No. 125550

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court
	) of Illinois, Third District,
Plaintiff-Appellant,	) No. 3-17-0830
	)
	) There on Appeal from the Circuit
	) Court of the Tenth Judicial
v.	) Circuit, Peoria County, Illinois
	) No. 14 CF 282
	)
JOHN McCAVITT,	) The Honorable
	) David Brown & Albert Purham,
Defendant-Appellee.	) Judges Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Police suspected that defendant John McCavitt, an officer in the Peoria Police Department (PPD), had committed criminal sexual assault. The Illinois State Police (ISP) obtained unchallenged search warrants authorizing the seizure and search of defendant's personal computer for digital images, storage data, deleted data, and "[a]ny evidence" of the crimes of aggravated criminal sexual assault, unlawful restraint, and unauthorized video recording/live video transmission. The forensic examiner who conducted the search of defendant's computer created an exact copy of the computer's hard drive as part of the investigation that resulted in sexual assault charges. The day after defendant was acquitted of those charges, the PPD initiated an internal investigation of defendant. The PPD obtained a copy of the copy of defendant's hard drive and, days later, discovered incriminating images that ultimately led to defendant's conviction for several counts of child pornography. The appellate court reversed defendant's convictions, holding that the circuit court erroneously denied defendant's motion to suppress that challenged the PPD's warrantless search of the copy of the copy of defendant's hard drive. No question is raised on the pleadings.

ISSUES PRESENTED

1. Whether an officer's warrantless examination of a copy of a copy of defendant's hard drive did not violate defendant's Fourth Amendment rights for any of three independent reasons. First, the warrantless review was a permissible "second look" that was no broader than the "first look" authorized by an unchallenged and presumptively valid search warrant that reduced defendant's expectation of privacy. Second, defendant had such significantly reduced privacy and possessory interests in the hard drive copy, for

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several reasons, that its examination did not constitute a "search" triggering the Fourth Amendment warrant requirement. Third, even if a "search," the officer's review was reasonable because it constituted, at most, a minimal intrusion on defendant's privacy and possessory interests while diligently promoting compelling law enforcement interests.

2. Alternatively, whether the good-faith exception to the exclusionary rule should apply because the officer reasonably concluded that his warrantless search was permissible under binding precedent.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). On May 27, 2020, this Court allowed the State's petition for leave to appeal. *People v. McCavitt*, 147 N.E.3d 692 (Table) (Ill. 2020).

STATEMENT OF FACTS

The Prior Case: Case No. 13 CF 741

In the early morning hours of July 17, 2013, Aimee Koch reported to her neighbor that she had been sexually assaulted. A16-17.[1] The neighbor arranged for her transport to a hospital, and ISP officers were dispatched to interview Koch at the hospital because the assault allegedly involved an off-duty PPD officer. *Id*. Koch described that after she had lain down in defendant's spare bedroom, she awoke to find herself restrained and her

[1] "C_" refers to the common law record; "R_" to the report of proceedings; "Sup R_" to the supplemental report of proceedings; "A_" to the appendix to this brief. The appendix to this brief includes documents from the sexual assault case, including search warrants, a docket sheet, a transcript excerpt, a motion, and an order. A16-40. This Court may take judicial notice of these documents because, as record documents from another case, they are "'readily verifiable facts which are capable of instant and unquestionable determination.'" *In re Abdullah*, 85 Ill. 2d 300, 308 (1981) (internal citation and quotation marks omitted). Where the cited material appears in the appendix, only an appendix cite is given.

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eyes covered; she believed that she heard "clicking noises that sounded like that of a camera" before she was penetrated anally and vaginally. A17.

Later that same day, the ISP obtained a search warrant authorizing a search of defendant's home and seizure of "any electronic media ca[pa]ble of video/audio recording" and "any electronic storage media capable of storing pictures, audio or video." A19; *see also* A1, ¶ 3, A8; R10. When executing this warrant, the officers arrived around 8:00 p.m., but defendant did not allow them to enter until approximately 10:30 p.m. R380-84. Subsequent forensic analysis of defendant's computer recovered data that had been deleted between approximately 9:20 and 10:26 p.m. that day. R611-12. ISP officers seized defendant's home computer during the search. A1, ¶ 3, A8, A23; R10.

A week later, on July 24, 2013, the ISP obtained a search warrant authorizing law enforcement to "search" and "examine" the home computer for evidence of specified offenses, including:

- "Any and all digital images including but not limited to JPG, GIF, TIF, AVI, MOV and MPEG files.
- Any and all storage data/deleted data to determine which particular files are evidence or instrumentalities of criminal activity.
- Any evidence of crimes listed below that may be discovered from separate incidents."

A29; *see also* A1, ¶ 4, A8. The offenses being investigated included aggravated criminal sexual assault, unlawful restraint, and unauthorized video recording/live video transmission. A29; *see also* A1, ¶ 4, A8.

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Detective Jeff Avery of the Peoria County Sheriff's Department worked with the ISP to investigate defendant. A1, ¶ 4; R14-15. Avery conducted a forensic examination of defendant's computer. A1, ¶ 4, A8; R15-16. As part of that examination, Avery created an "EnCase evidence file," a "bit-by-bit image" reflecting all data from defendant's hard drive. A1, ¶ 4, A8-9; R17. EnCase software ensures that the generated copy is complete and identical to the original and that the hard drive is not altered in the process. A9; R22-24. Avery saved this copy onto his work computer before returning defendant's computer to the ISP for storage. A1-2, ¶ 4, A9; R17, R23-24.

Avery then conducted his forensic examination of the EnCase file. R24-25. Following this investigation, on August 6, 2013, the State charged defendant with aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(4) (2012)) and criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (2012)). A2, ¶ 5, A30, A32. On March 19, 2014, a jury acquitted defendant of both charges. A2, ¶ 5, A9, A30, A34; R11, R18.

That same day, defense counsel orally requested the return of property of defendant's that had been seized by law enforcement when executing the search warrants in this criminal sexual assault case. Defense counsel stated that officers had seized "some guns, some — more like collector guns" that defendant would like returned. A36. The circuit court asked that the request be put in a written motion to be considered "sometime shortly" so that "everybody would have a chance to digest it." *Id.* Defense counsel did not mention defendant's computer, his hard drive, or any copies of his hard drive. *Id.*

On March 24, 2014, defense counsel filed a written motion seeking the return of "confiscated property, . . . including but not limited to collector weapons," noting that the

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property "is legal" and that defendant was "properly credentialed to receive and possess such property." A38-39. Following an April 24, 2014 hearing, the circuit court ordered ISP to "return all guns + weapons instanter to [defendant] including ammunition" and otherwise "generally continued" the motion. A40; *see also* A30.

PPD's Internal Investigation of Defendant

On March 20, 2014, one day after defendant's acquittal, PPD Chief Settingsgaard initiated a "formal investigation" or "internal affairs investigation" into defendant. A1, ¶ 3, A2, ¶ 6, A9; R30.[2] The next day, March 21, 2014, PPD Detective James Feehan, Jr. contacted Detective Avery and asked Avery to save a copy of the EnCase file onto a PPD external hard drive that Feehan provided. A2, ¶ 6, A9-10; R17-18, R25-27, R30. Avery provided the requested copy that same day. A2, ¶ 6, A10; R19-20, R30.

On March 24, 2014, Feehan began his forensic analysis of the copy of Avery's copy of defendant's hard drive and found two images of suspected child pornography. A2, ¶ 6, A10; R33, R38-39, R48. Upon discovering the images, Avery suspended his analysis "to take the extra caution" of getting a search warrant listing child pornography as a target offense. A10; R35.

Days later, defendant was arrested and charged with unauthorized video recording (720 ILCS 5/26-4(a) (2014)) in case number 14 CF 203. A2, ¶ 6, A10; R33; *see also* C37-38. The PPD suspended its internal investigation given the arrest. A10; R35.[3]

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[2] Under an arbitrator's ruling and the governing collective bargaining agreement, such an investigation could not occur while the criminal case was pending. R36; *see also* A10.

[3] Although the record does not show what happened in the unauthorized video recording case, defendant's Illinois Department of Corrections (IDOC) Inmate page lists a conviction and one-year prison sentence for unauthorized video recording under this case number. IDOC Inmate page, *available at* https://tinyurl.com/y2qhglca (last visited Sept. 24, 2020); *see also Cordrey v. Prisoner Review Bd.*, 2014 IL 117155, ¶ 12 (relying on

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On April 1, 2014, Feehan sought and obtained a search warrant and resumed his review of the copy of the copy of defendant's hard drive. A2, ¶ 7, A10; R34. Because the internal investigation was suspended, Feehan acknowledged that he was pursuing a criminal investigation as of April 1. R35. Feehan explained that he had two reasons for getting the warrant: (1) it would be "safe[r]" to get a warrant authorizing a search for evidence of child pornography rather than the sexual-assault-related offenses listed in the prior warrant, and (2) the investigation had shifted from an internal investigation to a criminal investigation. *Id.*

The Present Case: Case No. 14 CF 282

In late April 2014, the State charged defendant with seven counts of aggravated child pornography (720 ILCS 5/11-20.1B(a)(6) (2012)) and three counts of child pornography (720 ILCS 5/11-20.1(a)(6) (2012)) based on images found on the copy of the copy of his hard drive. A2, ¶ 7; C11-20. The parties later agreed to amend the indictment to correct citations and refer to all charged offenses as "child pornography" given the legislature's corresponding amendment to the relevant statute.[4] R77-81. The State later further amended the indictment to charge defendant with seven additional counts of child pornography based on additional images found. A2, ¶ 9; C159-65.

Defendant filed a motion to suppress evidence, C33-47; *see also* R43-49, asserting that Detective Feehan violated his Fourth Amendment rights by obtaining and

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information from IDOC Inmate page because IDOC records are properly subject to judicial notice).

[4] Effective January 1, 2013, the offense of aggravated child pornography was repealed, *see* P.A. 97-995, and the offense of child pornography was amended to encompass the former offense of aggravated child pornography, retaining its heightened felony classification for depictions of younger children. *Compare* 720 ILCS 5/11-20.1B(a)(6) (2012) (repealed aggravated child pornography provision) *with* 720 ILCS 5/11-20.1(a)(6), (c) & (c-5) (2013) (amended child pornography provisions).

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searching of the copy of the copy of his hard drive without a warrant, A7; C40. Defendant argued that after his March 19, 2014, acquittal, authorities were obligated to return his seized property, citing 725 ILCS 5/108-2, *et seq*. C40-41. Defendant further argued that Feehan lacked authority to request and obtain the copy from Avery without first obtaining a warrant, subpoena, or other court order. C41-42. Defendant maintained that the PPD's internal investigation did not authorize Feehan's actions. C42-44. Finally, defendant argued that the April 1 search warrant and additional images discovered thereafter were tainted by Feehan's warrantless discovery of the initial images so that suppression of all the images was appropriate. A7; C45-47. Defendant's supplemental motion further complained that the original search warrant concerned evidence pertaining only to sexual assault, unlawful restraint, and unauthorized video recording, but not child pornography. C52-69.

