lest the courts fail to give law enforcement and the public the guidance needed to regulate their frequent interactions.”); *United States v. Bosyk*, 933 F.3d 319, 332 n.10 (4th Cir. 2019) (“[W]hen a Fourth Amendment case presents a novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates, there is sufficient reason for [a court] to decide the violation issue before turning to the good-faith question.” (alterations in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 264 (1983) (White, J., concurring))).

Rather, *Riley* involved the search incident to arrest exception and “carefully tailored its analysis to that context.” *Wood*, 16 F.4th at 533. What is unreasonable after arrest may be perfectly reasonable at customs, as *Riley* itself anticipated. *See Riley*, 573 U.S. at 401–02 (“[O]ther case-specific exceptions may still justify a warrantless search of a particular phone.”); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (Fourth Amendment reasonableness “depends on the context within which a search takes place.”). A border search is fundamentally different from a search incident to arrest, not least because “the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border,” where the government’s interest in protecting its territorial integrity is at its peak and travelers’ expectations of privacy are diminished. *Montoya de Hernandez*, 473 U.S. at 538; *cf. United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125 (1973) (“Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations.”). Underlying the Court’s decision in *Riley* was the fact that neither of the search incident to arrest exception’s twin concerns—preventing harm to officers and destruction of evidence—“ha[d] much force with respect to digital content on cell phones.” *Riley*, 573 U.S. at 386. Here, in contrast, we agree with the First Circuit that “given the volume of travelers passing through our nation’s borders, warrantless electronic device searches are essential to the border search exception’s purpose of ensuring that the executive branch can adequately protect the

border.”³ *Alasaad v. Mayorkas*, 988 F.3d 8, 17 (1st Cir. 2021).

While Mendez argues that cell phone searches are untethered to the border search doctrine’s justifications, this case illustrates that cell phones *can* contain the contraband the border search doctrine means to intercept: here, digital contraband in the form of child pornography. See *United States v. Cano*, 934 F.3d 1002, 1014 (9th Cir. 2019) (“The best example [of digital contraband] is child pornography.”). The government’s interest in detecting child pornography at the border is just as strong as its interest in intercepting firearms, narcotics, or any other prohibited item.⁴ See

³ We have twice declined to extend *Riley* beyond the search incident to arrest exception: to parolee searches in *Wood*, 16 F.4th at 533, and to consent searches in *United States v. Thurman*, 889 F.3d 356, 366 n.9 (7th Cir. 2018) (finding in the consent-search context that “*Riley* d[id] not affect our holding” because “[a]lthough the Court discussed the unique nature of modern cell phones as unparalleled repositories for personal information, it did not address the consent-based exception to the warrant requirement”).

⁴ Although the scope of a search conducted under an exception to the warrant requirement must be “commensurate with its purposes,” *Arizona v. Gant*, 556 U.S. 332, 339 (2009), the Ninth Circuit is the only circuit to cabin the border search exception to detecting contraband itself. Compare *Cano*, 934 F.3d at 1019 (holding that “border officials are limited to searching for contraband only”), with *United States v. Levy*, 803 F.3d 120, 124 (2d Cir. 2015) (noting that CBP officers “have the authority to search and review a traveler’s documents and other items at the border when they reasonably suspect that the traveler is engaged in criminal activity, even if the crime falls outside the primary scope of their official duties.”), and *United States v. Xiang*, 67 F.4th 895, 900 (8th Cir. 2023) (adopting the Second Circuit’s “more sensibl[e]” position), and *Alasaad*, 988 F.3d at 20 (“[T]he border search exception’s purpose is not limited to interdicting

United States v. Touset, 890 F.3d 1227, 1235 (11th Cir. 2018) (“‘[Digital]’ child pornography poses the same exact ‘risk’ of unlawful entry at the border as its physical counterpart.”). That digital contraband like child pornography can pass into the country electronically or be accessed remotely does little to diminish the government’s interest in preventing its physical entry into the country. *See id.* (“If anything, the advent of sophisticated technological means for concealing contraband only heightens the need of the government to search property at the border.”); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (“Customs officers characteristically inspect luggage and their power to do so is not questioned . . . ; it is an old practice and is intimately associated with excluding illegal articles from the country.”). And although it was not the case here, a border search of a cell phone could also facilitate the doctrine’s goal of “reasonably requiring one entering the country to identify himself as entitled to come in.” *Carroll v. United States*, 267 U.S. 132, 154 (1925).

No circuit court has read *Riley* to require more than reasonable suspicion to support even the most intrusive electronics search at the border. *See United States v. Castillo*, 70 F.4th 894, 897–98 (5th Cir. 2023) (“[W]hen it comes to manual cell phone searches at the border, our sister circuits have uniformly held that

contraband; it serves to bar entry to those ‘who may bring anything harmful into this country.’” (emphasis in original) (quoting *Montoya de Hernandez*, 473 U.S. at 544)), and *United States v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019) (finding the purposes of the exception to be “protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband”).

Riley does not require either a warrant or reasonable suspicion.”); *Molina-Isidoro*, 884 F.3d at 293 (5th Cir. 2018); *Xiang*, 67 F.4th at 900 (8th Cir. 2023) (“*Riley* involved a different Fourth Amendment exception, searches incident to arrest. No Circuit has held that the government must obtain a warrant to conduct a routine border search of electronic devices.”); *Alasaad*, 988 F.3d at 17 (1st Cir. 2021) (“*Riley* does not command a warrant requirement for border searches of electronic devices nor does the logic behind *Riley* compel us to impose one.”); *Cano*, 934 F.3d at 1015 (9th Cir. 2019); *Touset*, 890 F.3d at 1234 (11th Cir. 2018) (“Although the Supreme Court stressed in *Riley* that the search of a cell phone risks a significant intrusion on privacy, our [caselaw makes] clear that *Riley*, which involved the search-incident-to-arrest exception, does not apply to searches at the border.”); *United States v. Vergara*, 884 F.3d 1309, 1312–13 (11th Cir. 2018) (“Border searches have long been excepted from warrant and probable cause requirements, and the holding of *Riley* does not change this rule.”); *United States v. Kolsuz*, 890 F.3d 133, 147 (4th Cir. 2018). We join our sister circuits to hold that a border search of a cell phone or other electronic device requires neither a warrant nor probable cause.

The question remains whether the agent’s manual search of Mendez’s phone—scrolling through its photo gallery—was a routine search permissible without any suspicion or a “non-routine” search requiring reasonable suspicion. Mendez contends that because electronic devices carry potentially vast troves of sensitive and personal information, we should treat *all* electronic device searches as intrusive border searches requiring at least reasonable suspicion. *Riley*

itself involved a manual phone search and no doubt indicates that all cell phone searches are intrusive to some degree, but the privacy concerns such searches implicate “are nevertheless tempered by the fact that the searches are taking place at the border.” *Alasaad*, 988 F.3d at 18. Moreover, manual electronic searches at the border are typically “brief procedure[s]”—here, around thirty minutes—practically limited in intrusiveness by the fact that the customs agent cannot download and peruse the phone’s entire contents. Instead, they must physically scroll through the device, making it less likely for an agent to tap into the revealing nooks and crannies of the phone’s metadata, encrypted files, or deleted contents. *Flores-Montano*, 541 U.S. at 155; compare *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) (en banc) (pre-*Riley* decision finding the legitimacy of a suspicion-less “quick look and unintrusive” manual laptop search “not in doubt”), with *Kolsuz*, 890 F.3d at 136 (requiring reasonable suspicion for a month-long, off-site forensic analysis that yielded a nearly 900-page report cataloguing the phone’s data).

We therefore agree with the consensus among circuits that brief, manual searches of a traveler’s electronic device are “routine” border searches requiring no individualized suspicion. See *Castillo*, 70 F.4th at 897–98 (“[W]hen it comes to manual cell phone searches at the border, our sister circuits have uniformly held that *Riley* does not require either a warrant or reasonable suspicion.”); *Alasaad*, 988 F.3d at 19 (“[B]asic border searches [of electronic devices] are routine searches and need not be supported by reasonable suspicion.”); *Cano*, 934 F.3d at 1016 (“[M]anual searches of cell phones at the border are reasonable

without individualized suspicion.”); *Touset*, 890 F.3d at 1233; *Kolsuz*, 890 F.3d at 146 n.5 (describing *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005), as “treat[ing] a [basic] search of a computer as a routine border search, requiring no individualized suspicion”).

The only point of divergence among the circuits is whether more intrusive, forensic electronic device searches require individualized suspicion. Compare *Touset*, 890 F.3d at 1231 (no suspicion required for forensic electronics search), with *Cano*, 934 F.3d at 1016 (reasonable suspicion required). We need not resolve this issue today because this case does not require it. The valid manual search of Mendez’s phone revealed child pornography. So, even if the extensive forensic searches that followed required reasonable suspicion, customs agents had that and more once they found illicit images and videos of children on Mendez’s phone during the routine search.

AFFIRMED

**JUDGMENT IN A CRIMINAL CASE,
U.S. DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS
(MARCH 8, 2023)**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

v.

MARCOS MENDEZ

Case Number: 1:16-CR-00163(1)

USM Number: 54840-424

Before: Mary M. ROWLAND,
United States District Judge.

Marco Andrew Duric, Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

pleaded guilty to Count Two (2) of the
Indictment.

The defendant is adjudicated guilty of these offenses:

Title & Section/Nature of Offense

18 U.S.C. § 2251(a), 18 U.S.C. § 2251(e)
Production of Child Pornography

Offense Ended

12/15/2015

Count

2

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Counts 1, 3, and 4 of the Indictment dismissed on the motion of the United States

It is ordered that the defendant must notify the United States Attorney for this District within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

February 24, 2023
Date of Imposition of Judgment
/s/ Mary M. Rowland
Signature of Judge

Mary M. Rowland
United States District Judge
Name and Title of Judge

March 8, 2023
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 300 months as to count 2

- The court makes the following recommendations to the Bureau of Prisons: The Court recommends designation to SOMP and/or FMC Devens. The Court further recommends Defendant participate in sex offender treatment.
- The defendant is remanded to the custody of the United States Marshal.

{ Collateral Conditions of Confinement
and Probation Omitted }

**MEMORANDUM OPINION AND ORDER
ON MOTION TO SUPPRESS,
U.S. DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION
(JULY 28, 2021)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCOS MENDEZ,

Defendant.

Case No. 16-cr-00163-1

Before: Mary M. ROWLAND, U.S. District Judge.

MEMORANDUM OPINION AND ORDER

On April 26, 2016, Defendant Marcos Mendez was indicted on four counts, two counts of production of child pornography, in violation of 18 U.S.C. § 2251(a); one count of transportation of child pornography, in violation of § 2252A(a)(1); and one count of possession of child pornography, in violation of § 2252A(a)(5). Mendez has moved to suppress the evidence obtained

by the Government in this case, arguing that the Government violated his Fourth Amendment rights by searching his cell phone without first obtaining a search warrant. For the following reasons, Mendez’s motion to suppress [50] is denied.

I. Background

The facts herein are undisputed and drawn from the evidentiary hearing and the parties’ briefs. On February 20, 2016, Marcos Mendez (“Mendez” or “Defendant”) arrived alone at Chicago O’Hare International Airport from Ecuador via Panama City, Panama. (Gov’t Resp. (Dkt. 54), p. 2). Based on a TECS entry¹ for Mendez, he was selected for secondary inspection. *Id.* During the secondary inspection, two U.S. Customs and Border Protection (CBP) Officers conducted routine questioning of Mendez. *Id.* Officers then searched Mendez’s possessions and located three electronic devices—a personal cell phone, a work cell phone, and a work iPad. *Id.* at 3. The officers first manually searched Mendez’s personal cell phone, his work cell phone, and his work iPad. *Id.* CBP Officer Richard Callison conducted a manual search of Mendez’s personal cell phone. *Id.* at 4. Having found child pornography within about 30 minutes of when the secondary inspection began, Officer Callison consulted his supervisor and obtained approval to DOMEX Mendez’s devices. *Id.* at 5. DOMEX technology downloads a copy of the device’s contents based on certain search parameters but does not damage or

¹ Formerly known as the Treasury Enforcement Communications System, TECS is used by the U.S. Department of Homeland Security (DHS) to manage the flow of people through border ports of entry and for immigration enforcement case management. *Id.*

change the data on the device or disrupt the function of the device. *Id.* The DOMEX extracted files only from the camera roll of Mendez’s cell phone.

CBP gave the extracted data from the cell phone to DHS’s Homeland Security Investigations (“HSI”) (when CBP finds child pornography it calls on HSI to do the investigation). Relying in part on evidence from the manual search and forensic preview of Mendez’s phone, the Government later obtained search warrants for Mendez’s residence, his parents’ residence, his Apple iCloud account, and his work electronics. (Dkt. 54 at 7). Border crossing information showed that on February 23, 2016, two days after Mendez was released from O’Hare, his mother drove him across the border into Mexico in the family’s car. *Id.* at 8. Mendez was indicted on April 26, 2016 and was extradited to the United States from Mexico on January 22, 2020. *Id.*

The Court held an evidentiary hearing on the motion to suppress on May 28, 2021. (*see* Dkt. 73).² At the hearing, the Government presented testimony from CBP Officer Callison, who was assigned to the Customs’ Passenger Enforcement Rover Team at O’Hare. Defendant presented testimony from HSI Special Agent Jennifer Finerty. In 2016 Agent Finerty was assigned to the HSI O’Hare Group. She obtained an initial search warrant on March 10, 2016 to search Mendez’s and his parents’ residence. She obtained a second search

² Defendant requested an evidentiary hearing. (*see* Dkts. 59, 67). After review of the parties’ briefs and consideration of the issues in dispute, the Court granted Defendant’s request for an evidentiary hearing. *See United States v. Villegas*, 388 F.3d 317, 324 (7th Cir. 2004) (evidentiary hearing warranted if there are disputed issues of material fact).

warrant for Mendez’s three devices on March 18, 2016, and a third warrant on March 24, 2016 for all information related to Mendez’s Apple ID. Defendant also presented CBP Officer Mohammed M. Alikhan, who was on the same team as Officer Callison in 2016. The Government also relied on six exhibits at the hearing.³ The Court found all of the witnesses to be credible, in particular Officer Callison who provided the most testimony.

Having considered the evidence and the parties’ arguments presented in their briefs and at the hearing, the Court denies the motion to suppress.

II. Analysis

A. The Fourth Amendment and the Border Search Exception

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects[] against unreasonable searches and seizures.” U.S. Const. amend. IV. *See Katz v. United States*,

³ The Court admitted five of the Government’s exhibits: Government Exhibits 1A through 1D: photos of how the secondary inspection area appeared on February 20, 2016 (although they were not photos of the exact area since that particular area is being remodeled). Government Exhibit 2: Mendez’s personal iPhone. Government Exhibit 3: Customs and Border Protection tear-sheet explaining the airport search process. Government Exhibits 4A through D: red folder containing photographs of images Officer Callison saw during his manual search, in the cell phone’s photo gallery. Government Exhibits 5A through D: CDs containing the photos and videos extracted from the cell phone using the DOMEX technology. Defendant stipulated to Government Exhibit 6, the NCIC (National Crime Information Center) report for Mr. Mendez.

389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The Court must suppress evidence gathered in violation of the Fourth Amendment's protection against unreasonable searches and seizures. *See Mapp v. Ohio*, 367 U.S. 643, 648–49 (1961). The Fourth Amendment generally requires that a warrant supported by probable cause be issued before any search, with a few exceptions. *Stanley v. Henson*, 337 F.3d 961, 963 (7th Cir. 2003).

One such exception is the border search exception. *United States v. Ramsey*, 431 U.S. 606, 621-22, 97 S. Ct. 1972, 1978, 52 L. Ed. 2d 617 (1977). “[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.” *Id.* at 616. “The Court has linked this longstanding, congressionally-granted, search-and-seizure authority to two main purposes: to allow the regulation of the collection of duties, and ‘to prevent the introduction of contraband into this country.’” *United States v. Wanjiku*, 919 F.3d 472, 480 (7th Cir. 2019) (citation omitted).⁴

B. *United States v. Wanjiku*

The parties dispute the applicability of the Seventh Circuit's decision in *Wanjiku*. As here, that case involved a challenge to a warrantless border search of electronic devices at O'Hare. The district court found

⁴ “O'Hare Airport is an international gateway into the United States, and incoming passengers from international ports are subject to border searches because the airport is the functional equivalent of an international border.” *United States v. Yang*, 286 F.3d 940, 944 (7th Cir. 2002).

no Fourth Amendment violation because “the information available to the government at the time it initiated the searches of Mr. Wanjiku’s electronic devices was sufficient to trigger a reasonable suspicion that he was involved” in criminal activity. *United States v. Wanjiku*, 2017 WL 1304087, at *5 (N.D. Ill. Apr. 6, 2017). On appeal, the Seventh Circuit affirmed. 919 F.3d at 474.