The circuit court denied the motion to suppress. A15. The court noted that defendant did not challenge the validity of (1) the initial seizure and search of his computer related to his prior case; or (2) Detective Avery's use of EnCase software to generate and retain a copy of defendant's hard drive. A11. The court dismissed defendant's protests that his computer should have been promptly returned after his acquittal in the sexual assault case because the police searched only the copy of the copy of the hard drive and because, in any event, any violation of statutory procedures governing the return of property would not constitute a Fourth Amendment violation. A11-12. The circuit court also concluded that the police did not violate defendant's Fourth Amendment rights by sharing a copy of defendant's hard drive between police agencies. A12. Finally, the court concluded that Feehan's search of the copy of the copy

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was reasonable because (1) defendant had a diminished expectation of privacy in the hard drive's contents after the police had already properly seized, copied, and searched it; (2) Feehan's search did not exceed the scope of the prior, lawful search warrant, triggering application of the plain view doctrine; and (3) once Feehan discovered evidence of a crime other than the crime listed on the prior search warrant, he suspended his search until he obtained a new search warrant authorizing a search for evidence of child pornography. A12-15.

On July 14, 2016, a jury found defendant guilty of 15 of the 17 child pornography charges and acquitted him of counts 9 and 14. C319-35; R666-69; A2, ¶ 11. Following a hearing, R692-850; Sup R244-511, the circuit court denied defendants' post-trial motions, C461; R861-882, which challenged the denial of his suppression motion, C404-18, C421-34.[5]

The court conducted the sentencing hearing on November 17 and December 1, 2017, imposing sentence on the latter date. R951-1229. The circuit court found that four counts (counts 2, 4, 6, and 8) merged into others and imposed sentence on 11 counts: for count 1, a five-year prison term followed by a three-years-to-life MSR term; for counts 3, 5, 7, 10-13 and 15-17, a consecutive four-year probation term. C488-99; R1208-1227; *see also* A2, ¶ 11. Defendant filed three timely notices of appeal. A41-43.

A divided panel of the appellate court reversed, holding that the circuit court should have granted defendant's motion to suppress. A4-5, ¶¶ 24-35. While acknowledging that defendant's expectation of privacy in his computer hard drive was "significantly diminished" between the time when police seized his computer and when

[5] Judge Brown considered and denied the suppression motion, A7-15; Judge Purham considered and denied the post-trial motions, C461; R860, R882.

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he was acquitted in the prior case, the majority concluded that his expectation of privacy reset upon conclusion of his sexual assault trial. A4, ¶¶ 24-26. The majority noted that the police were entitled to generate the hard drive copy, but concluded that they were neither entitled to retain any portion beyond the scope of the July 2013 warrant after searching it, nor entitled to retain any portion of the copy at all — much less the entire file — once defendant's trial ended. *Id.* For the same reason, the majority also rejected application of the good-faith exception to the exclusionary rule, because "no reasonably trained officer would conclude that he could perform a warrantless search of a mirrored hard drive that he had no right to possess following the termination of the criminal case against defendant." A5, ¶¶ 27-31.

The dissent disagreed with the majority's conclusion that defendant's hard drive and copies had to be returned to defendant immediately upon his acquittal in the prior case under "the unique procedural facts of this case." A5-6, ¶¶ 36-37 (Wright, J., dissenting). First, the dissent observed that, in the prior case, defendant's oral request for the return of his seized property had been denied and the written motion had never been ruled upon, so that case has not yet concluded. A6, ¶ 39 (Wright, J., dissenting). Moreover, even if the acquittal marked the end of the case, the dissent would have held that the circuit court's denial of the oral motion stood as the law of the case and was an unappealable order over which the appellate court lacked jurisdiction (given the absence of a notice of appeal). A6, ¶ 40 (Wright, J., dissenting).

As for the present case, the dissent emphasized that Judge Brown made factual findings upon denying defendant's suppression motion that have not been challenged, namely that the copies of defendant's hard drive remained in the continuous possession

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of law enforcement until Feehan's search, and that Feehan's search was within the scope of the lawful, unchallenged earlier warrant. A6, ¶¶ 42-43 (Wright, J., dissenting). The dissent would have held that defendant's expectation of privacy remained diminished given that Feehan reviewed only information lawfully seized and within the scope of that warrant. A6, ¶ 44 (Wright, J., dissenting). Accordingly, the dissent would have found that no Fourth Amendment violation occurred and would have affirmed the circuit court's denial of the suppression motion. A6, ¶ 45 (Wright, J., dissenting).

ARGUMENT

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures. *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001) (citing U.S. Const., amend. IV). This Court has defined a "search" as "an examination of a person's body, property or other area in which the person has a reasonable expectation of privacy." *People v. Bailey*, 232 Ill. 2d 285, 290-91 (2009) (citing *Katz v. United States*, 389 U.S. 347 (1967); *Black's Law Dictionary* 1351 (7th ed. 1999)). A "'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). As the United States Supreme Court explained,

> Although our Fourth Amendment cases sometimes refer indiscriminately to searches and seizures, there are important differences between the two. . . . The Amendment protects two different interests of the citizen — the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter. As a matter of timing, a seizure is usually preceded by a search, but when a container is involved the converse is often true. Significantly, the two protected interests are not always present to the same extent; for example, the seizure of a locked suitcase does not necessarily compromise the secrecy of its contents, and the search of a stopped vehicle does not necessarily deprive its owner of possession.

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Texas v. Brown, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring) (cited in *Arizona v. Hicks*, 480 U.S. 321, 328 (1987)); *see also Horton v. California*, 496 U.S. 128, 133-34 (1990) (discussing differences between searches and seizures).

I. Detective Feehan's March 24, 2014 Warrantless Examination — of a Copy of Defendant's Computer's Hard Drive Retained After Defendant's Acquittal of the Criminal Charges Arising out of the Original Seizure and Search of the Computer — Did Not Violate Defendant's Fourth Amendment Rights.

Standard of Review: A two-part standard of review applies to a circuit court's ruling on a motion to suppress evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). A reviewing court defers to the circuit court's factual findings, reversing them only if they are against the manifest weight of the evidence, *id.*, meaning "the opposite conclusion is clearly evident," *In re A.W.*, 231 Ill. 2d 92, 102 (2008) (internal quotation marks omitted). A reviewing court reviews the circuit court's ultimate legal ruling regarding whether suppression was warranted *de novo*. *Luedemann*, 222 Ill. 2d at 542-43.

The appellate majority held that defendant's motion to suppress should have been granted because Detective Feehan's March 24, 2014 warrantless examination of a copy of a copy of defendant's hard drive violated his Fourth Amendment rights. A1, ¶ 1, A2-3, ¶¶ 13-26. This Court should reverse that judgment for any of three reasons. First, Feehan's warrantless examination was permissible because it was merely a "second look" that was no broader than the "first look" authorized by an unchallenged, and presumptively valid, search warrant, which reduced his expectation of privacy in such copies. Second, defendant's privacy and possessory interests in any copy of his hard drive were so significantly diminished — not only by the "first look" search and seizure,

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but also by the nature of the item and his failure to include it when seeking return of seized property — that Feehan's examination did not constitute a "search" triggering the Fourth Amendment warrant requirement. Third, even if a "search," Feehan's warrantless examination was reasonable under the general balancing test because it minimally intruded upon defendant's significantly reduced privacy and possessory interests while diligently promoting compelling legitimate law enforcement interests in preserving access to and reviewing the hard drive copy for evidence of serious crimes. Contrary to the appellate majority's conclusion, defendant's March 19, 2014 acquittal of the sexual assault charges did not instantaneously restore a possessory or privacy interest in the hard drive (or any copies). This Court should hold that defendant cannot carry his burden of showing that Feehan's examination violated defendant's Fourth Amendment rights.

A. Feehan's warrantless review of a copy of defendant's hard drive did not violate the Fourth Amendment because it was a "second look" that was no broader than the "first look" authorized by an unchallenged, and presumptively valid, search warrant.

1. Warrantless "second looks" are permissible under the Fourth Amendment, justifying Feehan's examination, because the valid "first look" reduces a defendant's expectation of privacy.

One basis for this Court to affirm the circuit court's denial of defendant's suppression motion is that Feehan's examination was a permissible "second look" at digital images that the unchallenged, and presumptively valid, warrant had already authorized law enforcement to take a "first look" at, under a line of cases originating with *United States v. Edwards*, 415 U.S. 800 (1974).

In *Edwards*, the United States Supreme Court held that when a person is lawfully arrested and taken into custody, the items in his possession when arrested — which were lawfully subject to search at the time and place of his arrest — may also be lawfully

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searched and seized without a warrant even though a "substantial period of time" has elapsed between the arrest and the time that the item is later searched. 415 U.S. at 807. Although the Court declined to categorically hold that the Fourth Amendment never requires a warrant for post-arrest seizures of an arrestee's personal property, it commented that a person's legal arrest reduces that person's expectation of privacy "'for at least a reasonable time and to a reasonable extent'" in light of the competing legitimate law enforcement interests. *Id.* at 808-09 (quoting *United States v. DeLeo*, 422 F.2d 487, 493 (1st Cir. 1970)). Although *Edwards* used an initial lawful warrantless arrest rather than an initial lawful search pursuant to a warrant to justify a later warrantless search, this is nonetheless a seamless analogy for this case because both a warrantless arrest and a search warrant must be supported by probable cause, both amply justifying the first search. *See Edwards*, 415 U.S. at 801-03 (search incident to lawful warrantless arrest); *People v. Manzo*, 2018 IL 122761, ¶¶ 28-29 (search pursuant to lawful warrant).

In fact, courts have expanded the *Edwards* rule to apply beyond its factual context. As the Ninth Circuit described it, "once an item in an individual's possession has been lawfully seized and searched, subsequent searches of that item, so long as it remains in the legitimate uninterrupted possession of the police, may be conducted without a warrant." *United States v. Burnette*, 698 F.2d 1038, 1049 (9th Cir. 1983); *accord United States v. Huntoon*, 796 F. App'x 362, 364 (9th Cir. 2019) (relying on *Burnette* in applying this principle); *United States v. Lackner*, 535 F. App'x 175, 180-81 (3d Cir. 2013) (same, in upholding search two years later); *Williams v. Commonwealth*, 527 S.E.2d 131, 136 (Va. 2000) (relying on *Burnette* in applying this principle); *Hilley v. State*, 484 So. 2d 476, 481 (Ala. Crim. App. 1985) (same); *see also State v. Copridge*,

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918 P.2d 1247, 1251-52 (Kan. 1996) (citing *Edwards*, legality of later warrantless search is determined by whether items "were lawfully in their custody in the first place").

This is true even when the second look was done, like in this case, by an officer from a different agency pursuing a different investigation. For example, in *People v. Richards*, 94 Ill. 2d 92 (1983), this Court held that a Peoria County detective's "second look" at a necklace that had been legally searched and inventoried upon the defendant's arrest by a Tazewell County officer did not violate the Fourth Amendment under *Edwards*. *See id.* at 93-97, 100; *see also, e.g., Huntoon*, 796 F. App'x at 364 (federal agent's warrantless search, for unrelated investigation, of copy of hard drive made when state police executed valid search warrant did not violate Fourth Amendment, given that later search did not exceed scope of original warrant); *Williams*, 527 S.E.2d at 134-36, & 136 n.2 (same regarding municipal police officer's warrantless testing of boots seized by sheriff's deputy when defendant was incarcerated on unrelated charge); *United States v. Thompson*, 837 F.2d 673, 674-76 (5th Cir. 1988) (same regarding federal agent's warrantless examination of label on keys that had been properly inventoried at jail upon defendant's arrest on state drug charges); *cf. State v. Bentler*, 759 N.W. 2d 802, 806-07 (Iowa App. Ct. 2008) (Fourth Amendment not implicated by warrantless transfer of property seized by Illinois law enforcement to Iowa law enforcement).

This "second look" rationale is based on sound Fourth Amendment reasoning: after a person's property has been validly seized and searched by police, the second look "does not invade any substantial privacy interest." *Richards*, 94 Ill. 2d at 96; *see also Bentler*, 759 N.W.2d at 806-07 (once property is seized, second warrantless search valid because person's "expectation of privacy is substantially reduced to the point that no

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constitutionally protectable interest remains"); *State v. Mejia*, 579 So. 2d 766, 767 (Fla. App. 1991) (after valid first look, "any privacy interest that previously existed is dissipated" and, given uninterrupted police possession, the "second look imposes no greater intrusion than the initial search").

And this "second look" rationale applies to justify Feehan's examination in this case. In July 2013, ISP obtained warrants authorizing the seizure and search of defendant's computer. A16-29. This Court should assume, as the circuit court did, A11, that the warrants complied with the Fourth Amendment because defendant never challenged them. As a preliminary step when executing the July 2013 warrants, Detective Avery made a copy of defendant's hard drive, A1, ¶ 4, A8-9; R15-17; defendant never challenged this, either, *see* A13, and the lower courts agreed this step was lawful, A11 & A13 (circuit court); A3, ¶ 20 & A4, ¶ 25 (appellate court). Defendant has never alleged, much less demonstrated, that Feehan accessed an area of his hard drive or a file that fell outside the scope of this warrant. Nor could he do so, because the warrants authorized law enforcement to search digital images from defendant's hard drive. A1, ¶ 4, A8, A29. Finally, the hard drive copy was in the uninterrupted possession of law enforcement; defendant has never contested this uninterrupted possession, A6, ¶ 42 (Wright, J., dissenting), nor is there any record evidence to the contrary. In light of these undisputed and undisputable facts, Feehan's examination should be held to be nothing more than a permissible warrantless "second look" under the *Edwards*/*Richards* line of cases.

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2. Under the plain view doctrine, the "second look" justification applies despite Feehan discovering evidence of a crime not listed in the "first look" warrant.

The "second look" rationale for justifying Feehan's examination of the hard drive copy is not called into question by the fact that Feehan discovered evidence of a crime not listed in the "first look" warrant, through operation of the plain view doctrine. Under the plain view doctrine, law enforcement's warrantless seizure of incriminating evidence is constitutional if the item, whose incriminating nature is "immediately apparent," is in plain view, and the officer is lawfully in the place from which the item can be seen with lawful right to access the item. *Horton*, 496 U.S. at 136-37 (internal quotation marks omitted). In the context of computer searches, the plain view inquiry focuses on whether an officer is exploring hard drive locations and opening files responsive to the warrant, in light of both the types of files accessed and the crimes listed on the warrant as being investigated. *See, e.g., United States v. Johnson*, 789 F.3d 934, 941-43 (9th Cir. 2015) (rejecting claim that later computer search was "rummaging for more offenses" because officer's search methods related directly to uncovering correspondence related to and evidence of crimes listed in warrant). And in this context, courts acknowledge that officers often have to open files to determine whether they are responsive to the warrant. *See, e.g., United States v. Kearns*, No. 1:05-cr-146-WSD-JMF, 2006 WL 2668544, at *5-*9 (N.D. Ga. Feb. 21, 2006) (upholding officer's viewing and seizing child pornography files from computer search pursuant to warrant authorizing search for financial, accounting, and real estate fraud-related evidence because agent was unable to determine whether files were responsive to warrant without opening them, and their incriminating nature was immediately apparent).

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Here, defendant has never alleged, much less demonstrated, that Feehan accessed an area of his hard drive or a file that fell outside the scope of the warrant. Nor could he do so, because the warrant authorized law enforcement to search digital images on defendant's hard drive for evidence of the crimes listed on the warrant, A1, ¶ 4, A8, A29, and Feehan would have no reason to know, before opening them, that the digital images he opened would not contain evidence of the crimes listed on the warrant but would instead implicate defendant in child pornography violations. And because the incriminating nature of the images was immediately apparent, Feehan's discovery of the images falls within the plain view doctrine, as the circuit court held. *See* A14-15.

This conclusion is not affected by the facts that Feehan (1) stopped his March 24, 2014 search upon discovering two images of child pornography, and (2) did not resume his search until he obtained a new search warrant (on April 1, 2014) listing child pornography as a target offense. A2, ¶¶ 6-7, A10; R33-35. An officer need not cease executing a search upon discovering evidence in plain view that is beyond the scope of a warrant. *See, e.g.*, *United States v. Loera*, 923 F.3d 907, 920 (10th Cir. 2019). Feehan's actions, taken out of an abundance of caution, confirm nothing more than his awareness that the images in plain view suggested that defendant had committed crimes other than those listed in the original warrant.

B. Because defendant's privacy and possessory interests in a copy of his hard drive were significantly diminished for several reasons, Feehan's examination did not constitute a "search" triggering the Fourth Amendment warrant requirement.

Even if this Court declines to apply the "second look" rationale, multiple factors confirm that defendant had severely diminished — if not non-existent — privacy and possessory interests in copies of his hard drive. In addition to the reduction caused by the

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earlier seizure and search pursuant to the presumptively-valid warrants, defendant's privacy and possessory interests were further diminished by two additional facts: (1) the item in question was merely a copy rather than his computer's original hard drive; and (2) defendant did not seek the return or destruction of hard drive copies (or the computer itself) when pursuing return of his seized property. Thus, a second basis for this Court to affirm the circuit court's denial of defendant's suppression motion is that defendant's privacy and possessory interests in copies of his hard drive were so significantly reduced, due to these three factors, that Feehan's examination of a copy was not a "search" that triggered the Fourth Amendment warrant requirement.

Generally, searches and seizures are reasonable, and thus consistent with the Fourth Amendment, only if conducted pursuant to a warrant supported by probable cause. *Sorenson*, 196 Ill. 2d at 432 (citing U.S. Const., amend. IV). Exceptions to the warrant requirement include consent, exigent circumstances, the existence of "'diminished expectations of privacy, [and] minimal intrusions.'" *People v. Absher*, 242 Ill. 2d 77, 83 (2011) (quoting *Illinois v. McArthur*, 531 U.S. 326, 330 (2001)). Stated differently, some cases may present circumstances in which a suspect lacks a sufficient expectation of privacy in an item to consider an examination of it to be a "search" within the meaning of the Fourth Amendment. *See Bailey*, 232 Ill. 2d at 290-91 (citing *Katz*, 389 U.S. 347). Thus, Fourth Amendment claims often turn on whether the defendant has demonstrated a legitimate expectation of privacy in the area or item searched, meaning an expectation that society will recognize as reasonable rather than just a subjective expectation. *People v. Lampitok*, 207 Ill. 2d 231, 242 (2003) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)). The question of whether defendant has satisfied his burden of showing that he

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had a legitimate expectation of privacy in an item is evaluated in light of the totality of the circumstances of his particular case. *People v. Rosenberg*, 213 Ill. 2d 69, 78 (2004); *see also Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

To be sure, defendant had a reasonable expectation of privacy in the contents of his computer kept at his home for his personal use. R10-11; A3, ¶ 17; *see, e.g.*, *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (noting home owners' reasonable expectation of privacy in their homes and their belongings, including personal computers). But the July 2013 presumptively valid search warrants authorized law enforcement to seize and search defendant's computer. A16-29. And as the appellate majority acknowledged, A4, ¶ 24, these unchallenged warrants "significantly diminished" defendant's expectation of privacy in the computer's contents. *See, e.g.*, *Burnette*, 698 F.2d at 1049 (owner's expectation of privacy in item is "significantly reduced" once police seize and search it); *United States v. Pace*, 898 F.2d 1218, 1243 (7th Cir. 1990) (following *Burnette*). Indeed, this diminished expectation of privacy is the justification for the "second look" rationale described above.

Moreover, this Court has identified several factors relevant to determining whether defendant has a legitimate expectation of privacy in the place searched or property seized, and application of these factors to this case provides further reason to conclude that defendant's Fourth Amendment interest in copies of his hard drive was severely reduced. The factors include: "(1) property ownership, (2) whether the defendant was legitimately present in the area searched, (3) the defendant's possessory interest in the area searched or the property seized, (4) prior use of the area searched or property seized, (5) ability to control or exclude others' use of the property, and (6) a

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subjective expectation of privacy in the property." *Rosenberg*, 213 Ill. 2d at 78 (citing *People v. Johnson*, 114 Ill. 2d 170, 191-92 (1986)).

These factors do not support a finding that defendant had a legitimate expectation of privacy in the copies of his hard drive. Defendant neither owned nor had a possessory interest in Avery's copy, which was stored on Avery's work computer. A1-2, ¶ 4, A9; R17, R23. For similar reasons, defendant lacked the ability to control others' use of the copy.[6] In addition, that defendant lacked a subjective expectation of privacy in Avery's copy is confirmed by the fact that defendant's oral and written requests for return of his seized property made no mention of any copies of his hard drive (or even the hard drive or computer itself), *see* A36, A38-39;[7] *see also, e.g., United States v. Burgard*, 675 F.3d 1029, 1033 (7th Cir. 2012) ("[I]t can be revealing to see whether the person from whom the item was taken ever asserted a possessory claim to it — perhaps by checking on the status of the seizure or looking for assurances that the item would be returned. If so, this would be some evidence (helpful, though not essential) that the seizure in fact affected [his] possessory interests."); *People v. McGregory*, 2019 IL App (1st) 173101, ¶¶ 17-20 (noting that assertion of possessory interest in property, for example by requesting its return, can provide evidence that seizure in fact affected that interest). This analysis applies equally to Feehan's copy, saved on a PPD external hard drive, which Avery made for him on March 21, 2014. A2, ¶ 6, A9-10; R17-18, R25-27, R30.

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[6] In fact, Avery testified that, generally, an EnCase file is never returned to a defendant. A11 n.1; R25. Instead, after a case is complete, the EnCase file is archived so that it can be retrieved if needed for an appeal or a reexamination. A9, A11 n.1; R25. Consistent with this "normal common practice," Avery did not receive a court order directing him to return defendant's EnCase file. R27-28.

[7] The appellate majority incorrectly stated that defendant's oral request for return of his property included his computer, A2, ¶ 5. A36 (asking for return of "some guns, some — more like collector guns").

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Some cases from other jurisdictions reflect that a defendant lacks a reasonable expectation of privacy in a government-created copy of lawfully seized evidence. *See, e.g.*, *United States v. Lutcza*, 76 M.J. 698, 702 (A.F. Ct. Crim. App. 2017) ("a Government-created *copy* of evidence that was lawfully seized, whether by consent or by a search warrant, does not carry a reasonable expectation of privacy") (collecting cases) (emphasis in original); *see also Mason v. Pulliam*, 557 F.2d 426, 427-29 (5th Cir. 1977) (given defendant's consent to allow federal agent to remove and examine business records, district court correctly refused request for return of copies made prior to revocation of consent); *United States v. Ward*, 576 F.2d 243, 244-45 (9th Cir. 1978) (similar); *United States v. Megahed*, No. 8:07-cr-342-T23-MAP, 2009 WL 722481, at *3 (M.D. Fla. Mar. 18, 2009); (defendant did not retain reasonable expectation of privacy in copy of hard drive obtained with consent prior to revocation of consent).

The Federal Rules of Criminal Procedure provide further confirmation that examination by law enforcement of a *copy* of lawfully seized electronically stored information, as occurred here, implicated a reduced expectation of privacy by defendant, at least with regard to the portion of the copy responsive to the original warrant. Rule 41 provides, in relevant part, that "[a] warrant [to search for and seize a person or property] may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information," and that "*[u]nless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant*." Fed. R. Crim. P. 41(e)(2)(B) (emphasis added). As already explained, *supra* Part I.A., Feehan's examination of the copy of the copy was within the scope of the warrant. Another subsection of the rule provides that an "officer may retain a copy of the

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electronically stored information that was seized or copied." Fed. R. Crim. P. 41(f)(1)(B); *see also* Fed. R. Crim. P. 41, Advisory Committee Notes to 1989 amendments (explaining that, under Rule 41(e), "[i]n many instances documents and records that are relevant to ongoing or contemplated investigations and prosecutions may be returned to their owner as long as the government preserves a copy for future use").