In June 2015, CPB and HSI were conducting a criminal investigation at O’Hare targeting certain individuals returning from three countries known for sex tourism and sex trafficking, including the sex trafficking of children. *Id.* Wanjiku met the investigators’ initial screening factors, and after some additional research the investigators decided that Wanjiku should be sent for secondary inspection. After the CBP Officer’s manual search of Wanjiku’s cell phone, CBP turned the phone over to the HSI forensics team that used forensic software to “preview” Wanjiku’s hard drive and cell phone. The searches revealed child pornography. *Id.* at 477-78.

On appeal, Wanjiku conceded that no court had applied a standard higher than reasonable suspicion for even highly intrusive searches at the border but argued that the Supreme Court’s decisions in *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) and *Carpenter v. United States*, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018) altered the legal landscape for cell phone searches. The Seventh Circuit acknowledged these cases but found “neither case address[ed] searches at the border where the government’s interests are at their zenith.” *Id.* at 484. The Seventh Circuit observed that “[n]o court required probable cause and a warrant for a border search of any

property,” and no circuit court, before or after *Riley*, had “required more than reasonable suspicion for a border search of cell phones or electronically-stored data.” *Id.* at 485.

Therefore, “[g]iven the state of the law at the time of these searches . . . the agents [] possessed an objectively good faith belief that their conduct did not violate the Fourth Amendment because they had reasonable suspicion to conduct the searches.” *Id.* at 485-86. Summarizing the evidence the agents had gathered, the Court also found that “the agents possessed reasonable suspicion to search Wanjiku’s electronic devices, including his cell phone, portable hard drive, and laptop computer. At the time that they conducted these searches, they reasonably relied on Supreme Court precedent that required no suspicion for non-destructive border searches of property, and nothing more than reasonable suspicion for highly intrusive border searches of persons.” *Id.* at 488-89.

C. The Mendez Search Did Not Violate the Fourth Amendment

Although *Wanjiku* did not decide “what level of suspicion is required (if any) for searches of electronic devices at the border,” no circuit court including the Seventh Circuit has “required more than reasonable suspicion for a border search of cell phones or electronically-stored data.” *Wanjiku*, 919 F.3d at 485, 489.⁵

⁵ In 2019, the Ninth Circuit held that “manual searches of cell phones at the border are reasonable without individualized suspicion, whereas the forensic examination of a cell phone requires a showing of reasonable suspicion.” *Cano*, 934 F.3d at 1016, cert. denied, 2021 WL 2637990. This year, in a civil case, the First Circuit “join[ed] the Eleventh Circuit in holding that

In this case, there was no Fourth Amendment violation because the agents had reasonable suspicion to search Mendez’s cell phone.

a. Defendant’s Argument that a Warrant was Required is Unfounded

Relying on *Riley* and *Carpenter*, Defendant first argues that the officers should have obtained a warrant before the initial search of Mendez’s cell phone. (Dkt. 50 at 5-10). The Seventh Circuit rejected the same argument in *Wanjiku*. The Seventh Circuit explained that in *Riley* and *Carpenter* the Supreme Court granted “heightened protection to cell phone data, [but] neither case address[ed] searches at the border where the government’s interests are at their zenith.” 919 F.3d at 484. As the Supreme Court explained in *United States v. Montoya de Hernandez*, “not only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border.” 473 U.S. 531, 539, 105 S. Ct. 3304, 3309, 87 L. Ed. 2d 381 (1985).

While not disputing that one purpose of a border search is “to prevent the introduction of contraband into this country,” *Montoya de Hernandez*, 473 U.S. at 537, Defendant argues that cell phone searches do not

advanced searches of electronic devices at the border do not require a warrant or probable cause . . . [and] join[ed] the Ninth and Eleventh Circuits in holding that basic border searches of electronic devices are routine searches that may be performed without reasonable suspicion.” *Alasaad v. Mayorkas*, 988 F.3d 8, 13 (1st Cir. 2021), cert. denied sub nom. *Merch. v. Mayorkas*, No. 20-1505, 2021 WL 2637881 (U.S. June 28, 2021).

promote this interest. (Dkt. 50 at 10-11). Relying on *Riley*, Defendant contends “that not only are cell phone searches ineffective in preventing the entry of electronic contraband, they allow the government to arbitrarily invade the expectation of privacy in millions of pages of unrelated personal information in the process.” (*Id.*). Defendant’s reliance on *Riley* is misplaced. *Riley* stressed the uniqueness of cell phones and the nature of the data they store but *Riley* was about the “search incident to arrest” exception to the warrant requirement; it did not involve either the border search exception or contraband. Most significant for this case, the Seventh Circuit specifically stated in *Wanjiku*, which involved child pornography at the border, that *Riley* did not “address[] searches at the border where the government’s interests are at their zenith.” 919 F.3d at 484. The fact that even when the phone is searched and seized, the “illicit material may be stored on remote servers and continue to remain accessible inside the border” (Dkt. 50 at 10), does not decrease the government’s interest at the border. To the contrary, the ready availability of this particular form of contraband increases the government’s interest in detecting efforts to “import” it.

Moreover, Defendant does not dispute that child pornography is digital contraband. *See e.g. United States v. Cano*, 934 F.3d 1002, 1014 (9th Cir. 2019).⁶

⁶ Defendant relies on *United States v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019), cert. denied, 2021 WL 2637946 (U.S. June 28, 2021), but there the Court found no basis “in the record for agents to reasonably suspect that [defendant] possessed child pornography on his devices.” *Id.* at 723. By contrast here, agents had reasonable suspicion that Mendez’s cell phone contained evidence of child pornography.

Indeed Officer Callison testified that as a CBP officer he is responsible for preventing contraband from entering the country and once he saw what he believed was child pornography on Mendez's phone, he had an obligation to prevent it from entering the country. Defendant also does not address CBP's statutory authority to inspect baggage for contraband, a point raised by the Seventh Circuit in *Wanjiku* (919 F.3d at 480-81) and argued by the Government here (Dkt. 54 at 9).

b. Reasonable Suspicion Supported the Search

Having determined that the border exception applies and at most the agents needed reasonable suspicion to search Mendez's cell phone, the question is whether reasonable suspicion existed for the initial manual search of Mendez's cell phone and scrolling through the photo roll.⁷

To assess whether officers have reasonable suspicion of criminal activity:

we look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis

⁷ The remaining searches, (1) the search of additional files in the phone's iSafe application, (2) the forensic preview (DOMEX), and (3) the extraction of metadata from the files using an "ExifTool" were all conducted after Officer Callison discovered child pornography during his initial search of the cell phone. This gave the Government at least reasonable suspicion for these remaining searches. See *Wanjiku*, 919 F.3d at 485, n. 15 (forensic agent's search of the first device, hard drive, revealed child pornography so "[a]t that point, the agents possessed probable cause to search Wanjiku's cell phone.").

for suspecting legal wrongdoing. Reasonable suspicion requires more than an inchoate and unparticularized suspicion or hunch but considerably less than preponderance of the evidence. Ultimately, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.

United States v. Eymann, 962 F.3d 273, 282 (7th Cir. 2020) (cleaned up). The standard “takes into account ‘the totality of the circumstances—the whole picture.’” *Navarette v. California*, 572 U.S. 393, 397, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680 (2014) (citation omitted). “Because it is a ‘less demanding’ standard, ‘reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause.’ The standard ‘depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” *Kansas v. Glover*, 140 S. Ct. 1183, 1188, 206 L. Ed. 2d 412 (2020) (cleaned up). The Court “measure[s] whether reasonable suspicion existed at the moment of the search.” *Wanjiku*, 919 F.3d at 487.⁸

At the evidentiary hearing, Officer Callison testified that on February 20, 2016, he received a “lookout” from CBP’s intelligence group for Mendez. The lookout was for child pornography. Callison explained that a lookout provides information about the individual, their passport, and any arrest or other background information. Callison knew that the information leading

⁸ Because the Court finds reasonable suspicion existed in this case it need not decide whether the good faith exception to the exclusionary rule applies.

to the lookout for Mendez was a prior arrest record related to child pornography or endangering a child, a 2011 conviction for endangering the life or health of a child, and “odd” previous travel. Based on the lookout, Callison searched the records and learned that in 2014 Mendez had been in a secondary inspection on return from Mexico and had reported that he had been kidnapped and all his electronics were taken and he was ordered to leave Mexico.

Callison approached Mendez who acted in a very condescending way and tried to divert attention from the inspection. Callison asked for his cell phone and its password. Once Callison unlocked the phone, he began manually scrolling through the camera roll (only the camera roll) on the phone. He saw thousands of images of pornography generally and had no doubt that some of it was child pornography.

Thus at the time Callison searched Mendez’s cell phone, the Government knew: (1) Mendez was an adult male traveling by himself; (2) Mendez had significant prior travel; (3) he was traveling from Ecuador, which Officer Callison understood to be a potential source country for child trafficking; (4) in 2014, Mendez underwent a secondary inspection, and the customs report from that inspection stated that Mendez had been kidnapped and all his electronics taken and he was told to leave Mexico; (5) Mendez had prior arrests for child pornography and soliciting a minor; (6) he had a 2011 conviction for endangering the life or health of a child; and (7) when Callison met Mendez, Mendez was very condescending and gave the impression that CBP should be letting him go, which Callison believed showed Mendez attempting to deflect attention away from his inspection.

Defendant argues that the only basis for searching his phone was his 2011 conviction. (Dkt. 50 at 13). That is not accurate. While there were some distinguishing facts in *Wanjiku* (agents had social media information about Wanjiku and found physical evidence in his bags and other items that called into question his story about the reason for his travel), the overall facts are strikingly similar. In *Wanjiku* and here, both individuals were adult males traveling by themselves from countries that agents understood to be either a sex tourism destination or potential source country for child trafficking. Both men had prior criminal histories involving a minor victim. Both were flagged by the government before they landed at O'Hare as meeting certain criteria warranting a secondary inspection. Wanjiku was one of twenty-three or twenty-four individuals selected. Mendez was the target of a "lookout" from CBP's intelligence group for child pornography.

Additional facts here, not present in *Wanjiku*, support a finding of reasonable suspicion. Mendez had *two* prior arrests, both involving child pornography and solicitation, and a prior conviction for endangering the life/health of a child. Wanjiku had one prior arrest which involved a minor victim, but no prior conviction. Further, Mendez had a previous interaction with customs and at the time reported that all his electronics disappeared.

Considering the "whole picture" (*Navarette*, 572 U.S. at 397), the Court finds the agent had reasonable suspicion to scroll through Mendez's cell phone. Mendez's arguments do not account for the totality of the circumstances. He is correct that reasonable suspicion of criminal activity cannot be based *solely* on an individual's prior criminal record. *United States v.*

Walden, 146 F.3d 487, 490–91 (7th Cir. 1998). But “a criminal record in conjunction with other information can form the basis of a reasonable suspicion.” *Id.* At the evidentiary hearing, defense counsel asked Officer Callison whether it was fair to say that “pretty much any country could be a source of child pornography,” and Callison responded yes. Again this is only one factor, and moreover, “the law simply does not require law enforcement officials, including Customs inspectors, to be right every time.” *Kaniff v. United States*, 351 F.3d 780, 790 (7th Cir. 2003).

III. Conclusion

For the stated reasons, Mendez’s motion to suppress [50] is denied.

ENTER:

/s/ Mary M. Rowland
United States District Judge

Dated: July 28, 2021

**SUPPRESSION HEARING,
TRANSCRIPT OF PROCEEDINGS
(FEBRUARY 5, 2022)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCOS MENDEZ,

Defendant.

Docket No. 16 CR 163

Chicago, Illinois

May 28, 2021

10:29 a.m.

Before: Honorable Mary M. ROWLAND, Judge.

**TRANSCRIPT OF PROCEEDINGS -
Suppression Hearing BEFORE THE
HONORABLE MARY M. ROWLAND**

(In open court.)

THE CLERK: 16 CR 163, *United States of America v.
Marcos Mendez.*

MR. DURIC: Good morning, your Honor.

THE COURT: Good morning.

(Defendant enters the courtroom.)

MR. PARENTE: Chris Parente and David Green for the United States.

THE COURT: Good morning.

MR. DURIC: Marko Duric and Rob Robertson on behalf of Mr. Mendez.

THE COURT: Good morning.

Good morning, Mr. Mendez.

THE DEFENDANT: Good morning.

THE COURT: How are you?

THE DEFENDANT: I'm well.

THE COURT: Good.

Okay. So we have a new order in the court about face masks. I don't know if anyone's aware of that.

MR. PARENTE: Yes, your Honor.

THE COURT: But I can obtain—if I can obtain on the record that people are fully vaccinated and if there's not a jury, people can remove their face masks. You don't have to tell me if you don't want to share that information, whether you're fully vaccinated. But if you are and you want to share that on the record, then I can allow you to remove your face masks. So it's up to you whether or not you indicate that. But if you do, I will allow you to remove your face mask.

So, Mr. Parente.

MR. PARENTE: Judge, I would share that I am vaccinated and would prefer to remove the face mask.

THE COURT: Okay. Counsel?

MR. GREEN: Also, yeah—David Green—fully vaccinated.

THE COURT: Okay.

MR. DURIC: Your Honor, I know that Mr. Robertson is fully vaccinated. I, however, am not.

THE COURT: Okay. So you'll remain in your face mask.

If you'd like to remove your face mask, you can. If you want to keep it on, obviously, you can. But if you're vaccinated, you may remove it.

And what about your client?

(Counsel and defendant conferring.)

MR. DURIC: He indicates he's fully vaccinated.

THE COURT: Okay. If you're fully vaccinated, if you'd like to remove your face mask, you may while you're in court. If you'd like to leave it on, obviously, you may leave it on as well if you feel more comfortable.

Okay. Now, Mr. Parente, I don't know how we'll deal with your witnesses, but I will have to get that information on the record. But I have been allowing witnesses—actually, I had a hearing earlier in the week, and I allowed the witnesses to remove their face mask, which is something we've always been able to do. So I will probably just allow them to testify without face masks for

credibility reasons and obviously for—to help the court reporter.

MR. PARENTE: And I should have asked you, Judge. If there's anyone on your staff that would prefer me to stay in a mask, I'm happy to do that.

THE COURT: I'm sorry?

MR. PARENTE: If there's anyone on your staff that wants me to—okay. I was just going to defer to your staff. If someone had a preference for masks, I'm happy to wear the mask.

THE COURT: I think we're fine.

MR. PARENTE: Okay.

Yeah, the witnesses, without answering for them, I would just have you ask them, and if they want to share that on the record.

THE COURT: Yeah, okay.

MR. PARENTE: And then I did file a short witness list. Obviously, we're just calling one witness, the last name, as well as an exhibit list. Does your Honor have those? I have a copy.

THE COURT: I do. Thank you, yes. I do not have the exhibits, but I do have the exhibit list.

MR. PARENTE: Correct.

THE COURT: Yeah, okay.

MR. PARENTE: And for the exhibits, with the new protocols—as you saw, there's very few exhibits.

The main exhibits are actually child pornography. They're in a red folder. With your Honor's permission and defense counsel's permission, we'll

just put those on the witness stand so the agent can look at them to himself and describe them. And to the extent anyone else needs to see them, we'll show them ahead of time. And if your Honor wants them, obviously, he can pass you the folder, but we wouldn't be publishing that regardless.

And then the other exhibits, like the phone, unless there's an objection, we'll just hold it up so the officer can see it so we don't have to approach.

And then there's some photos. So we have copies for everybody if it's just easier for everybody to look at their own copy, but this is an exhibit kind of case.

THE COURT: Yeah, okay. Very good.

So are you ready to call your witness?

MR. PARENTE: We are, Judge.

And so—but just by way of procedure, we're going to call one witness, and then we think that's enough for our case.

THE COURT: I understand.

MR. PARENTE: Defense counsel will call their witness.

THE COURT: And I would like to clarify that the defendant is challenging the manual search of the phone, which I understand happened first. And then there was a forensic preview of the phone.

Now, are you challenging both of those as two separate searches?

MR. DURIC: We would contest that there's actually four separate searches, but we are contesting all aspects of the search in this case, yes.

THE COURT: Okay. When you say there are four separate searches, could you describe what you mean to me.

MR. DURIC: There is the initial—

COURT REPORTER: Can you pull the microphone closer to you, please. Speak right into it.

MR. DURIC: I'm sorry.

COURT REPORTER: Thank you.