And while Illinois's analogous provision does not address copies of electronically stored information, specifically, *see* 725 ILCS 5/108-6, case law applying that provision reflects agreement with the federal rules. For example, in *People v. Shinohara*, 375 Ill. App. 3d 85 (1st Dist. 2007), the defendant sought to suppress evidence obtained from his hard drives because police purportedly did not execute the search warrant within the 96-hour time frame mandated by statute. *Id.* at 102-03 (discussing 725 ILCS 5/108-6). Rejecting the defendant's argument that the warrant was not executed within the requisite time frame, the appellate the court explained that the officer timely "executed the warrant" on November 8, 2001, when he made an EnCase copy of defendant's hard drives, and the officer's subsequent January 2002 examination of the copy was a "forensic analysis" rather than a Fourth Amendment search. *Id.* at 104.

Thus, these many authorities confirm that defendant had severely reduced — if not non-existent — privacy and possessory interests in any copy of his hard drive — at least the portions responsive to the presumptively-valid warrants that previously authorized its seizure and search — because of that prior seizure and search, because the item is merely a copy rather than his original computer, and because he demonstrated no interest in regaining possession of his computer or any hard drive copies when pursuing return of property seized pursuant to those warrants. Under these circumstances,

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defendant cannot demonstrate a legitimate privacy or possessory interest in the responsive portions of his hard drive copies that society would recognize as reasonable. *See Lampitok*, 207 Ill. 2d at 242 (citing *Rakas*, 439 U.S. at 143 & n.12). And as a result, this Court should hold that Feehan's targeted review of a copy of defendant's hard drive did not constitute a "search" that triggered the Fourth Amendment warrant requirement. *See Bailey*, 232 Ill. 2d at 290-91 (citing *Katz*, 389 U.S. 347).

C. In any event, the balance of defendant's individual interests affected and the law enforcement interests promoted demonstrates that Feehan's warrantless examination did not violate defendant's Fourth Amendment rights.

1. Feehan's examination was reasonable under the circumstances.

Even if a "search" for Fourth Amendment purposes, there is a third basis for this Court to affirm the circuit court's denial of defendant's suppression motion. Under the applicable balancing test, Feehan's warrantless examination was reasonable given its minimal intrusion on defendant's significantly diminished privacy and possessory interests in copies of his hard drive, in light of law enforcement's compelling, and diligently-pursued, interests in preserving access to and reviewing a copy for evidence that defendant committed serious crimes.

The question of whether a search is reasonable generally "'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Samson v. California*, 547 U.S. 843, 848 (2006) (quoting *United States v. Knights*, 534 U.S. 112, 118-19 (2001)) (internal quotation marks omitted). Similarly, the reasonableness of a seizure is analyzed by considering the invasiveness of the seizure against the need for it. *United States v. Place*, 462 U.S. 696,

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712 (1983). Thus, Fourth Amendment inquiries balance the individual's Fourth Amendment privacy and possessory interests against the relevant government interests. *See County of Los Angeles, Cal. v. Mendez*, 137 S. Ct. 1539, 1546 (2017); *People v. Jones*, 215 Ill. 2d 261, 269 (2005).

As detailed in *supra* Parts I.A. & B., Feehan's examination caused merely a minimal intrusion on defendant's significantly reduced privacy and possessory interests in any copies of his hard drive because the search was consistent with the unchallenged and presumptively valid search warrant and the item reviewed was a mere copy of a copy of defendant's hard drive, the return of which defendant did not seek when pursuing return of other seized items.

On the other side of the requisite balance of interests, there can be no dispute that law enforcement had a significant interest in maintaining access to and searching defendant's hard drive copy as of March 24, 2014. First, the PPD had a significant interest in investigating defendant: based on prior searches of defendant's computer data, phone data, and email account, the PPD suspected defendant of committing criminal conduct in addition to the conduct that resulted in the charges for which he was acquitted. R36-38, 40-41. Feehan explained that he "knew that there were other victims that could be identified" that could lead to future criminal charges. R32.

Thus, the PPD had a significant interest in determining whether its employee, a law enforcement officer, was participating in sexually based criminal conduct. *See United States v. Bradley*, 488 F. App'x 99, 104 (6th Cir. 2012) (government had "significant" interest in deterring the production and dissemination of child pornography) (citing *United States v. Moore*, 916 F.2d 1131, 1139 (6th Cir. 1990) ("The Government

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maintains an extremely important interest in preventing the spread of child pornography and child sexual abuse.")). Indeed, this Court has repeatedly acknowledged the State's compelling, legitimate interest in enforcing criminal laws and protecting its citizens from crime, including sex offenses. *See, e.g.*, *People v. Minnis*, 2016 IL 119563, ¶ 45 (acknowledging "substantial government interest [in] preventing sex offenses against children and protecting the public from the danger of recidivist sex offenders"); *People v. Hollins*, 2012 IL 112754, ¶¶ 23-24 (noting "legitimate government purpose" in child pornography statute of "protecting children from sexual abuse and exploitation"); *People v. Garvin*, 219 Ill. 2d 104, 122 (2006) (in evaluating State interest in DNA sampling system, describing that "[p]romoting an effective and accurate criminal justice system and increasing public safety through either deterrence or removal of criminal offenders from the streets is a fundamental concern of the State and law enforcement").

Further, record evidence established that defendant attempted to destroy or delete the incriminating evidence on his computer before allowing officers to enter his home to execute the July 17, 2013 search warrant. The officers arrived around 8:00 p.m., but defendant did not allow them to enter until approximately 10:30 p.m. R380-84.[8] Subsequent forensic analysis of defendant's computer recovered data that had been deleted between approximately 9:20 and 10:26 p.m. that day. R611-12. In other words, if defendant's hard drive and all copies were returned, there is good reason to believe that he might attempt (again) to destroy incriminating evidence. Thus, law enforcement had a pressing need to preserve access to defendant's computer data by retaining a copy. *See,*

[8] Although evidence described in this paragraph came out during defendant's trial rather than during the suppression hearing, this Court may consider it. *People v. Hopkins*, 235 Ill. 2d 453, 473 (2009) (in reviewing denial of motion to suppress, reviewing court is free to look not only at testimony from suppression hearing but also at trial testimony) (citing *People v. Stewart*, 104 Ill. 2d 463, 480 (1984)).

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e.g., *Bradley*, 488 F. App'x at 104-05 (noting government interest in preventing destruction of digital evidence because it is "inherently ephemeral and easily destructible" or "fragil[e]").

Moreover, the PPD conducted this investigation in a reasonable manner. Both a collective bargaining agreement and an arbitrator's ruling barred internal investigations while criminal proceedings were pending. R36; *see also* A10. Respecting these parameters, the Chief of the PPD promptly initiated an internal investigation on March 20, 2014, the day after defendant's sexual assault trial ended in his acquittal. A2, ¶ 6, A9; R30. Feehan promptly conducted this investigation by (1) seeking and obtaining a hard drive copy from Avery the next day, on March 21, 2014 (a Friday), A2, ¶ 6, A9-10; R17-20, R30-31; and (2) beginning his forensic analysis of that copy on the following business day, Monday, March 24, 2014, A2, ¶ 6, A10; R33, R38-39.[9] In light of these facts, the PPD acted with reasonable diligence in pursuing its investigation. *Cf. McGregory*, 2019 IL App (1st) 173101, ¶ 22 (eight-month delay in obtaining search warrant after seizure unreasonable); *Thomas v. United States*, 775 F. App'x 477, 490 (11th Cir. 2019) (noting even when defendant's possessory interest in computer is diminished, government, which seized it with probable cause but without a warrant, must act diligently in obtaining search warrant); *United States v. Mitchell*, 565 F.3d 1347, 1351 (11th Cir. 2009) (finding no justification for delay in obtaining search warrant by agent attending two-week training program who did not arrange for another agent to do it in his absence).

[9] This Court may take judicial notice that March 21, 2014 fell on a Friday and that March 24, 2014 was a Monday. *People v. Norris*, 2018 IL App (3d) 170436, ¶ 35 & n.3; *see generally People v. Mata*, 217 Ill. 2d 535, 539-40 (2005) (judicial notice appropriate of readily-verifiable information from "sources of indisputable accuracy").

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2. In weighing defendant's interests in his hard drive copy, the appellate majority erroneously concluded that defendant's expectation of privacy instantly reset upon his March 19, 2014 acquittal.

No Fourth Amendment concern is raised by the fact that Feehan conducted his examination five days after defendant's acquittal for the sexual assault charges, for defendant's acquittal did not restore a legitimate privacy or possessory interest in any copies of his hard drive. Police were not required, by the constitution or by Illinois law, to immediately return all seized property (much less copies) to defendant. Indeed, defendant did not file a written motion seeking return of his property — explicitly naming only "collector guns" — until the day of Feehan's challenged examination.

Although defendant cited only Illinois statutes when asserting a right to the return of seized property after his acquittal, C40-41, the appellate majority held that a Fourth Amendment violation occurred because police, although entitled to retain copies of defendant's hard drive during his sexual assault trial, were required to "quickly" or "immediately" return them to him once the trial ended, rendering Feehan's post-acquittal examination improper, A3-4, ¶¶ 21, 22, 24-26. In the majority's view, defendant's diminished expectation of privacy in his hard drive's contents ended upon his acquittal and reset to a reasonable expectation of privacy. A4, ¶¶ 24-26. This Court should reject the majority's conclusion that defendant's privacy and possessory interests in copies of his hard drive had been fully restored by the date of Feehan's examination, five days after defendant's acquittal. *See* A6, ¶¶ 42-44 (Wright, J., dissenting); A11-15.

At the threshold, contrary to the appellate majority's holding, there is no Fourth Amendment right to immediate return of seized property upon the conclusion of related criminal proceedings. On the contrary, federal courts have held that where the initial

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seizure was reasonable, the failure to later return property does not violate the Fourth Amendment, even if it violates state law. *See, e.g.*, *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004) (retention of lawfully-seized photographs beyond state law parameters was too "novel" a theory for Fourth Amendment to apply); *Lee v. City of Chicago*, 330 F.3d 456, 461-65 (7th Cir. 2003) (where property was lawfully seized, no Fourth Amendment challenge available to conditions imposed on property's return); *Fox v. Van Oosterum*, 176 F.3d 342, 349-52 (6th Cir. 1999) (refusal to return property, even if unreasonable, does not state Fourth Amendment claim where original seizure was lawful).

This does not mean that a person deprived of his property is without recourse to seek its return. *See, e.g.*, *Lee*, 330 F.3d at 466-67 (rejecting Fourth Amendment unreasonable seizure claim, but noting that other legal remedies may exist for seeking return of lawfully seized property); *Shaul*, 363 F.3d at 187 ("[t]o the extent the Constitution affords [defendant] any right with respect to a government agency's retention of lawfully seized property, it would appear to be procedural due process"). It does mean, however, that the Fourth Amendment does not provide that recourse.