MR. DURIC: There's an initial search where agents unlock the phone, scroll through the camera roll.

THE COURT: Right. So that's what I call a manual search.

MR. DURIC: Okay.

THE COURT: Okay.

MR. DURIC: Subsequent to that, they then go into an application called iSafe, which is like an electronic safe. They then view additional files in that application.

THE COURT: So forensic preview.

MR. DURIC: I think that's done with their hands, not using any special technology. However, they do unlock that application.

THE COURT: Okay.

MR. DURIC: The phone is then taken to an office—

THE COURT: Yes.

MR. DURIC: —and examined for I think a couple/ maybe three hours with a software program.

Subsequent to that, there's then a couple weeks later another software program used to extract metadata from the files.

THE COURT: Okay.

MR. DURIC: So in our view, there's four separate steps there.

THE COURT: Okay. So there's right there looking at it. Then there's more intense looking at it but with no assistance. That's what I would call the forensic preview.

Right, Mr. Parente?

MR. PARENTE: The manual—we—the way we look at it is that first search—and you'll hear this through the testimony—is the manual search.

THE COURT: Right.

MR. PARENTE: Then when they hook it up to the machine called the DOMEX, which your Honor's —Cellebrite, the same thing.

THE COURT: Right.

MR. PARENTE: That is what they would call the forensic preview.

THE COURT: Yeah.

MR. PARENTE: And then our position is—and you'll hear this—the defendant wipes that phone that day.

THE COURT: Right.

MR. PARENTE: So that phone is never searched again.

What the agents are searching, those later searches, are then just going back to the DOMEX or the Cellebrite, which we would argue under the law is not a new search. It's just as if the agents had a search warrant, took a box out of the house, and then a week later went back to the box. That's not a new search. We never get a new search warrant.

So our position is that's all irrelevant, and we can argue that when we get to that point.

THE COURT: Right. Okay. I understand.

So that's why you're saying there's four separate searches.

MR. DURIC: (Nodding head.)

THE COURT: Okay. Got it. Just wanted to be clear about that as I hear the testimony.

Okay.

MR. ROBERTSON: Judge, just for the record, a motion to exclude.

THE COURT: I'm sorry?

MR. ROBERTSON: Just for the record, motion to exclude witnesses.

THE COURT: Okay.

MR. ROBERTSON: Just for the record.

THE COURT: Do we have any witnesses here who are going to testify?

MR. PARENTE: Our case agent is Agent Finerty, and she's involved in the latter search. We don't think it's an active search under the law. We were going

to have her in here, unless you don't want her in here.

THE COURT: Is she going to testify?

MR. ROBERTSON: Judge, it may depend on your Honor's ruling. We would anticipate, depending on what the first witness says, that if he cannot talk about that, what we've clarified as the fourth search, then we would call Agent Finerty to talk about that fourth search.

MR. PARENTE: And this agent won't be—he wasn't there much. Agent Finerty wasn't at the airport that night, which is what this witness is going to testify to, and he's our only witness. And this witness wasn't with Agent Finerty when she did this fourth search.

THE COURT: And you were going to have Agent Finerty in the courtroom right now?

MR. PARENTE: As the case agent.

THE COURT: I'll exclude her.

MR. PARENTE: You want her excluded?

THE COURT: Yeah.

MR. PARENTE: Okay.

MR. GREEN: And, your Honor, may I preposition our exhibits?

THE COURT: Yes.

MR. GREEN: Thank you.

Did you want to—

MR. DURIC: No.

(Witness enters the courtroom.)

THE COURT: Right up here, sir.

Raise your right hand.

(Witness duly sworn and takes the stand.)

THE WITNESS: I do.

THE COURT: Have a seat. Keep your voice up. Stay close to the microphone. That's a clean—whatever that is, microphone cover.

Before you begin. If you're fully vaccinated, you can say so on the record. If you are, I'll let you remove your mask.

THE WITNESS: I am not.

THE COURT: Okay.

Who is questioning the witness?

You may do so from the podium if you're comfortable standing at the podium, or you may stay seated.

MR. GREEN: Okay.

RICHARD CALLISON, GOVERNMENT WITNESS,
SWORN DIRECT EXAMINATION

BY MR. GREEN:

Q. Good morning. Can you please introduce yourself.

A. Sure. My name is Richard Callison. I'm an officer with U.S. Customs and Border Protection.

Q. And would you mind just briefly spelling your last name.

A. C-A-L-L-I-S-O-N.

Q. How long have you worked for Customs and Border Protection?

A. I began in August of 2013.

Q. What is your position?

A. Currently I'm assigned to the K-9 department as a narcotics K-9 handler.

Q. And we're going to be talking today about events on February 20th, 2016.

What was your position at that time?

A. At that time, I was a CTR, or PERT rover, which is a Passenger Enforcement Rover Team.

Q. Can you describe a little bit more about the rover team and what that is.

A. Sure. We—anytime someone was a person of interest from our intelligence unit, we would find those people as they came off the airplanes. We would interview them. We would do exams, whether it was baggage or whatever they were carrying with them.

Q. Really big picture, you're trying to protect the country?

A. Very much.

Q. Intercept things that could harm the country?

A. Yes.

Q. What training have you received as a CBP officer?

A. Beginning with the academy, our academy was 18 weeks long down in Georgia. That covered wide variety of things, from the laws to different tactics we use.

Beyond that, in beginning of 2016, I took a class that was detecting deception and eliciting responses. So really goes over interviewing.

Q. Did your initial training include searching baggage?

A. Yes.

Q. Have you had training on reviewing electronic devices?

A. Yes. So additionally with that, our DOMEX program we had to be certified, so we had to go through classes for that as well.

Q. Have you received training on child exploitation?

A. Yes.

Q. Can you describe what that was.

A. Every year we have an update. It's a—it's a general computer training course involving trafficking, anybody entering the country.

Q. So as of 2016, you were stationed at O'Hare?

A. Correct.

Q. And you're seeing thousands of people coming through each day?

A. Every day.

Q. You've been interviewing those people throughout your career up until that point?

A. Yes.

Q. You've interviewed thousands of people?

A. That's correct.

- Q. Final question I want to ask about your background. Do you have any children of your own?
- A. I do.
- Q. And about what ages would they have been in 2016?
- A. I have one would have been 3 at that age, and the other one was 7.
- Q. Focusing now on February 20th, 2016. Were you working that day?
- A. I was.
- Q. What was your assignment?
- A. That day we received a lookout from our intelligence group, specifically looking for Marcos Mendez, to talk to him about his travel.
- Q. You mentioned a “lookout.” What is that?
- A. So a lookout is information generated for us. It gives the person’s information, their passport, who they are. It will give a description of what—excuse me—what the person in the intelligence unit was looking for, whether that is the—an arrest record or another background.
- Q. If you receive a lookout, will you do additional research?
- A. I do. I—personally, once I receive that lookout, I will do my own homework on that so I know what the basis of the lookout is, what they’re looking for, and how that applies to the person.
- Q. If you receive a lookout for someone, does that mean you’ll automatically arrest them?

A. Very rarely.

Q. Is it fair to say it's kind of just a way to direct your attention on something that might be—need to be looked into further?

A. It is.

Q. How often do you get a lookout?

A. This would be very often, at least one a day. It's unusual to not have any.

Q. And the lookout in this case, what was that for?

A. This was for child pornography.

Q. Are you aware of what information led to the lookout?

A. The information leading to the lookout was a prior arrest record, previous travel. Previous travel seemed odd. The arrest record contained prior child pornography or endangering a minor.

Q. You said there was an arrest record. Are you aware—or were you aware at that time whether that had led to a conviction?

A. I was aware of one conviction but unaware of any of the others.

Q. And was that a 2011 conviction for endangering the life or health of a child?

A. Yes.

Q. Based on your training and experience, why would a prior conviction be of interest to you?

A. Depending on where the person is coming from, it could be a source country for sex exploitation, child exploitation, or trafficking of minors.

Q. Where was Mr. Mendez coming from?

A. He was coming from Ecuador.

Q. Is that one of those countries that you just mentioned that is viewed as a potential source country for child trafficking?

A. It is.

Q. Was Mr. Mendez traveling alone or with others?

A. He was alone.

Q. Was that meaningful to you?

A. It is.

Q. Can you describe why.

A. Most people we encounter and dealing with child pornography or exploitation typically are traveling alone. They're never—I've not come across one that was traveling with family or friends.

Q. Before Mr. Mendez arrived at customs, were you aware of a 2014 secondary inspection report regarding him?

A. I was.

Q. Do you remember roughly what that was about?

A. It was a trip to Mexico. I believe something with work was mentioned. But more notably, it stated that he had been kidnapped and his electronics were all taken and then he was told to leave the country.

Q. Did you find that strange in any way?

A. It's odd.

Q. Mr. Mendez you knew to be an adult male, right?

A. Yes.

Q. Was that meaningful to you?

A. Yes.

Q. Can you describe why.

A. Again, typically the people we see traveling, dealing with exploitation or sex trafficking, are single males.

Q. So I just want to summarize briefly. Before Mr. Mendez arrives at customs, you knew he had a prior arrest and conviction for an offense involving a child; he was an adult male; he was coming from a potential source country of child trafficking, namely, Ecuador; he was traveling alone; and that he had significant prior travel.

Is that accurate?

A. That is correct.

Q. Okay. We've covered what you knew before Mr. Mendez arrived at customs.

THE COURT: I need some clarification.

MR. GREEN: Yes, your Honor.

THE COURT: You said, Officer, that you had a second—he had a second inspection before. Does that mean that he previously entered the country and there was something in the database that he had previously been questioned by customs?

THE WITNESS: Yes, yes.

THE COURT: Okay. And there's information in that interview that involved a trip to Mexico where he

indicated that he had been kidnapped and told to leave the country.

THE WITNESS: That is correct.

THE COURT: And when did that happen?

THE WITNESS: That was in 2014.

THE COURT: Okay. Thank you.

Excuse me.

MR. GREEN: Thank you, your Honor.

BY MR. GREEN:

Q. And just for the record too. So when you reviewed that 2014 secondary inspection report, that was part of additional research you did based on the lookout you had received?

A. Yes.

Q. Let's move forward now to when Mr. Mendez arrives at customs. Did you speak with him at that time?

A. I did.

Q. Do you recall where that was?

A. Typically we—we will meet the traveler at the airplane. I do not recall that day whether we met him at the airplane or if it was in immigration.

Q. Do you remember where most of your interaction with him ultimately took place?

A. I do. After immigration, we would have escorted Mr. Mendez to collect his baggage, anything checked on the plane. Then we would have moved back to baggage secondary area. That's where we would have done our interviews and exams.

MR. GREEN: And, your Honor, I apologize. There is one set of exhibits that I neglected to preposition. Would it be all right if I approached the witness?

THE COURT: Sure.

MR. DURIC: And, your Honor, just respectfully. I think we'll object to the foundation for these exhibits because they're not taken—they're not a representation of the inspection area at the time the search took place.

THE COURT: Okay. Let—give them to the witness. See if he can lay a foundation.

BY MR. GREEN:

Q. If I could ask you to take a look at what's previously been marked as Government Exhibit 1A through 1D.

Do you recognize that?

A. I do.

Q. Can you describe what that is.

A. We have two secondary baggage halls that we use. This one is identical to the one that we used. The one that we used is on the—just on the other side of the wall, but it's under construction at this time.

Q. Are those photos a fair and accurate representation of what the secondary inspection area looked like on February 20th, 2016?

A. Yes.

Q. But to be clear, it's not the exact one because that one—that area is currently being remodeled?

A. Correct.

Q. But it's identical to what it looked like in 2016?

A. Yes.

THE COURT: And your objection is that it's not the same because the one that was actually used is under construction?

MR. DURIC: Correct.

THE COURT: Okay. I'll allow—I'll allow it. (Government Exhibits 1A through 1D admitted in evidence.)

MR. GREEN: Would the Court like a copy of those exhibits, your Honor?

THE COURT: Sure.

Thanks, Counsel.

BY MR. GREEN:

Q. When you first encountered Mr. Mendez in person at customs, what was your role at that point?

A. At that point I would have started asking him some questions, making sure he claimed all the bags were his, anything in his possession. It was all his belongings. No one had given him anything.

Q. What was his demeanor like at this point?

A. He was very condescending: He was above being inspected. He was a U.S. citizen. We should just be letting him go.

Q. Taken together, did those observations about his demeanor signify anything to you?

- A. As it continued, it seemed like it was, you know, deflecting the attention away from his personal inspection.
- Q. Did Mr. Mendez ever ask you if you were going to search a specific item in his possession?
- A. Once I had his personal cell phone and he had given me the password, he did. He asked me if I was going to search his phone.
- Q. So as part of your baggage search, you did check for electronic devices?
- A. That's correct.
- Q. And you found those?
- A. Yes.
- Q. What devices were those?
- A. There was a personal iPhone. There was a work phone and a work iPad.
- Q. And I'm going to hold up what has previously been marked as Government Exhibit 2. Do you recognize this?
- A. I do.
- Q. What is it?
- A. That's his personal iPhone.
- Q. And how do you know that's what this is?
- A. He told me it was his phone.
- Q. But how do you specifically know that his phone is inside here?
- A. Oh. I placed it in the bag on the inside there.
- Q. Okay.

MR. GREEN: Your Honor, I'd move to admit Government Exhibit 2.

THE COURT: Any objection?

MR. DURIC: No objection, your Honor.

THE COURT: I'll admit it.

(Government Exhibit 2 admitted in evidence.)

BY MR. GREEN:

Q. So at some point in your discussion with him, he had told you this was his phone?

A. Correct.

Q. And you reviewed this particular device?

A. I did.

Q. Before the review of the phone began, did you give him any information about the search process or the authority it was being conducted under?

A. I did. We explained it, and we also have a tear-sheet that explains everything that we hand the passengers before we look at any electronics.

Q. If I can direct your attention to another document that's sitting before you on the witness stand. It's been marked as Government Exhibit 3.

Do you recognize that?

A. I do. This is the sheet.

MR. GREEN: And, your Honor, if I could provide a copy of that to the Court as well.

BY MR. GREEN:

Q. So this is explaining the search process?

A. That's correct.

Q. And it's a fair and accurate depiction of—

A. It is.

Q. —what you gave to him at that time?

A. Yes.

MR. GREEN: Okay. Your Honor, I'd move to admit Government Exhibit 3.

MR. DURIC: No objection.

THE COURT: Okay. Admitted.

(Government Exhibit 3 admitted in evidence.)

BY MR. GREEN:

Q. After you handed out this tearsheet, what did you do next?

A. At that point I began inspecting his cell phone.

Q. How did you do that?

A. I used the password that he gave me. And we're specifically looking for photos and videos relating to child pornography or exploitation. So once I'm in the phone, I go straight to the photo gallery.

Q. So at this point, are you using any technology to aid the search?

A. I am not.

Q. You're just clicking and scrolling with your hands?

A. Correct.

Q. You said you navigated to the photo gallery. What did you see when you arrived there?

- A. The photo gallery contained thousands of images of pornography in general. And then it also contained what appeared to be child erotica or—and also child pornography.
- Q. When you say “child erotica” and “child pornography,” can you just describe a little bit what you mean by that.
- A. Sure. There was young children that were nude. There was some videos as well.
- Q. Based on, you know, having kids yourself, were you confident that any of those images depicted people under the age of 12?
- A. Definitely.
- Q. Other than the camera roll or photo gallery, did you look at any other parts of the phone?
- A. There was another app on the phone, the iSafe account, or iSafe app. It was a—another password-protected app that contained photos and videos.
- Q. If it was password-protected, how did you get into it?
- A. It was the same password that he provided me to unlock the phone.
- Q. So you didn’t use any outside technology to get into iSafe?
- A. I did not.
- Q. Once you entered that password and got into iSafe, what did you see?
- A. Inside that app, there were more photos and videos containing the same—some of the same people of the photo gallery, as well as additional videos of

other what appeared to be underage minors being coached by adults for different sex acts.

Q. What was Mr. Mendez's demeanor at this point?

A. He was quite irritated, continuing on with the demeaning language. He was—at that point he started mentioning other officers that he had encountered in the past, depicting them as friends.

Q. The videos or photos that you saw on iSafe, did those show any toddler-age children that were either naked or involved in sex acts?

A. Yes.

Q. Did any of the videos show a toddler that was being touched on their genitals?

A. Yes.

Q. Did any of the photos show a toddler that was being touched on their genitals?

A. Yes.

MR. DURIC: Your Honor, object to the form of the question at this point.

THE COURT: As leading?

MR. DURIC: Yes, your Honor.

THE COURT: I'll sustain that.