In fact, the appellate majority's conclusion that hard drive copies should have been returned to defendant "immediately" up his acquittal represents a misunderstanding not only of the Fourth Amendment but also of applicable Illinois statutes. In Illinois, section 108-2 of the Code of Criminal Procedure provides that items seized during a warrantless search incident to arrest shall be returned "upon release" if the person is released without being charged. 725 ILCS 5/108-2. Section 108-10 of the Code provides that "all instruments, articles or things seized" during execution of a search warrant shall

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be returned "without unnecessary delay" to the circuit court, 725 ILCS 5/108-10, who shall then enter an order "providing for their custody pending further proceedings," 725 ILCS 5/108-11. In practice, this occurs when a defendant files a motion for return of property, which is then heard and ruled upon by the circuit court. *See, e.g.*, *City of Chicago v. Pudlo*, 123 Ill. App. 3d 337, 344-45 (1st Dist. 1983).

Because defendant's property was lawfully seized pursuant to a warrant (and defendant was later charged), this case falls under sections 108-10 and 108-11, not section 108-2. Yet in finding that criminal defendants have a right to immediate return of seized property, the majority relied on two cases addressing section 108-2. A4, ¶ 22 (citing *People v. Jaudon*, 307 Ill. App. 3d 427, 447 (1st Dist. 1999), and *People v. Jackson*, 26 Ill. App. 3d 845, 848-49 (1st Dist. 1975)). *Jaudon* is a particularly thin reed for the appellate court to rely on given that it merely inaptly summarized the three provisions by mostly paraphrasing section 108-2, in a single sentence, before resolving the case on unrelated grounds. 307 Ill. App. 3d at 447-48. And *Jackson* confirms that under section 108-2, return of property is appropriately preceded by, as occurred here, the circuit court receiving a motion for return of property and conducting a hearing on the motion as needed to evaluate whether return is appropriate. 26 Ill. App. 3d at 848-49.

The federal cases cited by the appellate majority are even farther afield. *See* A4, ¶¶ 22, 25 (relying on *United States v. Rodriguez-Aguirre*, 264 F.3d 1195 (10th Cir. 2001); *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir. 1990); *United States v. Farrell*, 606 F.2d 1341 (D.C. Cir. 1979); *United States v. LaFatch*, 565 F.2d 81 (6th Cir. 1977); and *United States v. Wilson*, 540 F.2d 1100, 1103 (D.C. Cir. 1976)). *Rodriguez-Aguirre* addressed when the six-year limitations period for a defendant to file a motion seeking

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return of property begins to run. 264 F.3d at 1213 & n.15. *Cooper* reversed the grant of summary judgment on Cooper's claim that the government had sold his seized firearms without permission, noting that he should have had a chance to participate in forfeiture proceedings. 904 F.2d at 304-06. *Farrell* affirmed the district court's denial, on public policy grounds, of Farrell's motion seeking return of $5,000 paid to an undercover police officer in exchange for heroin. 606 F.2d at 1343, 1350. *LaFatch* reversed the district court's order granting LaFatch's motion for return of $50,000, noting that his acquittal in the criminal proceedings did not necessarily mean that he was the rightful owner of the money. 565 F.2d at 82, 84-85. Finally, *Wilson* ordered return of seized cash given no factual dispute that it was "not alleged to be stolen, contraband, or otherwise forfeitable and [was] . . . no longer needed[ ] as evidence." 540 F.2d at 1101, 1103. Indeed, Federal Rule of Criminal Procedure 41(g), like Illinois law, permits a person aggrieved by deprivation of property to move for its return and directs the court to hold a hearing if needed to resolve factual issues, but recognizes that such a motion need not be granted in every case and can be subject to "reasonable conditions to protect access to the property and its use in later proceedings." Fed. R. Crim. P. 41(g).

Again, a violation of any state or federal law providing for the return of seized property is not, in and of itself, a Fourth Amendment violation. But in any event, contrary to the appellate majority's view, A4, ¶¶ 22, 24-25, these Illinois and federal authorities do *not* confirm that criminal defendants have any right — constitutional or otherwise — to immediate return of seized property. Instead, the authorities reflect that the matter should be litigated, and requests for return of seized property can be rejected in some cases. In fact, any challenge to the propriety of the circuit court's rulings on

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defendant's oral and written requests for return of property under Illinois law is beyond the scope of the present case because that issue instead arises out of the (separate) sexual assault case in which no notice of appeal was filed, as the dissenting justice noted. *See* A6, ¶ 40 (Wright, J., dissenting).

Regardless, the circuit court's handling of defendant's request for the return of his seized property did not run afoul of this Illinois law. On March 19, 2014, defense counsel stated that items, including "collector guns" (but not defendant's computer or hard drive), were seized when the search warrant was executed, and he requested their return; the circuit court asked that the request be made in a written motion because it involved weapons and stated that the motion would be addressed "shortly." A36. Defendant filed that written motion on March 24, 2014, A38-39, and, on April 24, 2014, after a hearing, the circuit court ordered that defendant's guns and ammunition be returned "instanter," A40. Each step in this process was appropriate: it was appropriate for the circuit court to direct defendant to put his request in writing because it involved firearms, thus raising issues regarding whether defendant was "properly credentialed to receive and possess" them, A38-39; and it was likewise appropriate for the circuit court to wait until the next scheduled hearing date (on April 24, 2014) to address defendant's request, A30, A38-40.

Moreover, again, defendant did not specify in either the oral or written request that he wanted his computer returned, much less any copies of his hard drive returned or destroyed. A36, A38-39. Indeed, it is far from clear that defendant is entitled to have any copies of his hard drive returned even now, more than six years later. Such copies include several images of child pornography, which are contraband. *People v. Hill*, 2020

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IL 124595, ¶ 30 (noting "contraband" encompasses items that are unlawful to possess); 720 ILCS 5/11-20.1(a)(6) (defining offense of child pornography as including knowing possession of any visual depiction of child under age of 18 engaged in certain sexual acts). This Court has characterized as "absurd" the conclusion that a person could have a legitimate privacy interest in an item that it is illegal to possess. *Hill*, 2020 IL 124595, ¶ 29. For another, as detailed *supra* in Part I.C.1., law enforcement had a legitimate interest in analyzing the contents of defendant's hard drive through the PPD investigation by Feehan, which led to the child pornography charges underlying this appeal. *See, e.g.*, *In re Search of Office of Tylman*, 245 F.3d 978, 980 (7th Cir. 2001) (citing Fed. R. Crim. P. 41, Advisory Committee Notes to 1989 amendments) (noting that if government needs property "in an investigation or prosecution," its retention of property is generally reasonable unless these interests can by satisfied even if property is returned).

In short, contrary to the appellate majority's conclusion, a criminal defendant's statutory right to prompt return of seized property is *not* synonymous with a defendant being entitled to have his property back immediately upon his acquittal, much less with such a right to immediate return under the Fourth Amendment. Thus, defendant's acquittal did not cause him to regain a legitimate privacy or possessory interest in his hard drive, much less any copy of it, by the time of Feehan's examination.

II. Alternatively, the Good-Faith Exception to the Exclusionary Rule Should Apply.

Standard of Review: Whether the good-faith exception to the exclusionary rule applies is a question of law subject to de novo review. *Manzo*, 2018 IL 122761, ¶ 67.

The Fourth Amendment "says nothing about suppressing evidence obtained" from unreasonable searches or seizures. *Davis v. United States*, 564 U.S. 229, 236 (2011)

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(internal quotation marks omitted). Instead, the judge-created exclusionary rule is a "prudential doctrine" designed to deter police misconduct. *Id.* at 236-37 (internal quotation marks omitted). As this Court has noted, exclusion imposes a heavy toll on the judicial system and society because it usually requires courts to ignore reliable, trustworthy evidence relevant to guilt or innocence and can result in setting the criminal loose in the community without punishment. *People v. LeFlore*, 2015 IL 116799, ¶ 23. Thus, exclusion is appropriate only if the deterrent benefit outweighs the substantial social costs; the exclusionary rule is restricted to "those unusual cases where it can achieve its sole objective: to deter future fourth amendment violations." *Id.*, ¶¶ 22-23 (internal quotation marks omitted); *see also United States v. Leon*, 468 U.S. 897, 906-09 (1984).

Accordingly, exclusion is a "last resort, not our first impulse." *LeFlore*, 2015 IL 116799, ¶ 22 (quoting *Herring v. United States*, 555 U.S. 135, 140 (2009)) (additional internal quotation marks omitted). Deterrence cannot be effectively promoted in a case in which the "police acted with an objectively reasonable good-faith belief that their conduct was lawful or when their conduct involved only simple, isolated negligence." *Id.*, ¶ 24 (internal quotation marks and brackets omitted). The good-faith analysis is an objective one, in which the Court must evaluate whether "a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Id.*, ¶ 25 (citing *Leon*, 468 U.S. at 922 n.23). In other words, the exclusionary rule does not apply if evidence was "obtained during a search conducted in reasonable reliance on binding precedent." *Davis*, 564 U.S. at 241; *see People v. Burns*, 2016 IL 118973, ¶ 49; *see also* 725 ILCS 5/114-12(b)(1) & (2) (codifying good faith exception).

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If this Court were to find that Feehan's examination of the copy of the copy of defendant's hard drive violated the Fourth Amendment, it should nonetheless decline to suppress the resulting evidence because a reasonably well-trained officer would have believed that his search was valid under the circumstances. The appellate majority's contrary conclusion should be rejected.

Feehan testified that he believed that his March 24, 2014 examination was authorized under the original, presumptively lawful search warrant, which allowed officers to search the contents of defendant's computer for evidence of criminal sexual assault. *See* R35, R39. As permitted by the warrant, Feehan searched defendant's computer data, including digital images, and stopped his search upon discovering, in plain view, two images of child pornography. As an "extra caution," he then obtained the April 1, 2014 warrant that listed child pornography as a target offense. R35, R39.

Feehan's subjective belief was consistent with that of a reasonably well-trained officer. *See LeFlore*, 2015 IL 116799, ¶ 25 (citing *Leon*, 468 U.S. at 922 n.23). As detailed above, *supra* Part I.A., courts, including this Court, have consistently permitted officers from different agencies to take a warrantless "second look" at seized evidence, so long as it was consistent with a valid "first look." *See, e.g.*, *Richards*, 94 Ill. 2d at 93-97, 100 (Peoria County detective's "second look" at necklace that had been legally searched and inventoried by Tazewell County jail officer upon defendant's arrest did not violate Fourth Amendment). Thus, in light of this binding authority, a reasonably well-trained officer could believe that his actions were lawful under the circumstances.

Declining to apply the good-faith exception, the appellate majority focused instead on the fact that defendant was acquitted of the sexual assault charges five days

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prior to Feehan's examination. A5, ¶ 31. The majority held that no reasonably well-trained officer could conclude that he could conduct a warrantless search of a copy of defendant's hard drive that "he had no right to possess following the termination of the criminal case," citing *Jaudon*, *Jackson*, and *Rodriguez-Aguirre*. *Id.* But as explained above, *supra* Part I.C.2., the appellate majority incorrectly described these cases as establishing a criminal defendant's Fourth Amendment right to the immediate return of seized property following an acquittal. These cases and other authorities establish only that a defendant may invoke state or federal rules or provisions to seek return of seized property at the end of the criminal proceedings, and, further, that such a request may take time to litigate and may be denied (such as, for example, when the seized items are contraband, subject to forfeiture, or — as in this case — subject to an ongoing law enforcement investigation). In other words, the law was *not* clearly established that defendant's acquittal barred law enforcement's continued access to the hard drive copy five days after his acquittal. As a result, even if a Fourth Amendment violation occurred, the evidence incriminating defendant should not have been suppressed.

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CONCLUSION

For these reasons, the People of the State of Illinois respectfully ask this Court to reverse the judgment of the Illinois Appellate Court, Third District.

October 13, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 36 pages.

/s/ Leah M. Bendik
LEAH M. BENDIK
Assistant Attorney General

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KeyCite Yellow Flag - Negative Treatment
Appeal Allowed by People v. McCavitt, Ill., May 27, 2020

2019 IL App (3d) 170830
Appellate Court of Illinois, Third District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
John T. MCCAVITT, Defendant-Appellant.

Appeal No. 3-17-0830
|
Opinion filed November 26, 2019

Synopsis

Background: Defendant was convicted in the Circuit Court, Peoria County, Albert L. Purham, J., of 15 counts of child pornography. Defendant appealed.

Holdings: The Appellate Court, Lytton, J., held that:

police officer's warrantless search of file copy of defendant's computer hard drive following acquittal of previous charges violated defendant's right to privacy, and

officer did not act in reasonable good faith in concluding that he could perform warrantless search of mirrored hard drive that he had no right to possess following acquittal, and thus, good-faith exception to exclusionary rule did not apply to child pornography images found in search of defendant's hard drive.

Reversed and remanded.

Wright, J., dissented with opinion.

***641** Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois. Circuit No. 14-CF-282, The Honorable Albert L. Purham, Jr., Judge, Presiding.

Attorneys and Law Firms

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OPINION

JUSTICE LYTTON delivered the judgment of the court, with opinion.

***642** ****106** ¶ 1 Defendant John T. McCavitt was charged with 17 counts of child pornography based on images found on his personal computer. He filed a motion to suppress, arguing that the search of his computer was unlawful. Following a hearing, the trial court denied defendant's motion, and the case proceeded to trial. The jury found him guilty of 15 counts of child pornography. The trial court sentenced defendant on 11 counts to five years in prison, probation, and mandatory supervised release. On appeal, defendant argues that (1) the trial court erred in denying his motion to suppress, (2) he was denied effective assistance of counsel, (3) the trial court erred in admitting certain evidence at trial, and (4) the prosecutor's statements during closing argument warrant reversal. We reverse, finding that the trial court erred in denying defendant's motion to suppress.

¶ 2 I. BACKGROUND

¶ 3 On July 17, 2013, the Illinois State Police obtained a search warrant to search the home of defendant, a police officer employed by the Peoria Police Department. The warrant authorized the seizure of "any electronic media cable [*sic*] of video/audio recording" and "any electronic storage media capable of stor[ing] pictures, audio or video." During the execution of the warrant, officers seized defendant's computer.

¶ 4 On July 24, 2013, the Illinois State Police sought and obtained a subsequent search warrant authorizing law enforcement personnel to search defendant's computer for "any and all digital images" and "any evidence of" aggravated criminal sexual assault, unlawful restraint, and unauthorized video recording/live video transmission. Detective Jeff Avery of the Peoria County Sheriff's Department, a forensic examiner, examined defendant's computer. He removed the hard drive from the computer and made an exact copy, or mirror image, of it using EnCase software. A copy of the hard

drive, called "EnCase evidence file," was saved on Avery's computer.

¶ 5 Based on images police found on defendant's computer, the State charged defendant with aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(4) (West 2012)) and criminal sexual assault (*id.* § 11-1.20(a)(1)) on August 6, 2013. That case proceeded to trial. On March 19, 2014, defendant was found not guilty of all charges. On that same day, defendant orally requested the return of his personal property, including his computer. The court denied the request, stating that defendant's property would be returned to him when everything "cooled down."

¶ 6 On March 20, 2014, the Peoria Police Department initiated a formal investigation of defendant. The next day, Peoria police detective James Feehan, a computer forensics examiner, requested a copy of the EnCase file from Avery. Avery delivered the EnCase file to Feehan the same day. On March 24, 2014, Feehan began a digital forensic analysis on the EnCase file and saw two images of what he believed to ***643 **107** be child pornography. On the same day, defendant filed a written motion seeking to have his property returned to him. That motion was never ruled on. On March 28, 2014, defendant was arrested and charged with unauthorized video recording (720 ILCS 5/26-4(a) (West 2014)).

¶ 7 On April 1, 2014, Feehan sought and obtained a search warrant to search defendant's EnCase file for images of child pornography. After further examination, Feehan discovered additional images of child pornography. On April 28, 2014, the State filed a 10-count indictment against defendant, charging him with seven counts of aggravated child pornography (720 ILCS 5/11-20.1B (West 2010)), a Class 2 felony, and three counts of child pornography (720 ILCS 5/11-20.1 (West 2012)), a Class 3 felony, based on five images found in defendant's EnCase file.

¶ 8 Defendant filed a motion to suppress, arguing that Feehan had no authority to obtain and examine the contents of the EnCase file in March 2014. A hearing was held on the motion. At the hearing, Feehan testified that he was aware that defendant was acquitted of the sexual assault charges on March 19, 2014, and that no other charges were pending. On March 21, 2014, Feehan requested defendant's EnCase file from Avery based on the Peoria Police Department's internal investigation of defendant. Feehan knew that the EnCase file had been seized in connection with the sexual assault charges filed against defendant. Feehan testified that he "knew that there was [*sic*] other victims that could be identified during the formal [investigation] that would turn criminal." Feehan did not believe he needed a search warrant or other court order to obtain the EnCase file "[b]ecause of case law that [he] was aware of" since defendant's computer was previously seized "[p]ursuant to a lawful search warrant." The trial court entered an order denying defendant's motion to suppress.

¶ 9 On July 10, 2015, the State amended its indictment and charged defendant with seven additional counts of child pornography (720 ILCS 5/11-20.1(a)(6) (West 2014)), a Class 2 felony, based on seven additional images found in defendant's EnCase file. The case proceeded to a jury trial in July 2016.

¶ 10 At trial, Feehan testified that he has been a police officer for 21 years and been employed by the Peoria Police Department for 18 years. He has been a digital forensic examiner for 17 years and completed approximately 500 hours of digital forensics training. The State introduced into evidence 12 images Feehan found in defendant's EnCase file. Those images formed the basis of the child pornography charges against defendant.

¶ 11 The jury found defendant guilty of 15 of the 17 counts of child pornography. Defendant filed posttrial motions, which the trial court denied. The trial court accepted the jury's verdict as to 10 counts of Class 2 felony child pornography and one count of Class 3 felony child pornography. The trial court sentenced defendant to five years in prison on one count, followed by mandatory supervised release of three years to life. The court sentenced defendant to probation of 48 months on the remaining 10 counts, to be served consecutively to defendant's prison sentence.

¶ 12 II. ANALYSIS

¶ 13 Defendant first argues that the trial court erred in denying his motion to suppress. He contends that Feehan's search of his EnCase file eight months after the initial warrant was issued and following his acquittal of sexual assault charges violated his fourth amendment rights. The State responds that defendant had no expectation of privacy in his EnCase file, which ***644 **108** had been confiscated pursuant to a valid warrant. The State alternatively contends that even if a fourth amendment violation occurred, the evidence should not be suppressed because Feehan acted in good faith.

¶ 14 A. Fourth Amendment

¶ 15 The fourth amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Similarly, article I, section 6, of the Illinois Constitution states that "people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches [and] seizures." Ill. Const. 1970, art. I, § 6. Illinois courts have interpreted the search and seizure provisions of the Illinois Constitution in "limited lockstep" with the fourth amendment. *People v. Caballes*, 221 Ill. 2d 282, 313-14, 303 Ill.Dec. 128, 851 N.E.2d 26 (2006).

¶ 16 Fourth amendment protections apply where (1) the person subject to a search or seizure had a subjective expectation of privacy in the thing seized or place searched and (2) that expectation of privacy is one that society accepts as objectively reasonable. *California v. Greenwood*, 486 U.S. 35, 39, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). A threshold question in fourth amendment analysis is whether a defendant has a reasonable expectation of privacy in the things and places searched. See *People v. Collins*, 106 Ill. 2d 237, 265, 87 Ill.Dec. 910, 478 N.E.2d 267 (1985).

¶ 17 Individuals have a reasonable expectation of privacy in their personal computers and computer files. *United States v. Heckenkamp*, 482 F.3d 1142, 1147 (9th Cir. 2007); *United States v. Broy*, 209 F. Supp. 3d 1045, 1053-54 (C.D. Ill. 2016); *People v. Blair*, 321 Ill. App. 3d 373, 381, 254 Ill.Dec. 872, 748 N.E.2d 318 (2001) (Homer, J., specially concurring). However, an owner's expectation of privacy is "significantly reduced" once an item has been lawfully seized and searched by police. *United States v. Burnette*, 698 F.2d 1038, 1049 (9th Cir. 1983). "The contents of an item previously searched are simply no longer private." *Id.* Once an item has been lawfully seized and searched, subsequent searches may be conducted without a warrant as long as the item remains in the continuous possession of the police. *Id.*; *United States v. Pace*, 898 F.2d 1218, 1243 (7th Cir. 1990).

¶ 18 The fourth amendment does not require that search warrants contain expiration dates. *United States v. Gerber*, 994 F.2d 1556, 1559 (11th Cir. 1993). Additionally, "it contains no requirements about *when* the search or seizure is to occur or the *duration*." (Emphases in original.) *Id.* The relevant test is the reasonableness of the search under all of the circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443, 509, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (Black, J., concurring and dissenting, joined by Burger and Blackmun, JJ.). Reasonableness must be decided on a case-by-case basis. *Id.* at 509-10, 91 S.Ct. 2022.

¶ 19 "[U]nder current law there is no established upper limit as to when the government must review seized electronic data to determine whether the evidence seized falls within the scope of a warrant." *United States v. Metter*, 860 F. Supp. 2d 205, 215 (E.D.N.Y. 2012). "[C]omputer searches are not, and cannot be subject to any rigid time limit because they may involve much more information than an ordinary document search, more preparation and a greater degree of care in their execution." *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 66 (D. Conn. 2002). Nevertheless, the fourth ***645 **109** amendment requires the government to complete its review of electronic data "within a 'reasonable' period of time." *Metter*, 860 F. Supp. 2d at 215. A review of seized electronic data is reasonable even if it takes several years to complete as long as the search ends prior to trial and does not exceed the parameters of the original search warrant. See *United States v. Johnston*, 789 F.3d 934, 942-43 (9th Cir. 2015).

¶ 20 Because it is impractical to forensically examine a hard drive in a person's home or office, copying electronic data by creating a mirror image of a computer hard drive for later analysis offsite had become a common practice that does not violate the fourth amendment. See *United States v. Veloz*, 109 F. Supp. 3d 305, 313 (D. Mass. 2015); *In re Search of Information Associated With the Facebook Account Identified by the Username Aaron.Alexis That Is Stored at Premises Controlled by Facebook, Inc.*, 21 F. Supp. 3d 1, 9 (D.D.C. 2013). Additionally, retention of a mirrored hard drive during the pendency of an investigation and trial does not violate the fourth amendment. See *United States v. Ganias*, 824 F.3d 199, 225 (2d Cir. 2016).

¶ 21 However, the government may not retain seized property indefinitely. *United States v. Premises Known as 608 Taylor Avenue, Apartment 302, Pittsburgh, Pennsylvania*, 584 F.2d 1297, 1302 (3d Cir. 1978). The fourth amendment may be violated when the State fails to quickly return information contained in a mirrored hard drive that is not within the scope of the warrant. See *Veloz*, 109 F. Supp. 3d at 313. "[W]hen items outside the scope of a valid warrant are seized, the normal remedy is suppression and return of those items ***."