BY MR. GREEN:

Q. The photos of the toddler that you viewed during the manual search, that—did that show any private areas of the toddler?

A. It did.

Q. And what else did it show?

A. It showed an adult hand touching the toddler.

Q. And you still remember this today?

A. Very much.

Q. Why is it that you remember that?

A. It's not something that you encounter every day. It's definitely out of the ordinary.

Q. Did you communicate with anyone else about the observations that you were seeing?

A. At that point I would have contacted my supervisor.

Q. Anyone else besides your supervisor?

A. Officer Baumgart, who was also working with me.

Q. How much time had passed from when you first interacted with Mr. Mendez to this point where you had looked at the camera roll; you had looked into iSafe and viewed these images and videos?

A. This was approximately 45 minutes to an hour, somewhere in that neighborhood.

Q. Did you move locations at any point as you were interacting with Mr. Mendez?

A. I did. At that point the baggage exam was completed, so we took this to a more private location.

Q. To be clear, during your manual search, you had viewed what you suspected was child pornography on the phone, on the camera roll?

A. That's correct.

Q. And in the iSafe application?

A. That's correct.

Q. If I could turn your attention now to what is on the witness stand, red folder, which includes what's been previously marked as Government Exhibits 4A through D.

Do you recognize those? And, if so, can you describe what they are.

A. I do. This is pictures of what appears to be a toddler. Legs are spread exposing the genitals. Nothing more than a blanket, what appears to be over her face.

There's one photo here of—

Q. If I can maybe pause really quick before you go into all the details.

Were these images that you saw during your manual search?

A. They were. This was in the photo gallery.

Q. And are they a fair representation of what you saw at that time?

A. It is.

MR. GREEN: Your Honor, we'd—government moves to admit Government Exhibits 4A through D.

THE COURT: Any objection?

MR. DURIC: No objection, your Honor.

THE COURT: Admitted.

(Government Exhibits 4A through 4D admitted in evidence.)

BY MR. GREEN:

Q. Okay. Now if you could return—maybe let's start with 4A. And if you could describe what that shows.

A. This is a close-up photo of what appears to be a toddler. The legs are spread exposing the genitals.

Q. Is this an image you remember seeing during your manual search?

A. It is.

Q. Okay. Same questions for 4B. Could you describe what that shows.

A. 4B again is what appears to be a toddler. The legs are spread, and there's a—looks to be an adult hand touching the genitals.

Q. Is this a photograph that you remember seeing during your manual search?

A. It is.

Q. And how about 4C.

A. 4C is again the photo of the toddler. This is not a close-up, but legs are still spread exposing the genitals. And there's sex toys on the bed next to her.

Q. And 4D.

A. 4D also is the toddler. This one legs are still spread exposing the genitals. Face is not covered on this one.

Q. And that was also something you viewed during your manual search?

A. It is.

- Q. Are these all of the photos and videos that you saw during your manual search, or were there others?
- A. No, this is a small portion.
- Q. Following the manual search when you were only using your hands, did you do anything else?
- A. Yes. At the point where we moved back to the private location and the supervisor was contacted, at that point we moved to use a DOMEX device.
- Q. What is a DOMEX device?
- A. A DOMEX is a device where the electronics are attached and you can extract photos and videos.
- Q. That's something you've been trained in specifically?
- A. It is. Before we can use this device, we have to take a class and be certified.
- Q. And you are certified?
- A. Yes.
- Q. How did you use the DOMEX on this occasion?
- A. At this point the phone is connected to a USB cable. On the screen of the DOMEX device, you select the files you're looking for. And specifically we're looking for photos and videos, so the camera roll was selected.
- Q. Why did you select just the photos and videos to extract using the DOMEX?
- A. That's all we're interested in. We're not interested in contacts or messages or anything like that.

Q. So were there other types of material that the DOMEX did not extract from Mr. Mendez's phone?

A. Yes. Nothing was selected from contacts, calendars, messages, anything other than just the photo/videos.

Q. When you used the DOMEX software, did that use any de-encryption technology?

A. It does not.

Q. Did it damage or impair the functionality of the phone?

A. It did not.

Q. Did it restore or examine deleted files?

A. It did not.

Q. Is the DOMEX process a full forensic examination of the phone?

MR. DURIC: Object to the form, your Honor.

THE COURT: In what way?

MR. DURIC: I think it calls for a legal conclusion.

COURT REPORTER: I can't hear you well. Speak in the microphone.

Just remain seated. That's fine. Thank you.

MR. DURIC: I object to the question as calling for a legal conclusion.

THE COURT: I'll allow the question.

To the extent you know.

THE WITNESS: Can you repeat the question.

BY MR. GREEN:

Q. Yes. The question was, is the DOMEX process full and—a full forensic examination of a phone?

A. No, it is not.

Q. Before we get to what the DOMEX process extracted, can you describe how long that process took.

A. This—approximately—took one to two hours.

Q. You mentioned earlier that during the manual search, you first looked at the camera roll or photo gallery and then looked at the iSafe application. Did the DOMEX process extract files from both of those?

A. No. The iSafe account was not able to be downloaded. It's protected in such a way that the DOMEX cannot extract those files.

Q. So did you end up with just the photos or videos from the camera roll—

A. Correct.

Q. —in the DOMEX? Okay.

And what did those show, the files that were extracted?

A. The files it extracted, they showed more of the same as these, exhibit here, for the child pornography. It showed more of the—what appears to be a toddler. The download, it included some other videos as well.

Q. Based on your training and experience, were those photos stored on the phone itself?

A. Yes.

Q. Okay. We've covered a lot of ground, so I wanted to clarify one point on timing.

Sitting here today, are you certain that you viewed photos that you believe were child pornography before the DOMEX?

A. Yes.

Q. After that one- to two-hour process where the DOMEX process was carried out, did you save any data that had been extracted?

A. Yes. That downloaded material would have been saved to CDs for evidence.

Q. If I could direct your attention to something else on the witness stand there, which has been previously marked as Government Exhibit 5A and 5B.

Do you recognize that?

A. I do. That's my handwriting.

Q. And what is your handwriting on?

A. These are the CDs containing the photos and videos.

Q. Have you had a chance to review those CDs?

A. Yes.

Q. The contents of them?

A. Yes.

Q. And are those contents a fair and accurate depiction of what was extracted from the DOMEX process?

A. Yes.

MR. GREEN: Your Honor, the government would move to admit Government Exhibit 5A and B.

THE COURT: Any objection?

MR. DURIC: No objection.

THE COURT: Admitted.

(Government Exhibits 5A and 5B admitted in evidence.)

BY MR. GREEN:

Q. After the DOMEX data was saved on those CDs, what did you do next?

A. We would have contacted HSI and seen if—what the next step would be, if they were going to prosecute at that point.

Q. We've talked a lot about the personal cell phone you looked at. What happened with the other devices?

A. The work phone and laptop—or iPad did not contain anything we were interested in, and they were returned to Mr. Mendez.

Q. But you did not return the personal cell phone?

A. Correct.

Q. What happened with Mr. Mendez?

A. Mr. Mendez was released at that time.

Q. Are you aware of anything else—any other events related to the phone before it was picked up by HSI?

A. Yes. That night while it was stored in our vault, it was remotely wiped. So all the information was removed from the phone.

Q. Do you have any idea how that happened?

A. I do not.

Q. Getting back to the contents of those CDs. You said DOMEX did not recover items from iSafe?

A. That's correct.

Q. So are there certain images you saw during your manual search that were not captured on those CDs?

A. That's correct.

Q. But we do have the photos from the camera roll?

A. Yes.

MR. GREEN: Your Honor, may I have a moment to confer with co-counsel?

THE COURT: Sure.

(Counsel conferring.)

BY MR. GREEN:

Q. If we could briefly return to the lookout phase of this before Mr. Mendez arrived at customs. You said there was a lookout for him?

A. Yes.

Q. And could you just explain again what that was for in terms of any relationships that he had had to the criminal justice system.

A. There were prior arrests listed on the lookout for soliciting a minor, child pornography.

Q. And one conviction that came from those. Is that correct?

A. Correct.

MR. GREEN: No further questions, your Honor.

THE COURT: Thank you, Counsel.

Cross-exam.

COURT REPORTER: Do we need to admit Government 1?

THE COURT: Government 1, photo of the inspection area. No, we admitted it over objection.

(Counsel conferring.)

THE COURT: Okay. Go ahead, Counsel.

CROSS-EXAMINATION

BY MR. DURIC:

Q. Good morning, Officer.

A. I'm sorry?

Q. I said good morning.

A. Good morning.

Q. I want to ask you about basically the purpose behind your secondary inspection of Mr. Mendez.

A. Sure.

Q. This was described as a CTR enforcement exam, correct?

A. Correct.

Q. That's a counterterrorism enforcement examination.

A. Not a hundred percent. So the unit was moving at that time from counterterrorism to also as a passenger enforcement.

- Q. Okay. And fair to say that what you're really doing as part of this examination is law enforcement?
- A. Correct.
- Q. And given that, given that that was your purpose, you asked Mr. Mendez to confirm that all of his luggage belonged to him?
- A. We did.
- Q. And you call that a binding declaration.
- A. Yes.
- Q. And the point of that is to get Mr. Mendez to confirm that he has possession of everything he brought with him so you can use that information for later purposes.
- A. Yes.
- Q. Prosecution.
- A. Yes.
- Q. Now, the DOMEX, it's a software, correct?
- A. Correct.
- Q. And the purpose of that software is to extract data from an electronic device.
- A. Yes.
- Q. And to preserve that data.
- A. For evidence.
- Q. And are you familiar with a program called ExifTool, E-X-I-F-T-O-O-L?
- A. I am not.

- Q. Now, you mentioned some of the things you knew before Mr. Mendez arrived at the airport. Fair to say you had decided to search him prior to him getting off the flight?
- A. Yes.
- Q. And was anyone else involved in that decision?
- A. The supervisor would have been involved.
- Q. And that would have been whom?
- A. Chief Borden.
- Q. Officer Baumgart involved in the initial decision to search Mr. Mendez?
- A. Not in the decision, but . . .
- Q. Was she present when you were talking to your supervisor about searching Mr. Mendez?
- A. Yes.
- Q. And where did that discussion take place?
- A. In our office.
- Q. Anyone else present during that time?
- A. I do not recall that.
- Q. Officer Alikhan or Officer Cislak, were they present?
- A. They were present during the baggage exam.
- Q. And the reason the decision to search Mr. Mendez was made was the fact that he had some international travel and he had a previous conviction?
- A. Correct.

- Q. And you mentioned on direct—I believe you mentioned something about arrests.
- A. Yes.
- Q. There weren't any arrests outside of this 2011 case in which Mr. Mendez was convicted.
- A. We have access to the criminal records, any arrests. So I review that before I ever interviewed him.
- Q. And what you saw was that he had a 2011 case, right?
- A. That was the conviction. That's not the arrest.
- Q. All right. But what I'm saying to you is there weren't any other cases or arrests outside of that 2011 case.
- A. I believe there were.
- Q. Okay. And what were those?
- A. It was for child pornography, or I believe there was a solicitation of a minor. But I'm not sure if that was the one that was pleaded down to the conviction in 2011.
- Q. Right.
- A. I don't recall that.
- Q. And you're not sure whether those arrests you're referring to were actually part of that 2011 case and then pleaded down to a lesser charge?
- A. No. I believe there were more than one.
- Q. Okay. And can you tell us what the result of those cases was?
- A. I cannot.

Q. And when you saw this information about these other arrests, was that in Mr. Mendez's criminal history?

A. Yes.

Q. And you would rely on that criminal history as what you reviewed at the time of this search.

A. Can you say that again.

Q. Yeah. So if I showed you the criminal history today, that would be the same thing that you reviewed at the time of the search.

A. Yes.

Q. Okay. Now, the conviction for endangering the life of a child, that is a misdemeanor?

A. I believe so.

Q. And that was in 2011?

A. Yes.

Q. And Mr. Mendez received a two-year probation term.

A. Yes.

Q. Which had expired by the time of this search in February 2016.

A. Yes.

Q. And you mentioned how you looked at some of these lookouts, or a lookout, previously to 2016?

A. That would have been a closeout from a previous exam, yes.

Q. Okay. And there was an exam in 2014.

A. Correct.

- Q. And that was a trip Mr. Mendez took to—that was in relation to a trip Mr. Mendez took to Mexico.
- A. Correct.
- Q. And he indicated that he was traveling to Mexico for business.
- A. Yes.
- Q. And he indicated that part of his job required him to travel outside the country.
- A. At—for that trip, yes. Other than that, we had no knowledge of that.
- Q. And you mentioned that Mr. Mendez was coming from a country that could be a source of child trafficking.
- A. Correct.
- Q. And that's Ecuador, right?
- A. Yes.
- Q. Same could be said of basically any country.
- A. Not—there are some countries that are more—higher level of trafficking than others.
- Q. And you weren't investigating Mr. Mendez for child trafficking, were you?
- A. It's a possibility.
- Q. Fair to say that pretty much any country could be a source of child pornography?
- A. Yes.

- Q. When you described Ecuador as a country that has more child trafficking than others, that's pretty much like calling it a high-crime area.
- A. You could say that.
- Q. At the time that you searched Mr. Mendez's cell phone, or just prior to that point, you had no information that he was actively involved in committing a crime, correct?
- A. Correct.
- Q. You had no information that he was actively involved in child trafficking.
- A. Correct.
- Q. Had no information he was actively involved in smuggling contraband.
- A. Correct.
- Q. Including child pornography.
- A. Correct.
- Q. At the time of the search of his cell phone, what you've described as a manual search, you also had no social media evidence regarding Mr. Mendez.
- A. Can you say that again.
- Q. At the time you conducted what you've described as a manual search of Mr. Mendez's cell phone, you had no social media evidence.
- A. Correct. We don't look at any social media.
- Q. You had no e-mail evidence.
- A. No.
- Q. No text message evidence.

A. No.

Q. You had no physical evidence.

A. No.

Q. You found nothing unusual in his luggage.

A. I did not look at his luggage.

Q. Okay. During the course of this entire examination, none of the officers involved found anything unusual in his luggage?

A. Not that I'm aware of.

Q. No condoms?

A. I have no idea.

Q. And you said that Mr. Mendez became sort of agitated as this search was going on?

A. Correct.

Q. And that's not unusual, is it?

A. To a point.

Q. I mean, this was around midnight or 12:30 a.m.?

A. Yes.

Q. Mr. Mendez was on his way home?

A. That flight typically lands around 11:30 p.m.
Correct.

Q. And he was referred for a secondary inspection that lasted a total of maybe three hours?

A. That's correct.

Q. And it's not like during this—this three-hour search that Mr. Mendez ever contradicted himself or changed his story about what he was doing.

A. Not that I recall.

Q. Now, let's talk about this manual search a little bit. You've described it as manual, but it required a password to access the phone, correct?

A. Correct.

Q. And that's something you told Mr. Mendez he had to give you.

A. No. I asked for it. He gave it to me willingly.

Q. And you hand him—you handed him this tear-sheet, correct?

A. Correct.

Q. And that tearsheet didn't say you have the option to decline the search of your cell phone.

A. No, it didn't.

Q. The tearsheet didn't say this—

COURT REPORTER: Can you stand by the microphone. Thank you.

BY MR. DURIC:

Q. Tearsheet didn't say that the search was voluntary.

A. No. It's not voluntary.

Q. You never asked Mr. Mendez to sign a form indicating that he was consenting to the search.

A. There's no form to sign.

Q. Okay. I mean, it wouldn't be hard to do that, right?

A. To do what? Have a form?

- Q. Yeah. Just type out a couple sentences indicating that he consented to the search. You could have done that.
- A. That's above my pay grade, sir.
- Q. And as you're scrolling through the camera roll on the phone—is that you doing that?
- A. Yes.
- Q. Anyone else involved? Anyone else scroll through the camera roll?
- A. No, not at that time.
- Q. Okay. Not Agent Baumgart—or Officer Baumgart. Excuse me.
- A. She was there for part of it.
- Q. Okay. And this took place in sort of like—it's like a luggage area, right?
- A. No. This is—this is separate from where you collect your luggage, our secondary baggage inspection area. It's not in the middle of all the traffic.
- Q. And when you were scrolling through the camera roll, Mr. Mendez is standing right in front of you?
- A. Partially, yes.
- Q. And Officer Baumgart is standing next to you?
- A. For part of it she was.
- Q. Officer Alikhan is also standing next to you?
- A. No.
- Q. Where is Officer Alikhan?
- A. Alikhan and Cislak were searching the bags.

- Q. Okay. And they were not too far away when they were doing that.
- A. Within voice range.
- Q. And at no point did Officer Alikhan or Officer Cislak indicate to you that they had found anything unusual in the luggage.
- A. Not that I recall.
- Q. And if they had found something unusual, that's something you would document, correct?
- A. Correct.
- Q. And when you were scrolling through the camera roll, you said that you saw literally thousands of pictures.
- A. Yes.
- Q. Mostly pornographic pictures?
- A. Yes.
- Q. And this search took place five and a half years ago almost.
- A. Correct.
- Q. And since that point, you've probably conducted hundreds, if not thousands, of other searches.
- A. Correct.
- Q. And you didn't memorialize anything you did during that search that day, correct?
- A. Explain. I'm not sure what you're asking.
- Q. Well, you didn't write down or make a note of each of the photos you saw on the camera roll.
- A. No.

- Q. You didn't write down or notate any of your conversations with Mr. Mendez.
- A. No.
- Q. You didn't make notes of any of the aspects of his demeanor that you observed.
- A. No.
- Q. There's no record of any of that.
- A. Not other than our closeouts, no.
- Q. Now, when you say "closeouts," you're referring to a report?
- A. Yes.
- Q. And have you reviewed any reports in preparation for today?
- A. I have.
- Q. What have you reviewed?
- A. I reviewed the report from this case.
- Q. Okay. And who prepared that report?
- A. Amy Baumgart.
- Q. Okay. And that report was maybe a paragraph long?
- A. Something like that, correct.
- Q. It didn't say anything about Mr. Mendez's demeanor.
- A. Not at all.
Not that I recall. Sorry.

- Q. Didn't say anything about which photos—which particular photos were reviewed on the camera roll?
- A. No.
- Q. Didn't distinguish between photos that were viewed on the camera roll as opposed to iSafe?
- A. No.
- Q. And when you were scrolling through the camera roll, you can't tell us whether or not the phone was in airplane mode?
- A. I cannot tell you that.
- Q. Can't tell us whether any of the information you saw on that phone or any of the files you saw on that phone were stored remotely.
- A. I can tell you that. It was not. It was stored on the phone.
- Q. Okay. And the reason you say that is because you saw things in the camera roll.
- A. I know where it was stored. On the phone, yes.
- Q. Okay. You didn't—I mean, there's no—you didn't do any sort of forensic examination to determine whether the files were stored on the phone or remotely.
- A. When you search these phones, there's—the way they're stored is separate from what's in the cloud.
- Q. Okay. Now, in the iSafe application, all of those files could have been stored remotely, correct?
- A. I believe that app is only stored on the cell phone.

- Q. Okay. And that belief is based on what?
- A. Just from my understanding of the app itself.
- Q. You have no expertise in how that app works.
- A. I do not, no.
- Q. You really have no foundation to talk about whether that app, the iSafe app, relies on cloud storage.
- A. I cannot.
- Q. And you've mentioned that there were basically two types of files that you saw. Some you've classified as erotica; some you've classified as child pornography. Correct?
- A. Yes.
- Q. Now, the files you've classified as erotica, those are not illicit photos.
- A. Correct.
- Q. And going through the thousands of images you saw, fair to say you can't tell us which particular ones were erotica and which particular ones were pornography?
- A. I can tell you if I'm looking at them. I'm not sure what you're asking.
- Q. Well, we don't have every single one of the photos that you looked at that night.
- A. I'm sorry?
- Q. We don't have—sitting here today, we don't have—
- A. Oh, no, definitely not. On the CDs, yes, but not on—not printed.

Q. Now, you said that when you—tell me if I have this right.

When you looked through the camera roll, you had no doubt in your mind that you saw child pornography on the camera roll.

A. Yes.

Q. No doubt in your mind that that phone contained contraband.

A. Yes.

Q. And at that point you had full control over the phone.

A. Yes.

Q. You had every right to detain or seize that phone.

A. Yes.

Q. You had the ability to place the phone in airplane mode.

A. Yes.

Q. To prevent it from being manipulated from the outside.

A. Possibly. I'm not sure how that works.

Q. And you had the full ability to contact any sort of technology or IT professional to make sure that nobody could manipulate that phone from the outside.

A. Yes.

Q. And at that point you also could have contacted Homeland Security Investigations as you did after the DOMEX search.

A. Yes. We—we would have contacted them before we actually completed the DOMEX search. It was part of the—somewhere along that line.

Q. And prior to the DOMEX search, you could have contacted HSI to determine whether they wanted to prosecute.

A. Yes.

Q. And at that point in time you could have sought a warrant.

A. A warrant for?

Q. The search—further search of the phone.

A. There's no warrant necessary.

Q. I understand. But it was certainly within your power or HSI's power to do that, correct?

A. I don't understand why I would need a warrant.

Q. I'm not—I'm not arguing with you on that point. I'm just saying that was fully within your power to do that.

THE COURT: Just answer the question. Could you have sought a warrant at that point?

THE WITNESS: Yes.

BY MR. DURIC:

Q. It's not like there were any exigent circumstances preventing anyone from getting a warrant at that point.

A. No.

Q. Okay. But that wasn't done because you didn't feel you needed to.

A. No.

Q. And instead of contacting HSI or getting a warrant, you and the other agents conducted a DOMEX examination of the phone.

A. Correct.

Q. And the only purpose of that examination was to extract and preserve the files from the phone.

A. Correct.

Q. And you wanted to preserve those photos so they could be later used in a prosecution.

A. Correct.

Q. And that search with DOMEX, for the DOMEX extraction, that took about maybe two to three hours?

A. Correct.

Q. And that took place inside an office?

A. It did.

Q. And you were the one who performed it.

A. That's correct.

Q. But there were other officers in the office with you.

A. Officer Baumgart was, yes.

Q. And your supervisor as well?

A. He was in and out of the office.

Q. You had to get your supervisor's approval before doing the DOMEX search.

A. Yes.

- Q. That's because a DOMEX search is not considered a manual search.
- A. That's correct.
- Q. It's certainly something that's not routine.
- A. It is not.
- Q. It's something that's very intrusive.
- A. It is.
- Q. And it's something you can't do unless your supervisor signs off on it.
- A. Correct.
- Q. Now, the point in time where you were doing what you described as the manual search of the phone, can you tell us the particular area of the airport where that happened.
- A. That was in the baggage examination area.
- Q. Okay. And that's—that's on the ground level?
- A. I'm sorry?
- Q. Is that on the ground level?
- A. It's—our whole inspection area is what you might call a basement or . . .
- Q. Okay. And were there, like, luggage movers nearby? I don't know what you call those things, but the things—
- A. The belts where the luggage comes out?
- Q. Yes.
- A. It's in a separate area.

- Q. Okay. You mentioned on direct how you have training in child exploitation.
- A. Yes.
- Q. That's not training you received as part of the counterterrorism unit.
- A. No.
- Q. Is that training you have received since the time of this search?
- A. I'm not sure when we began this training. This could have been all the way back to the academy. This is something we do every year.
- Q. Okay. And that's something that all Customs and Border Patrol agents do every year?
- A. Yes.
- Q. And doing this training, how long did it last?
- A. I couldn't tell you. It's maybe an hour long. It's not—it's not super-deep.
- Q. Once-a-year-type thing?
- A. Yes.
- Q. And that's the training you were referring to when you referred to training on direct.
- A. For the exploitation? Yes.
- Q. Okay. Was there any other training you mentioned on direct other than exploitation?
- A. The detecting deception and eliciting responses. I mentioned that.
- Q. Okay. But in terms of knowing about particular countries or areas where child exploitation is more

prevalent, that's something you would have learned about in these one-hour sessions?

A. No. That's—that's something that we're briefed on occasionally.

Q. Okay.

A. Not necessarily during a training.

Q. And through your review of materials prior to the search of Mr. Mendez's cell phone, you learned that he had also traveled to Canada previously.

A. I do not recall that. That's possible.

Q. Obviously you learned that he traveled to Mexico.

A. Yes.

Q. And there's nothing unusual about a United States citizen going to Canada or Mexico, is there?

A. Not at all.

Q. Any other countries that you're aware of him traveling to at the time of the search?

A. Not that I recall.

Q. And did you learn that Mr. Mendez had traveled to Ecuador to see his fiancée?

A. Yes.

Q. And that's not unusual, is it?

A. No, it's not.

MR. DURIC: One moment, your Honor. If I can confer with Mr. Robertson.

THE COURT: Sure.

(Counsel conferring.)

MR. DURIC: A few more questions.

BY MR. DURIC:

Q. Officer Callison, when you learned that Mr. Mendez had made a previous trip to Mexico for business, did you also learn that Mr. Mendez had been told by his employers to leave the country?

A. I was aware that somebody had told him to leave the country. I'm not sure if it was the employer or not.

Q. Somebody told him to come back safely.

A. Correct.

Q. Because he was in danger in Mexico.

A. That's what he said.

Q. And that's certainly a reasonable response to being in danger.

A. Sure.

Q. The files that were extracted from DOMEX, you didn't review those particular files the night of the search.

A. I did.

Q. Okay. And that would include the CDs?

A. Correct.

Q. And you put the CDs into a computer or a CD-ROM, and you reviewed all of them?

A. That's correct.

Q. Okay. And that was, what, more thousands of files?

A. I'm sorry. Say that again.

Q. Those CDs—

A. Yes.

Q. —containing the files extracted from DOMEX, they numbered in the thousands.

A. That's correct.

Q. And fair to say that there's a possibility that your memory of the photos or files from DOMEX is conflated with your memory of the photos and files from the camera roll?

A. No.

Q. Now, you were interviewed a couple times in this case, correct?

A. I'm sorry?

Q. You've been interviewed a couple times in this case?

A. Yes.

Q. You spoke with United States Attorneys.

A. Yes.

Q. Other attorneys?

A. Just the U.S. Attorneys.

Q. Okay. And that—the first time was back in August of 2020, correct?

A. I do not recall the date.

Q. It was last year sometime?

A. I would say so.

Q. And then you were interviewed again by the attorneys last week, I believe.

A. Correct.

Q. And collectively you spent several hours with the attorneys.

A. Yes.

Q. And you were asked questions, and you gave answers.

A. Yes.

Q. And you told them everything you knew about this case.

A. Yes.

Q. Didn't leave anything out.

A. Not that I know of.

Q. You were completely truthful and accurate during those interviews.

A. Yes.

Q. And fair to say that during those interviews, you never mentioned anything about getting a password from Mr. Mendez.

A. I believe I did.

Q. And when you got the password, Mr. Mendez asked you, "Are you searching my phone?"

A. Yes.

Q. And what did you tell him?

A. I told him I was.

Q. Okay. And what did he say back to you, and what did you say to him, if anything?

A. I don't recall any response.

Q. Okay. That flight to Ecuador, that's about a—or flight from Ecuador to Chicago, that's, what, about a seven- or eight-hour flight?

A. I'm not sure.

Q. Is it unusual to find international travelers coming off an international flight around midnight—unusual to find them being agitated?

A. No.

(Counsel conferring.)

MR. DURIC: Nothing further, your Honor.

THE COURT: Thank you.

Any redirect?

MR. GREEN: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. GREEN:

Q. Officer Callison, you were asked on cross about your role as a law enforcement officer.

So you are a law enforcement officer, right?

A. That's correct.

Q. But you're a Customs and Border Protection officer. So does that role include any responsibilities that are different from, say, a police officer on the street?

A. It does.

Q. Does that include preventing contraband from entering the country?

A. It does.

Q. In this particular case, once you saw what you believed was child pornography on the phone, did you view it as your obligation to prevent that from entering the country?

A. Yes.

Q. And is that true regardless of whether these photos would be used in a prosecution or not?

A. That is true.

Q. You also mentioned on cross you understood that Mr. Mendez had been sentenced to a probation term in 2011.

A. Correct.

Q. Were you aware at the time in 2016 that that sentence also included that he be evaluated and treated as a sex offender?

A. I believe I remember that he was to be entered as a sex offender. I don't recall all the details.

Q. You were also asked about your memory regarding these events.

Turning your attention back to Exhibits 4A through D, how often do you encounter images like that depicting child pornography where a toddler is involved?

A. In my time since 2013, I've only encountered this five or six times.

Q. Is that part of why you find it memorable?

A. For sure.

MR. GREEN: Nothing further, your Honor.

THE COURT: Anything else?

MR. DURIC: A moment, your Honor.

(Counsel conferring.)

MR. DURIC: Your Honor, could I ask Mr. Parente about one thing?

THE COURT: I'm sorry?

MR. DURIC: Could I ask Mr. Parente about one thing?

THE COURT: Sure.

(Counsel conferring.)

MR. DURIC: Nothing further of this witness.

THE COURT: Okay.

You can step down. Thank you.

THE WITNESS: Thank you.

THE COURT: Would you mind taking that off with you.

THE WITNESS: Yes.

THE COURT: Thank you.

He's going to leave the exhibits here?

MR. PARENTE: Yes, Judge. We'll come and grab them.

THE COURT: Okay.

MR. PARENTE: If your Honor wants to look at them, though, we—

THE COURT: I don't want them. But I don't know if you want your next witness to have them.

Well, I know you're done.

Okay. Any further witnesses from the government?

MR. GREEN: No, your Honor.

THE COURT: Okay. Thanks, Mr. Green.

Defendant, would you like to call some witnesses?
(Counsel conferring.)

MR. ROBERTSON: Judge, we'd like to call Special Agent Finerty.

THE COURT: Okay.

MR. ROBERTSON: Is it okay if I remain seated here with the—with the microphone, your Honor?

THE COURT: Absolutely.

MR. ROBERTSON: Thank you, your Honor.

THE COURT: You need to keep the IT people apprised of timing if we're going to have a witness by Webex. So they're thinking that person would be testifying around noon. I see that that's not going to happen. So maybe you can let me know. Do you think pushing that till 12:30? 12:45?

MR. ROBERTSON: Can I just talk to Mr. Duric real quick, Judge?

THE COURT: Sure, yeah.

(Counsel conferring.)

MR. ROBERTSON: Judge, we're not going to call one of the two witness. We'll call the other one.

THE COURT: Okay.

MR. ROBERTSON: And we can do that before Special Agent Finerty testifies or after, whatever is convenient for the government.

THE COURT: Let's do Agent Finerty first.

MR. ROBERTSON: Okay.

THE COURT: And maybe you can tell the government which one you're not going to call so they can let that witness know so they can move on with their day.

(Witness enters the courtroom.)

THE COURT: Come on up, Agent.

Good morning.

THE WITNESS: Good morning, Judge.

THE COURT: Raise your right hand.

(Witness duly sworn and takes the stand.)

THE WITNESS: I do.

THE COURT: Okay. You can have a seat.

And if you can put one of those doilies on the microphone.

THE WITNESS: Sure.

THE COURT: Thank you.

THE WITNESS: Sorry.

THE COURT: There's no graceful way to do that.

Now, if you are fully vaccinated, you need to tell me on the record, and then you can proceed without your mask. If you don't want to tell me that, you're free to not disclose that, but you need to keep your mask on.

THE WITNESS: Okay.

THE COURT: So it's up to you.

THE WITNESS: Okay. I'll keep my mask on, if it's okay with you, Judge.

THE COURT: Okay.

THE WITNESS: Thank you.

THE COURT: And stay close to the microphone and keep your voice up.

THE WITNESS: Sure.

JENNIFER FINERTY, DEFENDANT'S ADVERSE
WITNESS, SWORN DIRECT EXAMINATION

BY MR. ROBERTSON:

Q. Good morning. Could you please state your name and spell it for the benefit of the record.

A. Yes. Jennifer Finerty. J-E-N-N-I-F-E-R. Finerty, F- as in Frank I-N-E-R-T-Y.

Q. And, Agent Finerty, I know you may have trouble seeing me over here, but if you ever have any problems understanding any of my questions, just let me know and I'll repeat it. Okay?

A. Sure.

Q. And by whom are you employed?

A. The Department of Homeland Security, Homeland Security Investigations.

Q. And how long have you been so employed?

A. Approximately since January of 2004.

Q. Okay. I'd like to draw your attention back to February 21st, 2016.

Were you employed—you were employed with the Department of Homeland Security at that time, correct?

A. Yes.

Q. When did you become involved—and—sorry. Strike that.

In what capacity were you employed in February of 2016?

A. As a special agent assigned to the HSI O'Hare Group.

Q. And what is the HSI Group?

A. Sure. We are the group that handles any type of investigations, call-out, anything that touches the international mail branch or the international airports.

Q. So you're not on the front line, so to speak, of doing the Customs and Border Patrol; you're called in in certain circumstances to take the ball and run with the investigation. Is that fair to say?