United States v. Matias, 836 F.2d 744, 747 (2d Cir. 1988). It violates the fourth amendment for the State to seize and retain all data in a mirrored hard drive regardless of whether a warrant authorizes its seizure. See *In re Search*, 21 F. Supp. 3d at 10; *People v. Thompson*, 51 Misc.3d 693, 28 N.Y.S.3d 237, 258-59 (Sup. Ct. 2016). A New York court explained as follows:

> "When a warrant is issued which authorizes a search of paper records, the government is entitled to search the files and seize responsive material. They are not permitted to search the files, seize responsive material and then retain files they have never identified as relevant for multiple years, because, at some later time, they might want to search the files again. A search warrant which authorizes a search of voluminous digital records is no different. As Defendant's counsel during an argument pointed out, overseizure is 'a courtesy that was developed for law enforcement.' It is not a license for the government to retain tens of thousands of a defendant's non-relevant personal communications to review and study at their leisure for years on end." *Thompson*, 28 N.Y.S.3d at 258-59.

¶ 22 All property seized must be returned to its rightful owner once the criminal proceedings have terminated. *Cooper v. City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990); *United States v. Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979); *United States v. LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977). When no charges are pending against an individual, any of the individual's property in the possession of the State should be immediately returned to him. See *People v. Jaudon*, 307 Ill. App. 3d 427, 447, 241 Ill.Dec. 76, 718 N.E.2d 647 (1999) (citing 725 ILCS 5/108-2 (West 1996)); *People v. Jackson*, 26 Ill. App. 3d 845, 848-49, 326 N.E.2d 138 (1975). After criminal proceedings conclude, the government has no right to retain a defendant's property. ***646 **110** *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1213 (10th Cir. 2001). "[I]t is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner." *United States v. Wilson*, 540 F.2d 1100, 1103 (D.C. Cir. 1976).

¶ 23 In reviewing a trial court's ruling on a motion to suppress, mixed questions of law and fact are presented. *People v. Jones*, 215 Ill. 2d 261, 267, 294 Ill.Dec. 129, 830 N.E.2d 541 (2005). Findings of fact made by the trial court will be upheld on review unless they are against the manifest weight of the evidence. *Id.* at 268, 294 Ill.Dec. 129, 830 N.E.2d 541. However, a reviewing court remains free to undertake its own assessment of the facts in relation to the issues presented and may draw its own conclusions when deciding what relief should be granted. *Id.* Thus, we review *de novo* the ultimate question of whether the evidence should have been suppressed. *Id.*

¶ 24 Here, there is no question that defendant had an expectation of privacy in his computer files before his computer was confiscated by police pursuant to the search warrant issued on July 17, 2013. See *Heckenkamp*, 482 F.3d at 1147; *Broy*, 209 F. Supp. 3d at 1053-55; *Blair*, 321 Ill. App. 3d at 381, 254 Ill.Dec. 872, 748 N.E.2d 318 (Homer, J., specially concurring). Defendant's expectation of privacy significantly diminished once the police took possession of the computer, and that diminished expectation of privacy continued until his trial was complete. See *Burnette*, 698 F.2d at 1049; *Johnston*, 789 F.3d at 942. However, once defendant's trial was over, defendant could again expect that he had a right to privacy in the contents of his computer. See *United States v. Hubbard*, 650 F.2d 293, 303 (D.C. Cir. 1980) ("the party from whom materials are seized in the course of a criminal investigation retains a protectible [*sic*] property interest in the seized materials" because he is entitled to their return when the criminal proceedings conclude); *Thompson*, 28 N.Y.S.3d at 259 (State's unreasonable retention of an individual's files violates the individual's reasonable expectation of privacy).

¶ 25 Feehan violated defendant's right to privacy when he searched defendant's EnCase file without a warrant in March 2014. While police lawfully created the EnCase file to forensically examine defendant's hard drive, they were not entitled to retain the entire EnCase file indefinitely. See *Premises Known as 608 Taylor Avenue*, 584 F.2d at 1302. Rather, police were required to examine the contents of the mirrored hard drive and retain only those files that fit within the scope of the July 17, 2013, warrant. See *Matias*, 836 F.2d at 747; *Veloz*, 109 F. Supp. 3d at 313; *In re Search*, 21 F. Supp. 3d at 10; *Thompson*, 28 N.Y.S.3d at 258-59. While police could retain the relevant files throughout defendant's trial, once defendant's trial ended, police were not entitled to retain any portion of the EnCase file, much less the entire file. See *Jaudon*, 307 Ill. App. 3d at 447, 241 Ill.Dec. 76, 718 N.E.2d 647; *Jackson*, 26 Ill. App. 3d at 848-49, 326 N.E.2d 138; *Rodriguez-Aguirre*, 264 F.3d at 1213.

¶ 26 Because police had no authority to retain possession of the EnCase file after defendant's criminal trial ended, Feehan's warrantless search of the EnCase file violated defendant's fourth amendment rights.

¶ 27 B. Good-Faith Exception

¶ 28 "The fourth amendment is silent about suppressing evidence obtained in violation of its command." *People v. Martin*, 2017 IL App (1st) 143255, ¶ 38, 415 Ill.Dec. 389, 82 N.E.3d 593 (citing ***647** ****111** *Davis v. United States*, 564 U.S. 229, 236, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)). The exclusionary rule "was created by the Supreme Court to 'compel respect for the constitutional guaranty.' " *Id.* (quoting *Davis*, 564 U.S. at 236, 131 S.Ct. 2419). Application of the exclusionary rule is not automatic following a fourth amendment violation. *People v. LeFlore*, 2015 IL 116799, ¶ 22, 392 Ill.Dec. 467, 32 N.E.3d 1043. Rather, the exclusionary rule should be applied only when it can achieve its purpose, which is to deter future fourth amendment violations. *Id.*

¶ 29 When the circumstances show that the police acted with an objectively reasonable good-faith belief that their conduct was lawful, there is no illicit conduct to deter. *Id.* ¶ 24. In determining whether the good-faith exception applies, a court must ask "whether a reasonably well trained officer would have known that the search was illegal" in light of "all of the circumstances." *United States v. Leon*, 468 U.S. 897, 922 n.23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Once a defendant proves a violation of the fourth amendment, the State has the burden to prove the good-faith exception applies. *People v. Morgan*, 388 Ill. App. 3d 252, 264, 327 Ill.Dec. 316, 901 N.E.2d 1049 (2009). Whether the good-faith exception to the exclusionary rule applies presents a legal question that is reviewed *de novo*. *People v. Manzo*, 2018 IL 122761, ¶ 67, 432 Ill.Dec. 598, 129 N.E.3d 1141.

¶ 30 Section 114-12(b)(2)(i) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-12(b)(2)(i) (West 2016)) provides that a peace officer acts in " '[g]ood faith' " when he obtains evidence "pursuant to a search or an arrest warrant obtained from a neutral and detached judge, which warrant is free from obvious defects other than non-deliberate errors in preparation and contains no material misrepresentations by any agent of the State, and the officer reasonably believed the warrant to be valid." The State concedes that the July 17, 2013, warrant "did not authorize Feehan's search, as that warrant had already been executed and, after investigation and criminal proceedings, defendant was acquitted." However, the State argues that Feehan reasonably believed that he could rely on the eight-month-old warrant to justify his search of defendant's EnCase file. We disagree.

¶ 31 At defendant's trial, Feehan testified that he has been a police officer for more than 20 years and a forensic examiner for 17 years. When he requested defendant's EnCase file, he knew that defendant had been acquitted of the sexual assault charges against him and that no new charges had been filed. He also knew that defendant's EnCase file was created when defendant's computer was seized eight months earlier pursuant to the warrant issued in defendant's sexual assault case. Because the warrant issued in July 2013 had been executed and the charges stemming from the files found pursuant to that warrant were no longer pending, Feehan should have known that police had no right to retain, much less search, the EnCase file. See *Jaudon*, 307 Ill. App. 3d at 447, 241 Ill.Dec. 76, 718 N.E.2d 647; *Jackson*, 26 Ill. App. 3d at 848-49, 326 N.E.2d 138; *Rodriguez-Aguirre*, 264 F.3d at 1213. We find that no reasonably trained officer would conclude that he could perform a warrantless search of a mirrored hard drive that he had no right to possess following the termination of the criminal case against defendant. Had Feehan obtained a search warrant prior to searching the EnCase file, the good-faith exception would likely apply. See *Ganias*, 824 F.3d at 225. Because Feehan failed to do so, the good-faith exception does not apply.

¶ 32 With no basis for avoiding the exclusionary rule, we find that the evidence ***648** ****112** in this case should have been suppressed. Thus, we reverse defendant's conviction and remand for further proceedings.

¶ 33 III. CONCLUSION

¶ 34 The judgment of the circuit court of Peoria County is reversed and the cause is remanded.

¶ 35 Reversed and remanded.

Justice McDade concurred in the judgment and opinion.

Justice Wright dissented, with opinion.

¶ 36 JUSTICE WRIGHT, dissenting:
¶ 37 The majority holds defendant's computer tower and the information harvested from the computer tower's hard drive

should have been returned to defendant immediately once the criminal proceedings terminated with defendant's acquittal in Peoria County case No. 13-CF-741 on March 19, 2014. Based on the unique procedural facts of this case, I respectfully disagree and would affirm defendant's conviction in Peoria County case No. 14-CF-282.

¶ 38 A. Peoria County Case No. 13-CF-741

¶ 39 As the majority states, the trial judge, Judge Lyons, denied defendant's oral motion for the return of confiscated property in a previous criminal prosecution in Peoria County case No. 13-CF-741 on March 19, 2014, the date of the acquittal. [1] After Judge Lyons denied the oral request for the return of confiscated property, defendant filed a written motion for the return of the confiscated property in Peoria County case No. 13-CF-741. As the majority notes in its decision, the written motion was never ruled upon by the trial court. To me, until the written motion to return confiscated property is disposed of or withdrawn in Peoria County case No. 13-CF-741, that case has not been concluded.

¶ 40 Assuming for the sake of argument that the majority is correct and the acquittal concluded the criminal proceedings in Peoria County case No. 13-CF-741, the trial judge's denial of defendant's oral motion now stands as law of the case and represents an unappealable court order. Respectfully, I submit that our court lacks jurisdiction to review any ruling in Peoria County case No. 13-CF-741 absent a notice of appeal in that case.

¶ 41 B. Peoria County Case No. 14-CF-282

¶ 42 Turning to the instant appeal in Peoria County case No. 14-CF-282, I emphasize that Judge Brown's findings of fact have not been challenged by defendant for purposes of Peoria County case No. 14-CF-282. It is uncontested that the *copy* of defendant's hard drive contained in the EnCase file remained in the continuous possession of law enforcement at the time Feehan viewed the images at issue. The trial court also determined that Feehan examined a *copy* of the hard drive contained in an existing police file on March 24, 2014.

¶ 43 The court further noted that the 2013 seizure of information had "been approved for search and seizure by a neutral magistrate when the warrant was issued in 2013." Importantly, the court made an express *finding* that Feehan's examination of a *copy* of this EnCase file on March 24, 2014, was "within the scope of the [2013] original warrant." This finding has not been challenged. Once Feehan made this discovery of images while conducting an internal investigation of the alleged misconduct ***649 **113** of an officer, it is undisputed that Feehan stopped his investigation and obtained another search warrant to proceed with the investigation in 2014. For purposes of this appeal, defendant does not challenge the validity of either the 2013 or the 2014 search warrant.