A. Yes.

Q. Okay. And when you pick up an investigation, you're doing it to investigate criminal charges, correct?

A. Yes.

Q. And those include charges such as those that have been levied against Mr. Mendez in this case, such as child pornography, correct?

A. Yes.

Q. You've investigated a number of child pornography cases throughout your career, correct?

A. Yes.

Q. When did you become involved in the Mendez case?

A. It was—

Q. Approximately. If you don't know the exact—

A. Sure. It was the end of February of 2016, probably around February—trying to think—24th or so of 2016.

Q. Okay. So maybe a couple days after Mr. Mendez was initially searched by the Customs and Border Patrol agents, correct?

A. Yes, that's correct.

Q. And you reviewed all the evidence that was in the possession of the Customs and Border Patrol in regards to Mr. Mendez, correct?

A. The three discs?

Q. Yes.

A. Yes.

Q. You spoke with the Customs and Border Patrol agents in question: Callison, Baumgart, and Alikhan?

A. Yes.

Q. And your purpose in doing that was to start building evidence for criminal prosecution, potential criminal prosecution?

MR. PARENTE: Objection to the leading questions, your Honor.

MR. ROBERTSON: I think Mr.—I'm sorry—

THE COURT: I'm going to allow the leading questions. He -- I know he's putting her on, but she's a government agent.

Go ahead.

MR. ROBERTSON: Thank you, your Honor.

BY MR. ROBERTSON:

Q. Ms. Finerty, that was for the purpose of building a potential criminal case against Mr. Mendez, correct?

A. As part of the investigation.

Q. And then the investigation was to investigate potential crimes, correct?

A. Investigate potential crimes. Yes, that's my job, mm-hmm.

Q. Right. Preserve evidence that later could be used in a criminal prosecution, correct?

A. I'm sorry. I don't understand the question.

Q. Well, the purpose of the investigation is to see if there's criminal activity that should be charged, correct?

A. Yes.

Q. You don't just investigate cases just to investigate them, right?

MR. PARENTE: Objection, Judge. Again—and I think we need to clarify what the point of the hearing is. Is this about the border search? Or is this about the latter investigation into this case? Which I don't think is at issue here.

MR. ROBERTSON: This goes to—Agent Finerty's testimony has some minimal relevance to the earlier part.

But, your Honor, she's being put on for that search, what we call the fourth search, that occurs on

March 9th without a warrant where extra data is extracted from the DOMEX—DOMEX materials.

THE COURT: Okay.

I mean, I'll allow some of this. I don't know exactly what you're getting at when you're asking her about whether she's trying to preserve evidence or not. But I'll allow this a bit.

MR. ROBERTSON: Okay. Thank you, your Honor.

BY MR. ROBERTSON:

Q. Ms. Finerty, in your—in your role in this case, you obtained—subsequently obtained a number of search warrants, correct?

A. Yes.

Q. You were also responsible for obtaining a—using a particular—were you responsible for obtaining a particular application, Exif—Exif program to extract information from the DOMEX program?

A. I along with Tony Stack, Investigator Tony Stack.

Q. Okay. And on or about March 9th, 2016, that was done, correct?

A. Yes. I believe we looked at that as well on February 29th, 2016.

Q. Okay. So—and what that did was that was taking the images recovered from Mr. Mendez's personal iPhone that were extracted from the DOMEX, correct?

A. The dump of—of the—are you talking about the extraction? The three CDs that we were provided by CBP, yes.

Q. And you took those three CDs and you ran them through ExifToolGUI v3.38 with your fellow investigator, correct?

A. Yes.

MR. ROBERTSON: And for the record, that's E-X-I-F-T-O-O-L capital G-U-I.

BY MR. ROBERTSON:

Q. And that's a tool that allows investigators to view what's called metadata concerning the file types, correct?

A. Yes.

Q. And metadata is information about—that shows when the files were created, correct?

A. Yes.

Q. And it shows the geographic location, latitude and longitude, of where those photographs were taken, correct?

A. It could. That's the purpose of the software program. But it didn't in all the images that we put in there, only some of them.

Q. Okay. And you received—you received geographical and time information regarding some of the photos from those—from that initial dump, correct?

A. Latitude and longitude.

Q. And that led you to a particular residence, correct?

A. Yes.

Q. And when you did that, when you obtained that information by using the ExifTool, that was done without the benefit of a warrant, correct?

A. Yes.

Q. And that information that you obtained by using this tool was not information that was readily ascertainable by looking at the photograph—or the images with your eyes, correct?

A. This was from the border search. This was from the dump. So it's a copy of what was provided to us from the extraction of the dump.

I never looked at the phone, if that's what you're asking.

Q. No, no, no. Let me rephrase. And I'm sorry.

What I'm saying is the information that you pull out, the geographical location—

A. Yes.

Q. —the timing of the photographs, when they were taken—

A. Yes.

Q. —that you got through this program, the Exif—okay?—that's information that you can't get from just looking at the image on a computer screen. Correct?

A. I don't know that. I—I don't personally know that. I'm sorry.

Q. That's okay.

But fair to say that all the geographical and timing information that you recovered through the use of this Exif program came from the program itself and from no other source? True?

A. From the report, yes, that we created, we used the ExifTool.

Q. Okay. The airport at O'Hare, the—the areas—if you could open up Exhibit No. 1. I think it's up in front of you.

A. Yes.

Q. You're familiar with those photos, correct?

A. Yes.

Q. That's an area—how would you describe that area of the airport?

A. The secondary inspection area.

Q. Okay. Now, the secondary inspection area is videotaped 24/7, correct?

A. Yes.

Q. And that was so in 2016, correct?

A. I believe so, but I can't say definitively.

Q. Okay. There was never any preservation of any video from that secondary inspection area, correct?

A. Not from me.

Q. And as a case agent, you would have wanted any type of video/audio evidence, correct?

MR. PARENTE: Objection, Judge. Again, I think we're way outside the scope of what the purpose of this hearing is.

THE COURT: I'll sustain that.

MR. ROBERTSON: Judge, if I just may. I appreciate that it's sustained.

The only reason I'd like it is to argue subsequently or have Mr. Duric argue subsequently that in terms of officer credibility, in terms of preserving things, that nature, that there could have been video of this three-hour period where Mr. Mendez was in the secondary inspection area, but it was not saved or was not preserved.

THE COURT: Okay. Thank you.

BY MR. ROBERTSON:

Q. And, Special Agent Finerty, why didn't you get a warrant before using the ExifTool?

MR. PARENTE: Objection, your Honor.

THE COURT: I'll let her answer that.

THE WITNESS: Because we weren't operating off of original evidence. This was evidence extracted from the border search. And these are copies of the dump of the phone. And it was a very limited search, to my knowledge.

BY MR. ROBERTSON:

Q. When you say "a very limited search," have we—have we through our questioning here today defined the scope of that search in terms of the metadata, the geographical and the timing aspects of these photographs?

A. I'm sorry. What's—I don't understand the question.

Q. Okay. You said it's a limited nature of the scope—scope of the search. You just said that, right?

A. We're looking at images. Yes.

Q. Has—the limited nature of the search that you just said there was, has that been defined already in your testimony today?

A. No. That's my understanding.

Q. What was the limited nature of your search? Let me ask it that way.

A. We were looking at images that were pulled from the cell phone extraction.

Q. You were looking at the physical—the timing and the geographic locations of those photographs, correct?

A. We were—we ran the pictures through the Exif-Tool. Some of them did not have that information.

Q. Right. But some of them did, correct?

A. Some had the latitude, longitude—yes—date created.

Q. Was there any other examination that you performed on this material?

A. No.

MR. ROBERTSON: Could I have one second, your Honor?

THE COURT: Sure.

(Counsel conferring.)

MR. ROBERTSON: Couple more questions.

BY MR. ROBERTSON:

Q. Special Agent Finerty, the ExifTool was run both on February 29th and March 9th, correct?

- A. We created the report on—February 29th is when we run the ExifTool, yes. And the report is created March 9th, 2016.
- Q. And you got metadata from both photos and videos, correct?
- A. It was the same exact report.
- Q. My question is, the metadata that was extracted in the report—
- A. Yes.
- Q. —okay?—that concerned both photos from Mr. Mendez's phone and videos from Mr. Mendez's phone, correct?
- A. I don't recall videos. I only recall photos.
- Q. Okay. When—subsequently while you were working on the case, you recovered other electronic devices that were connected to Mr. Mendez, correct?
- A. Are you talking about the iPad and the—
- Q. Yes.
- A. —iPhone, the work iPhone?
- Q. Yes.
- A. As part of the border search, the—
- Q. No, no. I'm talking about subsequently.
- A. Did I encounter them was the question?
- Q. Let me—I'll rephrase it.
- A. Okay.
- Q. Subsequently, with respect to other electronic devices in your investigation—

A. Yes.

Q. —you received—you applied for and received a search warrant prior to searching those electronic devices, correct?

A. Yes.

MR. ROBERTSON: Judge, I have nothing further.

MR. PARENTE: Just a few questions, your Honor.

CROSS-EXAMINATION

BY MR. PARENTE:

Q. Agent Finerty, you work for the Department of Homeland Security?

A. Yes.

Q. And you work for HSI—is that what you call it?—Homeland Security.

A. Yes.

Q. And the other agency we're talking about, CBP, they are also under the umbrella of the Department of Homeland Security.

A. Yes.

Q. So HSI and CBP both work for DHS.

A. Yes.

Q. So when CBP, who works at the airport, when they find child pornography, do they always call in HSI to do the actual investigation?

A. Yes.

Q. That happens in every single case?

A. Yes.

Q. And is that because HSI actually has training in child pornography investigations?

A. Yes.

Q. Okay. And in this case, did you ever search the defendant's cell phone?

A. No.

Q. Okay. So Government Exhibit 2, you've never actually even looked at this phone.

A. No.

Q. Searched it.

The only thing that—when he's talking about you running these other searches or programs, what you took was what was provided to you by CBP, who did the border search. Is that correct?

A. Yes, that's correct.

Q. So you were using what they took out of the defendant's cell phone on the night he tried to bring that contraband into the country.

A. Yes.

Q. Okay. And your job, at least in part, was to try to figure out—one, verify that it was child pornography.

A. Yes.

Q. Okay. And in doing that, you took the images, right?

A. Yes.

Q. And that data that you found, that helps you find out where the location of some of those photos were taken?

A. Yes.

Q. And do you actually identify as you're in your role the little girl that this man took those photographs of?

A. Yes.

Q. And she has now been identified.

A. Yes.

Q. And that's one way to prove up that the contraband that he was suspected of bringing into this country actually was, in fact, child pornography.

A. Yes.

Q. Okay.

And, again, to get to that point, you never went back and did another search of the phone.

A. No.

Q. And you did, in fact, obtain a search warrant for all the devices on March 18th of 2016?

A. Yes.

Q. Including the cell phone?

A. Yes.

Q. But the cell phone was never searched under a full forensic exam. Is that correct?

A. Yes.

Q. And why is that?

A. Because it was set to factory reset. It was wiped.

Q. And based on search warrants that you executed on the defendant's iCloud account, did you encounter evidence that the Court will hear about in the future that that phone was—that he did Google searches about how to remotely wipe an iPhone?

MR. ROBERTSON: Objection, Judge. This is well beyond the scope and well beyond the time.

THE COURT: Sustained.

BY MR. PARENTE:

Q. And let me ask you this, Special Agent Finerty.

MR. PARENTE: One second, your Honor.

THE COURT: Sure.

(Counsel conferring.)

MR. PARENTE: Judge, I believe that's all I have for this witness. Thank you.

THE COURT: Okay.

MR. ROBERTSON: Judge, can I have just a brief redirect?

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. ROBERTSON:

Q. Special Agent Finerty—

A. Yes.

Q. —Mr. Parente made a point of talking about how you only used information that was obtained by the CBP in using the ExifTool. Okay?

You knew that information came from Mr. Mendez's phone, correct?

A. Yes.

Q. You knew that Mr. Mendez's iPhone, as any other iPhone, contains a great deal of potentially sensitive information, correct?

MR. PARENTE: Objection. Calls for speculation.

THE COURT: I'll allow her to answer it.

THE WITNESS: Yes.

BY MR. ROBERTSON:

Q. And, in fact, you lay out in your—you've had experience and you've laid out all the types of different personal information that can be contained on an iPhone or another type of electronic similar device, correct?

A. I did that?

Q. In your affidavits for search warrant.

A. Can I see what you're referring to?

THE COURT: I'm willing to take judicial notice that cell phones contain a lot of personal information.

MR. PARENTE: We would agree with that, Judge.

MR. ROBERTSON: Okay. You know, with that, Judge—I think if—it seems we don't have any way to argue that—I have nothing further.

MR. PARENTE: Nothing further, Judge.

THE COURT: Okay. Agent, you can step down.

And as case agent, you can remain in the courtroom at this point if you'd like. You do need to social-distance. So I'll let you work that out with counsel.

Okay. Do we have another witness? And this would be remote.

MR. DURIC: Yes.

THE COURT: Okay.

MR. DURIC: We would call—

THE COURT: And who is that?

MR. DURIC: —Officer Alikhan.

THE COURT: Okay.

MR. PARENTE: And, Judge, maybe we—should we take a minute?

THE COURT: I think we should take—why don't we take ten minutes. I'm going to get my courtroom deputy in here because I think she's going to help us make that happen. Okay?

MR. DURIC: And, your Honor, before we break, could we address the stipulation I had discussed with Mr. Parente?

THE COURT: Sure.

COURT REPORTER: Can you step up to the microphone, please.

THE COURT: Yes.

MR. DURIC: On the cross-examination of Officer Callison, I had asked him about Mr. Mendez's criminal background, whether there were arrests, convictions, et cetera.

THE COURT: Uh-huh.

MR. DURIC: I believe we can stipulate to what his criminal background actually showed.

THE COURT: That's good because I think in the briefing, it was indicated that he had a conviction, and then the briefing actually indicated an arrest. So some clarification. I would appreciate that.

MR. PARENTE: We can even put in the NC—I mean, I think it's—he has arrest and conviction.

COURT REPORTER: I need you at a mic too.

MR. PARENTE: We have arrest and a conviction. But it is what it is, so we obviously would—

THE COURT: Sure.

MR. PARENTE: We could even give your Honor the NCIC.

MR. DURIC: Yes.

MR. PARENTE: Or we can just—

MR. DURIC: That's what I'm suggesting, yes.

THE COURT: Okay. So we'll just have that be Exhibit 6 or whatever it is, and you can just give it to me after this next witness.

MR. DURIC: Thank you. Thank you both.

THE COURT: Okay. And I'll get my courtroom deputy.
And we're in recess.

(Recess at 12:08 p.m., until 12:22 p.m.)

THE COURT: Okay. I'm back.

Do we have our witness?

MR. PARENTE: We do, your Honor.

THE COURT: Well, I can't see him, but I guess that's okay.

Oh, yes. I can. I've got him right here.

All right. Great.

Okay. Are you ready?

MR. DURIC: Yes.

THE COURT: Very good.

COURT REPORTER: You'll need to stand over on this side so he can see you. Thank you.

THE COURT: Okay. Officer, can you hear me?

THE WITNESS: Yes, ma'am, I can.

THE COURT: Okay. Very good.

Can you stand up and raise your right hand.

Actually, I don't need you to stand.

THE WITNESS: Yes, your Honor.

THE COURT: Now I lost your head. Okay.

(Witness duly sworn.)

THE WITNESS: Yes.

THE COURT: Okay. Very good.

Have a seat. And keep your voice up. Okay?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

MOHAMMED M. ALIKHAN, DEFENDANT'S
ADVERSE WITNESS, SWORN DIRECT
EXAMINATION

BY MR. DURIC:

Q. Good afternoon, Officer. Could you please state and spell your name for the record.

- A. First name is Mohammed, M-O-H-A-M-M-E-D. Middle initial is M. Last name is A-L-I-K-H-A-N, Alikhan. Mohammed M. Alikhan.
- Q. Thank you, Officer Alikhan.
Where are you currently employed?
- A. I'm currently with U.S. Customs and Border Protection, currently stationed in Vancouver, Canada, preclearance.
- Q. And any particular unit or division you work in?
- A. Basically, I'm right now in primary processing.
- Q. Directing your attention back to February 2016, and specifically February 20th of 2016, where were you working at that time?
- A. I believe I was—in 2016, I was assigned to Primary Enforcement Roving Team operations in Chicago O'Hare—at Chicago O'Hare Airport.
- Q. That would be a counterterrorism roving team, correct?
- A. Yes. Yes, sir. That's also called a counterterrorism roving team.
- Q. And who were the other members of that team with you?
- A. At that time it was myself, Officer Amy Baumgart, Officer Richard Callison, and Officer Slawomir Cislak.
- Q. And that was a four-member team, correct?
- A. Yes, sir.
- Q. No one else was part of that team.
- A. As far as I remember, no.

Q. And that team was part of the Customs and Border Protection agency.

A. Yes, the—that is correct.

What I mean that no one else was part of that team, I'm talking about on that day. But the unit itself had other officers on it. But specifically on that day, it was just four of us.

Q. Okay. In general, outside of that day, how many other officers would work on that team?

A. It's a whole separate unit. So I—I would estimate, to the best of my knowledge, maybe about—first shift, it's four. So three shifts. I would say about 12 to 15, I would guess.

Q. And you were familiar with all the—I'm sorry.

You said 12 to 15?

A. Yeah, approximately 12—between 12 to 15 on the entire unit.

Q. And you were familiar with all the other officers on the team back at that time in February of 2016.

A. Yes.

Q. You knew all of them on a first-name basis.

A. Most of them I did.

Q. And that holds true for Officer Callison, Officer Baumgart, and Officer Cislak, correct?

A. Yes, sir.

Q. You worked with all three of those officers regularly.

A. Yes, sir.

- Q. And you worked as part of a team, correct?
- A. Yes, sir.
- Q. You each had different roles that you performed together.
- A. Yes, sir.
- Q. Now, fair to say that Officer Callison had more technology experience than the other three officers working that day?
- A. Yes, sir.
- Q. Do you have any training in computer forensics?
- A. Computer forensics? No, I don't.
- Q. Okay. And as part of that team, over the course of your time working at O'Hare as part of that team, how many searches would you say you were involved in?
- A. I mean, like, almost every day we had to search. I mean, like, it depended, right? For example, we—for some passengers, we searched their belongings for, like, undeclared currency, narcotics, or it all depends. So almost every day we would search, I would say, a few passengers, each officer.
- Q. And when was it you started in that role on the—on the roving team at O'Hare?
- A. I would—so maybe, like, October 2015 we would—because it goes for one year, as far as I remember, because every year we would have a different—different bidding options. So this would start in October 2015, as far as I remember.

- Q. And you left that position on the rover team at O'Hare around when?
- A. I would say it's about the same time, like October 2016.
- Q. Okay. So about a year you were working on that team, conducting daily searches at O'Hare.
- A. Yes, sir.
- Q. And what would you generally do on the team to conduct a search?
- A. I'm sorry. What's that?
- Q. What would your responsibilities on the team generally be when the team was conducting a search?
- A. Well, if I was a searching officer, then I would search the passenger. I would check, like, systems checks. I would do pat-downs if I had to. I would search their belongings. I would search their electronic media if I had to.
- Q. And you would also talk to -- talk to the passenger or question the passenger.
- A. Yes. I would also conduct a full interview if I needed to. So, like, basically, I would do, like, a basic interview. But if I needed to go in depth, then I would go in depth.
- Q. And were you the one on the team who generally conducted the interviews?
- A. It all depends. Like, if I signed up for that, if I was the first officer to encounter that passenger, then I would be the first officer to—to conduct an interview. But if I was not, I would be the backup

officer helping the other officer. For example, if he was doing the interview, I would do, like, a bag exam or I would just be there for officer—officer presence as well.

Q. Okay.

A. If there are more than two officers.

Q. Now, as part of your custom and practice on that team, would you say that there would always be two officers present for any interview?

A. Yeah. Yes, sir. And basically, yeah, two. Two per passenger.

Q. Okay. Directing your attention to February 20th of 2016, you were on duty at O'Hare that day, correct?

A. Yes, sir.

Q. And you were working, I guess, the night shift or the third shift?

A. As far as I remember, yes.

Q. And you were involved in the search of a passenger named Marcos Mendez.

A. That is correct.

Q. Tell me about your involvement in the search of Mr. Mendez. What did you do?

A. So with this search, I was basically assisting as an officer presence. I—I—as far as I remember, I don't think I talked to Mr. Mendez, or neither did I search his electronics.

Q. All right.

A. But since I was on the team, since we were—we were a group of four, I was present during that time. I was there when the search was happening.

Q. And when you say “present,” you were present in the secondary inspection area?

A. Yes.

Q. And Officer Baumgart, Officer Callison, and Officer Cislak were also there.

A. Yes, sir.

Q. And what specifically were you doing during this search?

A. Like I said, I exactly don’t remember because this was in 2016. But—but as far as I remember, I did not talk to Mr. Mendez. Neither did I search his device or his belongings.

Q. Okay. So—

A. I was just there as a—as a—basically like a support if they needed extra help or anything like that.

Q. So you—fair to say you don’t remember specifically what you did.

A. Well, like I said, I did not get involved, like—I did not get involved in the inspection, but I was there. I was—I was present during the inspection, when the inspection was going on.

Q. And why were you present?

A. Because we were—we were a team. And during—during nighttime, that was basically—I believe that was the only inspection—that was one of our

last inspections, as far as I remember. So we were just—I was just there as a—as a team member.

Q. And that inspection took place between around midnight and 3:00 or 4:00 a.m. on February 21st, 2016?

A. As far as I remember, yes, because it was the night shift, and then it may have gone into the 21st.

Q. And can you tell us anything that you specifically did during that three-or four-hour inspection?

A. I was there. I mean, like, I was—I mean, like, I don't remember exactly what I did. But I was on duty for the inspection part. Like I said, I—I never searched Mr. Mendez. I never talked to him. But as a team member, I was present during that inspection.

Q. Okay. And you don't remember because it was about five and a half years ago.

A. Fair to say that, yeah.

Q. And you didn't make any notes or generate any reports regarding this inspection.

A. No, because this was not my inspection. I would not do a report because I was not the primary officer that was—that encountered Mr. Mendez.

Q. And Officer Baumgart was the one who wrote the report?

A. As far as I remember, yes, sir.

Q. No one else wrote a report about that inspection.

A. I don't believe so.

Q. And have you reviewed all—

A. I personally—

Q. I'm sorry. Go ahead.

A. I was saying I personally did not write a report.

Q. Okay. And have you reviewed the report that was generated?

A. Yes, I did.

Q. And that was about a paragraph long?

A. Yes, sir.

Q. Didn't contain—

THE COURT: Counsel, is this going somewhere that has anything to do with suppression?

MR. DURIC: I would say so, yes.

THE COURT: Okay.

BY MR. DURIC:

Q. Report was about a paragraph long?

A. Yes, sir.

Q. And can you tell us how the cell phone belonging to Mr. Mendez was searched that evening.

A. Like I said, I did not search the phone. So, I mean, like, I don't know how I would answer that question because I did not search the phone.

Q. How did the team generally conduct cell phone searches?

MR. PARENTE: Objection, your Honor. I don't know what the relevance is.

THE COURT: Kind of wind it back to suppression, if you can.

MR. DURIC: I'm just trying to get to the steps that were taken before searching the cell phone.

THE COURT: Okay. But he doesn't seem to remember anything.

MR. DURIC: That's why I'm asking him about his habit or the general practice of the team.

THE COURT: Okay. But it—move it along a little bit.

BY MR. DURIC:

Q. Can you just briefly tell us, Officer, what steps the team would take before searching a cell phone.

A. Well, like the general steps would be advising the passenger, giving him electronic media device—electronic—like a—like, inspection device, that shows that CBP has the authority to basically search the electronic devices.

And that's—that would be, like, the general inspection process.

Q. And the general process would be to hand the passenger a tearsheet explaining the CBP's authority to search the cell phone device, correct?

A. We do, yeah. Yes, sir.

Q. And that was not a voluntary—that's not something the passenger had a right to refuse, correct?

A. We—I mean, we cannot control—if I give somebody a tearsheet, if they take it, they take it. If they don't, I mean, I cannot force it on them. That's up to the passenger to take the tearsheet or not.

Q. I understand that.

But the—when you hand a passenger a tearsheet explaining the CBP's authority to conduct a cell phone search or any other electronic media search, that passenger does not have the right to refuse that search.

A. Well, if he refuse—I mean, he can say no, but he would still be subject to the search. He would be, like—like, the phone may be seized under different authorities to see—and then send it to the lab or something like that. But he can—he can say no, but the search would not stop over there.

Q. Did you tell Mr. Mendez on the night of this search that if he didn't give up his password, you would make things more difficult for him?

A. Like I said, I did not speak with Mr. Mendez, so I didn't—I didn't—I did not—I did not conduct an interview, so I cannot answer that question because—

Q. What—were any other officers speaking to Mr. Mendez?

A. I would assume the officer that wrote the report, she would have—she would be the best person to answer this question.

Q. That would be Officer Baumgart?

A. Yes, sir.

Q. And what can you tell us, if anything, about what Officer Baumgart said to Mr. Mendez that evening?

MR. PARENTE: Objection, your Honor.

THE COURT: Sustained.

BY MR. DURIC:

Q. Did you hear anyone speaking to Mr. Mendez?

A. Well, I know Officer Baumgart spoke to him, but I don't remember what she talked to him about.

Q. Okay. Did you see Officer Callison talking to Mr. Mendez?

A. I don't remember.

Q. And you were at all times within the vicinity of Mr. Mendez, Officer Callison, Officer Baumgart, and Officer Cislak while the search was being conducted?

A. As far as I remember, I was there. But I may have walked away for—for, like, a brief moment for something else. But I don't remember exactly in 2016 what I was doing at that—at that time.

Q. Okay. Did you go into an office with a computer where Mr. Mendez's cell phone was being run through a software program?

A. I don't remember.

Q. Okay. Do you have any knowledge about Mr. Mendez's cell phone being run through a program called DOMEX?

A. As far as I remember, I know the phone was searched. But I don't—I don't exactly—if the program—but when I read the report, that it—basically it shows that the phone was searched and—and then there was contraband on the phone.

Q. Okay.

MR. DURIC: One moment, your Honor.

THE COURT: Sure.

MR. DURIC: We have nothing further, your Honor.

MR. PARENTE: Nothing from the government.

THE COURT: Okay, Officer. Thank you so much for taking the time today. And you're excused. Thank you.

THE WITNESS: Thank you, your Honor.

THE COURT: Thank you for your time.

Okay.

MR. ROBERTSON: Can we just have one moment, your Honor? I'm sorry.

THE COURT: Sure, sure.

MR. PARENTE: Thank you, Officer.

MR. DURIC: We have nothing further at this time, your Honor.

THE COURT: Okay.

I would suggest that—I'd like to hear from both of you, both sides, briefly about the searches because I—as you might have gathered when I came out, I thought we were talking about two searches. I understand now the defendant is arguing about four separate searches.

So I would like to get each side's take on that, if you don't mind. Would you like a few minutes?

MR. PARENTE: We're ready whenever your Honor is ready.

THE COURT: Do you need a minute?

MR. DURIC: I'm prepared, your Honor.

THE COURT: Okay.

I'll hear from the defendant first since you have the burden.

MR. PARENTE: Judge, no objection to the officers coming in? They asked.

THE COURT: Oh, sure.

Go ahead.

CLOSING ARGUMENT
ON BEHALF OF THE DEFENDANT

MR. DURIC: Your Honor, this matter involves a search that the government has relied on the border exception to justify. It is the government's burden to establish that exception. It's not our burden; it's the government's because the warrant requirement is—it's not a dead letter. It's something that if the government want to avoid, they have to establish an applicable exception.

And here the border exception was created essentially to prevent the flow of contraband into this country. That's the purpose of it. And the Supreme Court and a number of appellate courts have said when the government goes beyond the rationale underlying that exception, it cannot rely on the border exception.

The border exception is not a law enforcement exception. When the purpose in effect of a government search is law enforcement and not interdiction of contraband, the government cannot establish the border exception.

As courts have said, the border exception does not mean anything goes at the border. It does not mean the government has free rein to search an American citizen coming home just because he's passing through an international border at the airport.

And here what we have is really a law enforcement search. At each step of the process, Officer Callison acknowledged that. This was a CTR, counterterrorism enforcement exam. I asked him, "What was the purpose?" I asked him, "Was it law enforcement?"

"Yes, it was law enforcement."

You didn't hear about interdicting contraband. You didn't hear about looking out for someone trying to smuggle something. This was government agents seeing someone with a previous criminal conviction, targeting him for a search because they believed they'd find something they could use for criminal prosecution.

I asked Officer Callison, "What was the purpose of DOMEX?"

"To preserve evidence for criminal prosecution."

And certainly this second software program that was used, ExifTool, which Agent Finerty testified to, there's certainly no purpose behind that program or that search other than law enforcement. It's not to interdict contraband. They already have all of the material. It's already been interdicted. That search unquestionably has nothing to do with the border exception.

And what the government relies on here is basically twofold. First, the so-called manual search. And they're describing this manual search as a routine search that does not require any suspicion whatsoever. It can be done to anyone at any time for any reason. Anyone in this courtroom taking an international trip, according to the government, is subject to having their cell phone opened up, having the password unlocked, having a government agent go through everything on that phone.

THE COURT: But that's not really the testimony. I mean, I hear you about that. But that—they're talking about that he had a prior arrest. He had odd travel. He had been to a source country. He was alone. I mean, you can disagree with those things. I hear you saying, "Oh, Ecuador. It just means it's a high-crime area."

And, you know, okay. He's an adult male who is alone. Well, there are a lot of those. I mean, I get that you can criticize those factors.

But I don't have those factors. Okay? I don't have a prior arrest. So when you say that anybody in this courtroom flying in from a country could have this happen to them, do I really—should I really be concerned about that when, in fact, your client had a prior arrest; he had odd travel? I don't know exactly what "odd" means. He was coming from a, quote/unquote, source country.

You know, he had this flag, this—what did they call it?—where he was—where the agent—where the officer was notified ahead of time to, you know, approach your client. So that's not going to

happen to every traveler. So talk to me about that.

MR. DURIC: Well, I would respectfully disagree in one respect, and that's that—that's what the government is arguing is that they don't need suspicion to do the so-called manual search.

And that's why their argument is twofold. It's that we don't need suspicion—and obviously we take issue with that. But they say even if—even if we did, there was suspicion in this case for all the reasons that the Court mentioned.

THE COURT: I see.

MR. DURIC: And, you know, we look at the conviction. Seventh Circuit has said the conviction cannot form the basis of reasonable suspicion. That's not enough. We've cited that case law in our briefs. Simply because someone has been convicted of a crime, even if it's something terrible like child pornography, that cannot form the basis of reasonable suspicion.

And here we don't actually have a child pornography conviction.

THE COURT: Right.

MR. DURIC: If you look at the criminal history, it's endangering the life of a child, which, you know, could be theoretically anything—you know, almost anything: a neglectful parent, someone who made a mistake. Just because you have a conviction like that doesn't mean you give up your right to privacy in your cell phone.

Then you have the international travel, going to Mexico, going to Canada, which Officer Callison said was not unusual. He said that he learned that Mr. Mendez traveled to Mexico for business reasons, traveled to Canada, which is in no way, shape, or form a, quote/unquote, source country, at least not more so than any other country.

And then there's the testimony about Ecuador in general being a source country. But, you know, I don't know what that means. And that can literally apply to a number of countries.

THE COURT: So is it your argument that the officer needs reasonable suspicion, number one; and, number two, they did not have it here to do the manual search?

MR. DURIC: At the very least, they need reasonable suspicion. At the very least, yes.

We would, of course, contend that a warrant requirement—a warrant is required given the Supreme Court's decision in *Riley*.

THE COURT: Mm-hmm.

MR. DURIC: But at the very least, reasonable suspicion is required. And in the Seventh Circuit case addressing this issue—I'm going to butcher the name—it's *Wanjiku*, I believe.

THE COURT: *Wanjiku*, yeah.

MR. DURIC: The Court didn't actually decide the issue because it said no matter what, there was reasonable suspicion in that case. And we're not going to decide the issue because no Court before

has required more than reasonable suspicion for a cell phone search at the border.

THE COURT: Mm-hmm.

MR. DURIC: But the facts of those—of that case are very different. In that case, if you look at the facts, you have agents prior to the search developing social media evidence of the defendant in a—a mask—picture with him in a mask and being friends with a number of young children on Facebook, with him having a sexually suggestive e-mail address, travel to Thailand, which there was specific testimony about as being a place where a lot of people go for these types of crimes.

There was physical evidence recovered in the luggage prior to the search, including condoms, I believe. There was a—there was questioning about where the defendant stayed during his trip. He just indicated, “Hey, I just stayed with a friend.” Then they found physical evidence in the luggage contradicting that, hotel receipts. You have the defendant lying about where he’s coming from and what he was doing in that country. You had a lot more evidence in *Wanjiku* than you do here.

Here essentially it boils down to previous conviction and someone traveling abroad. And that’s simply not enough to establish reasonable suspicion. The Fourth Amendment requires a lot more than that.

I understand the Court’s comments about all these different factors and how, you know, the ordinary citizen may not be subject to a search because they may not fit all these criteria. But when you

boil them down, it's essentially having a criminal background and going abroad.

And if that's enough to search your cell phone, then the Fourth Amendment really—it just doesn't apply at the border. That's what we're saying. If we accept that, then American citizens, whatever they're charged with, have no right to privacy in their cell phone as long as they have a criminal background.

And we would submit, your Honor, that that just cannot be the case. Cannot be the case that American citizens, just because they've had a conviction, no matter what it was for, doesn't mean they surrender their right to privacy when they travel abroad.

The agent acknowledged in this case—the officer acknowledged in this case he had no information that Mr. Mendez was actively involved in committing a crime, no information that Mr. Mendez was actively involved in smuggling contraband. None. This at the very best was wild speculation.

And it cannot be excused with the benefit of 20/20 hindsight: “Hey, we were successful in recovering it, so because of this post hoc information we acquired, then it must have been a good search ex ante.” That's not the standard. It's what did they know at the time. And there just wasn't enough here, Judge.

And that's the initial—initial search where they get the password, they get into the—into the phone, and they thumb through the camera roll, or Officer Callison thumbs through the camera roll.

There's then three more layers. The iSafe application, which by its very name is something that is clearly of great privacy, something that has huge privacy concerns associated with it. It's an electronic safe to keep things safe from prying eyes.

And they get the password, and they go in there based on nothing other than the conviction and the travel. And they thumb through all those videos and photos. And no matter how illicit or terrible those things were, that can't excuse the government getting into it without any reasonable suspicion.

THE COURT: Right. But at that point they have what they saw in the photo app.

MR. DURIC: Very true. Very true.

And that—that could only serve as the basis for this—what we've deemed a subsequent search if that initial search was valid.

THE COURT: Uh-huh.

MR. DURIC: And here, of course, it was not, in our estimation. And that's step two.

But then there's three—there's two more steps. They see the contraband in the camera roll, in iSafe. They have the phone in their control, four government agents, at the very least, and a supervisor. They can disable the phone. There's no reason they have to do anything further at that point. They've intercepted the contraband. They can call law enforcement. They can call Homeland Security. They can ask someone to get a warrant. There's no exigency there.

The warrant requirement isn't something you just ignore for convenience' purposes. There's absolutely no government interest behind them failing to get a warrant at that point. Officer Callison said it very clear: "I had no doubt in my mind that that phone contained contraband." It's not like they had to do any more looking for contraband. It was already right in front of them. So why not get a warrant if you want to do any subsequent search? But he didn't because he said he doesn't think he has to.

They then run the phone through DOMEX for about two or three hours, and they extract thousands of files, allegedly, without a warrant. They then call Homeland Security, in Officer Callison's words, to see if Homeland Security wants to prosecute at that point. Why couldn't he do that before the DOMEX search? Absolutely no reason he couldn't do that before the DOMEX search.

And to make matters worse, days later, about a week later, on February 29th, Homeland Security, Agent Finerty—who I'm not criticizing in any way. But she then performs, or her and her coinvestigator perform a subsequent search to extract metadata for the explicit purpose of prosecuting Mr. Mendez. That search has nothing to do with the border. Metadata is not contraband. You don't need to interdict metadata and prevent it from coming into this country.

Now, the government argues that, hey, they can extract it out because that DOMEX search was valid. And they've described the DOMEX search as a limited search. Not a forensic search, but a

limited one. They can't have it both ways. You can't say the DOMEX was a limited search but then rely on the DOMEX search to justify an even more invasive metadata search.

Unquestionably, both the DOMEX and the later ExifTool search that extracted the metadata were highly intrusive forensic examinations for the purpose of generating and preserving evidence for Mr. Mendez's criminal prosecution. Neither of those two subsequent searches had anything to do with the border. They had the contraband. It was in their possession. There's no reason they couldn't get a warrant.

And, Judge, I'll just close by saying that I understand the nature of the charges here, and they are indeed very, very significant. But it is in these types of cases where we must hold most scrupulously to the Fourth Amendment because if we do not—do not guard our Fourth Amendment rights in cases like these, then it will simply erode away.

And our cell phones and all of our personal information—e-mails, text messages, family photos, photos with children, with spouses, financial records, anything you could possibly put on a phone—it's going to be turned over to the government without any questions simply because someone takes a trip overseas. And I think that the Fourth Amendment is made of much sterner stuff than that, your Honor.

We'd ask you for those reasons to suppress the evidence acquired as a result of each of the four searches I have described.

THE COURT: Thank you, Counsel.

Counsel for the government.

MR. PARENTE: Thank you, your Honor.

CLOSING ARGUMENT ON BEHALF OF THE
GOVERNMENT

MR. PARENTE: Judge, and with all due respect to defense counsel, I mean, his arguments, some of which are arguably valid, I mean, they're policy arguments. They don't actually apply to the state of the law as it is here.

And we are in the land of *Wanjiku*, which your Honor has read, and the Court makes it clear in that opinion that there's no suspicion required at all. And I'm reading from 485 of *Wanjiku*.

And the Seventh Circuit said, "So at the time the agents searched Wanjiku's cell phone, hard drive, and laptop, the Supreme Court required no particularized suspicion for a non-destructive border search of property, and, at most, reasonable suspicion for a highly intrusive . . . search of a person's . . . body . . ."

And when you look at—I handled the *Wanjiku* case. I'm very familiar with it. And what I can tell you is that the facts in *Wanjiku* were nowhere near as good, in my opinion, as the facts in this case because the agents saw the child pornography pre-DOMEX, pre-Cellebrite. That's a huge difference.

And that's why all this stuff about his prior travel and the arrest histories is really irrelevant because no Court in the country has ever required any suspicion for a manual search of a device at the border.

So when Officer Callison—once he testified that it was in the manual search that “I went through the photo album and saw those images,” that he described for the Court that are clearly child pornography, we are well past reasonable suspicion. We’re at probable cause.

And therefore all those other flags that we’re even arguing about really become irrelevant because the only argument that the defense has here is that the DOMEX search, which would arguably—and I won’t even concede this—be considered a nonroutine search under the—under the law, then you would need reasonable suspicion.

But it doesn’t matter because, as they conceded, officer found the child pornography in the manual search. And no Court has ever required any suspicion at all, including here in the Seventh Circuit, including the Supreme Court, for a manual, nondestructive search of a device at the border. So that kind of—in my opinion, that ends the analysis.

And to structure our argument that way, again, Officer Callison told you why this person was selected to the extent that it would matter. But the reason we listed all those flags in *Wanjiku* was because we didn’t have child pornography until they did the DOMEX search or the—it was a different software program at that time. But in this case, the fact that the child pornography was detected in the manual search, we’re way past reasonable suspicion.

THE COURT: But, you know, one thing that was interesting about Officer Callison’s testimony is

he indicated, I think on cross, that he was going to search the defendant before he looked at the phone. I mean, there's no doubt that he was relying on these factors, whether they're good or bad or what he knows about them and Ecuador and traveling alone and how significant these factors are. He thought they were significant, and that's what he testified to on direct.

But he was going to search at least the defendant. Now, whether that would get him to the phone or not, I don't know. Whether the defendant even would have a phone with him, of course, I guess he didn't—you know, the officer didn't know at the time. But assuming that he had a phone, he was going to search when he—when he—when the defendant deplaned.

MR. PARENTE: Absolutely. And—

THE COURT: So the child pornography really has nothing to do with that equation.

MR. PARENTE: It does in the extent that this exact same argument was raised in *Wanjiku*. And I would direct the Court to page 488. And the Court took this head on.

It's not the subjective intent of the officer until the moment of the search. They look at—and the same thing came out in the *Wanjiku* hearing where they crossed the officer: “But you were going to do it regardless.”

And that's why the Seventh Circuit addresses this directly. And they say it doesn't matter, the fact that he was going to do it regardless. It's what's

in the officer and collective law enforcement's mind at the time the search is executed.

So at the time, if you want to take it at the manual search, which there's no suspicion required. But at the time of the DOMEX, what did officers collectively know at that time, that's what matters. And—

THE COURT: So you would—are you conceding that you need reasonable suspicion to do the DOMEX?

MR. PARENTE: I'm not.

THE COURT: Okay.

MR. PARENTE: And that's not been decided in the Seventh Circuit. I don't think you need to address it because I think there are clearly—that's what the Seventh Circuit did. I argued in *Wanjiku* that we don't need it for that search because it's not a full forensic search.

And you kind of heard that a little bit from Callison in that, you know, the reason we did a search warrant on this phone and the other devices even though we had the border search is because in a full forensic search, you can get much more data: You can get unallocated data. You can get deleted data. You can get encrypted data. In a DOMEX search, you can't get that stuff.

And so I would argue for the government that this would still be—even DOMEX is not intrusive and wouldn't require reasonable suspicion. And that has not been decided in this circuit.

THE COURT: Okay. So I'm interested in the—when you get the metadata—

MR. PARENTE: Correct.

THE COURT: —which in my mind is more invasive. Now, you might disagree with me.

MR. PARENTE: Mm-hmm.

THE COURT: But it does give place and time. So it, for instance, says where you were on a certain day—right?—because that's where you took a photo. That's where you took a video. So it says you were at a bar at a certain time or you were at—you know, you were not where you were supposed to be. You were not where you told your spouse you were going to be, for instance. I mean, you can see where that would be problematic for people. So—and, of course, we know the time lapse.

So do you—is it the government's position that just because we're—we got the phone at the border, it's fair game from that moment on and there's never a warrant required, one, which is probable cause, two, no probable cause required, or, three, not even reasonable suspicion required before we do that—which I've forgotten the name of that program, but before we extract the metadata?

MR. PARENTE: A few things to that.

So the first thing I would say is you would never—under any standard at the border, you would never need more than a reasonable suspicion. I think that's clear.

THE COURT: Right.

MR. PARENTE: And I would say we had it in spades once they found the child pornography during the manual search. So it wouldn't matter.

But, two, this phone never cleared the border. Right? That's the whole point of this. This phone was stopped at—this was an individual attempting to bring contraband into our country. CBP, they're not there to prosecute. They're there to be the wall so that this stuff doesn't come into the country, which it would have had they not stopped it. Okay?

So the phone never clears the border. What they do, they have authority—the government's position is they have authority to do that download. That's now—that would be considered Attachment B if this were—if the border search were a physical search warrant.

Well, of course, once agents remove something from the home, they can go back to it and do whatever they want with it. If they gave me the disc from the airport that night, I'd pop it into my—I wouldn't call the magistrate judge and say, "I need another search warrant," to look at what they downloaded pursuant to the border search.

They're just going back to it, in fact, to make sure this is contraband. You know, maybe this was something different and not contraband. They were doing this to follow up on the actual purpose of what they were doing: "Should we stop this from coming into the country?"

And let's keep in mind he's actually—the offense is transporting this stuff through the airport. He was actually charged with what HSI was investigating, that he was transporting child pornography at O'Hare Airport when he tried to enter the country. Like, that was the whole basis of the charge.

So, one, at best, you would need reasonable suspicion, and we had it, way more than that because we had probable cause based on the finding of the images.

COURT REPORTER: I'm sorry. I didn't understand what you said. You were going a little too fast.

MR. PARENTE: Sorry.

At best you would need reasonable suspicion, which we had once they found the images in the manual search, which no Court has ever found you need any suspicion for.

And then it's not a new search when you're looking at items that were taken—that were seized pursuant to a valid warrant or a warrant exception. That would be the government's position.

THE COURT: So you're just looking at the items—documents, phone, whatever it is—in whatever form it is that you took at the border. It's as if it never cleared the border.

And so the fact that by applying this new application to it, new software to it, even though it's giving you very incriminating new information because it is how you're identifying Individual A and where she is and could lead to, obviously,

much more serious charges—whether, in fact, you charge that or not or have charged it or not I’m not even aware of at this particular moment—you don’t think that that requires an elevated finding of probable cause or going to a magistrate judge.

MR. PARENTE: No, Judge. If they went back to the actual phone and tried to do some new search to try to—or if they have better software or something like that, I would maybe—maybe we’re at reasonable suspicion.

But to go back to what was already extracted during the DOMEX search, which was approved—or at least the government’s position it was approved under the case law—I don’t believe that requires anything—anything further.

And, in fact, I bet there’s an argument that DOMEX probably could give you that information at the time if you needed it, but that’s not in the record.

THE COURT: Mm-hmm.

MR. PARENTE: So, no, that would be the government’s position on that.

I don’t think—you know, this is all in our briefing as well, that in addition to the border search, CBP has statutory authority to do these searches as well, and that’s also discussed in *Wanjiku*.

And, again, it’s not that the Fourth Amendment doesn’t apply at the border. It’s that, you know, the Fourth Amendment doesn’t prohibit all searches; it prohibits unreasonable searches.

And our country for hundreds of years has recognized that at the border, the country's interest in keeping stuff like this out and keeping other bad things out trumps a person's private—person's privacy interest at the border. So everyone agrees the Fourth Amendment does apply at the border. It's just a different analysis, which the Supreme Court has recognized in these cases.

And, again, I think the good-faith argument is also in our—in our brief. But, you know, this case happened six months after—seven months after Mr. Wanjiku came through the airport, so obviously there was no change in the case law. So they also have that—that issue to deal with. But we would stand on our briefs, unless your Honor has anything.

And the iSafe argument. Again, it's not, like, iSafe is, like, "Oh, okay. Let me put it in iSafe," and all of a sudden the government can't protect the border anymore. It's just an app on your phone that hides things. But it's still—you're still trying to bring it into this country, and agents have just as much right to look in that as they do in a locked suitcase that is checked.

THE COURT: Yeah.

MR. PARENTE: So if there's nothing further.

THE COURT: No.

Counsel?

MR. PARENTE: Thank you.

MR. DURIC: Just briefly, your Honor.

REBUTTAL ARGUMENT ON BEHALF OF THE

DEFENDANT

MR. DURIC: First, regarding the *Wanjiku* decision, I believe if the Court looks at basically the end of the decision, that—I think the Seventh Circuit says explicitly that “We’re not deciding the issue here today,” something to that effect.

THE COURT: Mm-hmm.

MR. DURIC: So I don’t think that the Seventh Circuit has said that a manual search, as the government has described, does not require any suspicion at all. The Seventh Circuit was persuaded by the presence of reasonable suspicion in *Wanjiku*.

And I don’t think the government would have put on evidence about reasonable suspicion, about all of these factors that they mentioned and would have strained to talk about Ecuador and Mr. Mendez’s agitated demeanor if it didn’t recognize that reasonable suspicion, at the very least, is required here.

Now, the argument, basically, is “There’s no suspicion. Maybe there’s suspicion required. But in any event, we lawfully got into the phone, and once we got into the phone, we could do anything we wanted with the data.”

And, frankly, that’s just not true.

This DOMEX search involved the application of sophisticated technology, computer software to extract information from the cellular device. I mean, you could look at case law in a lot of analogous contexts, like infrared equipment to look inside a home. The government can’t just

apply technology to anything they have in their possession simply because they've confiscated it.

And that's what the *Riley* court recognized as well. The cell phone was seized incident to a lawful arrest, but *Riley* said you can't search the phone without a warrant. Just because you've seized the phone doesn't give you the right to search and go through everything in it. It especially doesn't give you the right to go through metadata and search for metadata and apply sophisticated technologies to that phone. That unquestionably is an additional level and something that requires an additional quantum of proof, if not a warrant.

And Mr. Parente mentioned how upon examination of this phone there was probable cause. Great. That's pretty much what I've been trying to get at with Officer Callison and in my opening argument.

If they had probable cause and they have possession of the phone, why can't they get a warrant? Why not? The warrant requirement just can't be ignored. There's no reason to ignore it here: no exigency, no reason in terms of contraband. It's not like if they don't—if they wait for the warrant there's contraband that's going to flow into the country. It's not. They have the phone. They have the contraband.

If you want to do something more, examine the phone more, apply more technology to the phone, get a warrant.

THE COURT: I understand that.

MR. DURIC: And with that, your Honor, we would rest on our briefs.

THE COURT: Thank you, Counsel.

All right. Thanks, everybody. I'll take it under advisement.

Can we set a 90-day status?

MR. DURIC: That works for us, your Honor.

MR. PARENTE: Yes, your Honor.

THE COURT: Any objection to excluding time?

MR. DURIC: No, your Honor.

THE COURT: All right. Thank you very much. Thanks, everybody, for being prepared.

MR. DURIC: Thank you, your Honor.

(Concluded at 1:14 p.m.)