¶ 44 After careful review of this record, I conclude that Judge Brown's findings of fact are not contrary to the evidence. I wholeheartedly agree with Judge Brown's analysis based on the court's well-documented findings of fact. For the sake of clarity, I agree that Feehan was merely reviewing information that had already been lawfully seized by another detective and made a part of that police officer's working file. Based on this record, I also agree with Judge Brown's conclusion that defendant's *reasonable* expectation of privacy was not violated for fourth amendment purposes because those expectations were diminished once defendant lawfully lost possession of the computer tower pursuant to the 2013 search warrant.

¶ 45 I would be remiss if I did not recognize the exemplary efforts put forth by Judge Brown in this matter. Judge Brown meticulously documented his findings of fact and carefully recited each step of his analysis in a comprehensive, written, court order. This order made the record submitted for our review easily digestible. In fact, I could not have restated the applicable law supporting the trial judge's decision any better than the trial judge did in this case. Consequently, I would affirm the trial judge's ruling.

All Citations

2019 IL App (3d) 170830, 145 N.E.3d 638, 438 Ill.Dec. 102

Footnotes

1 According to Judge Brown's written order in Peoria County case No. 14-CF-282, the property, namely the computer tower, was in the possession of the circuit clerk.

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IN THE CIRCUIT COURT OF
THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

People of the State of Illinois	)	
Plaintiff,	)	**Case No.: 14-CF-282**
vs.	)	
JOHN MCCAVITT,	)	
Defendant.	)	

FILED
ROBERT M. SPEARS
OCT 21 2014
CLERK OF THE CIRCUIT COURT
PEORIA COUNTY, ILLINOIS

ORDER

This matter comes before the court on Defendant's Motion to Suppress Evidence filed on August 15, 2014, and Supplemental Motion to Suppress Evidence filed September 29, 2014. An evidentiary hearing was conducted on the motions, and after argument by counsel, which included references to various case law, the matter was taken under advisement by the court.

Defendant challenges Detective Feehan's March 24, 2014, examination of the copy of Defendant's computer hard drive contained in the EnCase file Detective Feehan received from the Peoria County Sheriff's Department. Defendant maintains said examination was a warrantless search of his computer hard drive that violated his 4th Amendment rights. He further maintains the subsequent search warrant he obtained based upon information obtained during the warrantless search, as well as all evidence obtained pursuant to the execution of said search warrant, should be suppressed as fruits of the poisonous tree.

Having reviewed the referenced case law as well as further case law obtained by the court's own research, and taking into consideration the testimony at the hearing and arguments of counsel, the court hereby FINDS and ORDERS as follows:

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FINDINGS OF FACT

The facts and circumstances of the challenged search are largely uncontested. As part of the court's analysis, a summary of the facts are provided.

Defendant, a police officer with the Peoria Police Department, was originally investigated for, charged with, and eventually tried on charges of aggravated criminal sexual assault and criminal sexual assault relating to allegations involving a female houseguest of the Defendant. At that time of the initial investigation of those charges, the Illinois State Police, the lead investigating authority, sought and obtained a search warrant for the search of Defendant's home which authorized the seizure of, among other things, "any electronic media cable [sic] of video/audio recording", and "any electronic storage media capable of storing pictures, audio, or video." During the execution of that search warrant, Defendant's LG Computer Tower was seized by law enforcement. The State Police then sought and obtained a subsequent search warrant to "search" and "examine" said Computer Tower for the following:

- Any and all digital images including, but not limited to JPG, GIF, TIF, AVI, MOV and MPEG files.
- Any and all storage date/deleted data to determine which particular files are evidence or instrumentalities of criminal activity.
- Any evidence of crimes listed below that may be discovered from separate incidents.

The search warrant then lists the following offenses as those being investigated:

- Aggravated Criminal Sexual Assault
- Unlawful Restraint
- Unauthorized Video Recording/Live Video Transmission

Detective Jeff Avery with the Peoria County Sheriff's Department was involved in the investigation of Defendant on the initial charges. While he was not involved in the execution of the search warrant at Defendant's home, he did receive items obtained pursuant to the search, including the Computer Tower. Detective Avery is a forensic examiner, and he conducted an exam of the Computer Tower. To conduct his examination he removed the hard drive from the Computer Tower and made an image

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(i.e., an exact copy) of the hard drive using EnCase software. That copy of the hard drive was in what Detective Avery called an "EnCase evidence file" which was saved on the detective's work computer. The original hard drive was placed back into the Computer Tower in an unaltered state, and the Computer Tower was returned to the State Police. Detective Avery did not retain the Computer Tower or the original hard drive thereafter, but did retain the EnCase evidence file which consisted of the software's forensic examination of the copy of the hard drive. That, in turn, is archived as an evidence file on the detective's computer so it can be retrieved in the event of an appeal or a need for a re-examination.

Defendant's original case involving the charges of criminal sexual assault went to trial in March of 2014, and Defendant was found not guilty. During the course of that trial, the Computer Tower was admitted into evidence, and it is the court's understanding it remains in the custody of the Circuit Clerk at this time. During the course of the initial case, Defendant was not charged with unauthorized video recording of other victims.

The time lines of events set forth in Defendant's motions appear to be accurate, and the court will accept those as such (unless inconsistent with the findings herein). The following is a brief summary of the events which the court feels are particularly important to its analysis in this matter:

- March 19, 2014 -- Defendant found not guilty in Case 13-CF-741 (charges of aggravated criminal sexual assault and criminal sexual assault);
  - Defense counsel makes an oral request for return of property seized by law enforcement;
  - Judge Lyons deferred ruling on said request at that time.
- March 20, 2014 -- Peoria Police Department initiated a "Formal Investigation" of Defendant;
- March 21, 2014 --
  - as part of the Formal Investigation of Defendant, Detective James Feehan with the Peoria Police Department contacted Detective Avery;
  - Feehan requested a copy of the "EnCase file" Detective Avery retained in his records;

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- Feehan knew of images of other victims with regard to videotaping from the prior investigation;
- Feehan provided a new Peoria Police Department computer drive to Avery onto which Avery copied the EnCase evidence file;
- Detective Avery then gave the PPD drive with the copy of the evidence file to Detective Feehan;

- March 24, 2014, defense counsel files a written motion for return of confiscated property pursuant to statute;
- March 24, 2014, Detective Feehan, as part of his internal investigation of Defendant, conducted a forensic examination of the copy of the EnCase file he received from Detective Avery
  - while conducting said exam he saw two (2) images of what he believed to be child pornography;
  - upon discovering the apparent child pornography images, Detective Feehan ceased his review and sought a search warrant for further forensic examination.
- March 28, 2014, Defendant was arrested on charges of unauthorized video recording relating to alleged conduct on March 27, 2013, and on or about May 1, 2013, through July 17, 2013 (charges presently pending in 14-CF-203);
- March 28, 2014, the Formal Investigation of Defendant by the Peoria Police Department was suspended because the department is not permitted to conduct an internal investigation of an officer when the officer has charges pending against him/her;
- April 1, 2014, Detective Feehan sought and obtained a search warrant to search the Computer Tower for images of child pornography.
  - Delay in obtaining search warrant from March 24 to April 1 was due to Feehan being busy on other matters;
  - Feehan's forensic examination of the EnCase file copy of the hard drive revealed images of suspected child pornography which are the subject of this case, and this motion to suppress.

ANALYSIS

Defendant asks the court to suppress evidence obtained through a police investigation. The use of the exclusionary rule has been found proper when the police have violated a person's 4th Amendment right to be free from unreasonable searches and seizures, and the circumstances warrant excluding the evidence to serve as a deterrent to future such violations. In essence, the court is asked sanction the police for their misconduct.

As an initial matter, the court would note the original search warrants pursuant to which the Computer Tower was seized (warrant authorized at 5:08 p.m. on 7-17-13, contained in file 13-MR-400) and subsequently searched (warrant authorized at 2:05 p.m. on 7/24/13, contained in file 13-MR.402) have not been challenged. Likewise, the original seizure of the Computer Tower, and subsequent forensic examination by Detective Avery have not been challenged. Therefore, for purposes of this analysis, the court assumes the seizure of the Computer Tower from Defendant's home, and the subsequent search of the hard drive of that computer by Detective Avery were reasonable. This assumption necessarily includes the proposition that Detective Avery's use of the EnCase software to make a copy of the hard drive, and retaining a copy of the hard drive, was likewise reasonable.[1]

Defendant contends the retention of the Computer Tower subsequent to his acquittal on the sexual assault charges was improper. Immediately upon being acquitted, defense counsel sought a judicial order for the return of the property. Defense counsel subsequently filed a written motion requesting the same pursuant to applicable statute. Defendant maintains it was improper for the police to retain said property after the acquittal and in light of the requests for the return of the property.

Whether the property should have been returned, or not, is not dispositive of Defendant's motion. Even if the Computer Tower had been returned to Defendant immediately upon his acquittal in 13-CF-741, such would not have changed the fact that Detective Avery still possessed a copy of the hard drive in his Encase evidence file. The subsequent examination conducted by Detective Feehan was not of Defendant's

[1] Detective Avery testified it was his practice to make EnCase file copies of hard drives and retain those copies. He also testified it was not normal or common practice to return the EnCase evidence file copy of the hard drive to anyone after a case was over.

Computer Tower, but was of a copy. Therefore, even if the tower was returned, Feehan still could have conducted his own forensic analysis of the copy. Furthermore, even assuming there was some violation of the statutory procedures for the return of property, the court would find that, alone, is not a violation of the 4th Amendment, and certainly does not amount to the type of police misconduct sought to be detered by the utilization of the exclusionary rule. Nothing has been presented to suggest Detective Avery retaining the EnCase evidence file and providing a copy to Detective Feehan was anything other than reasonable. He apparently had no knowledge of Defendant seeking a judicial order for a return of the Computer Tower. Even if he had been aware, the Motion filed by defense counsel did not seek return of copies of any evidence seized.

Defendant next challenges the fact that Detective Avery, a detective with the Peoria County Sheriff's Department, provided a copy of the EnCase evidence file to Detective Feehan, a detective with the City of Peoria Police Department. Defendant's Supplement Motion contends Avery was not authorized to take the seized property and pass it on to another police agency without first obtaining judicial authority. In support of this claim, Defendant cites to U.S. v. One 1979 Chevrolet C-20 Van (7th Cir. 1992), 924 F.2d120. That case stands for the proposition, at least in the context of an asset forfeiture proceeding, that once a state court has jurisdiction over a seized item the federal court does not acquire jurisdiction simply by the fact that the federal government took possession of the seized item from the state authorities. That case is not applicable to the situation faced herein. First, here there is no transfer of the item seized, but only a copy of the item seized. Second, there is no dispute as to which court has jurisdiction. The general policies underlying the case, likewise, do not help to advise the court regarding the reasonableness of the City detective obtaining a copy of the County detective's file. Therefore, the court finds this claim of improper transfer of a copy of evidence from one police agency to another to facilitate the receiving agency's investigation is without merit, as it implicates no constitutional right.

At least in the court's view, the claims in Defendant's motion don't raise a seizure issue (as nothing of Defendant's was taken), but instead of search issue. Feehan did not seize anything belonging to Defendant to conduct his forensic exam. To the extent the Computer Tower was seized, that was long before Feehan entered the picture, and that

seizure was pursuant to a warrant and thus was presumptively reasonable. As noted previously, the Computer Tower is not even being held by the police, but by the circuit clerk.

The crux of Defendant's claim motion is Feehan's forensic exam of the copy of the hard drive violates Defendant's 4th Amendment rights. The key to any 4th Amendment analysis is determinations of reasonableness -- reasonable expectations of privacy, reasonable police conduct, and the like.

The 2013 search warrant for the search of the Computer Tower hard drive authorized police to inspect the hard drive for evidence of various crimes, including unlawful restraint and improper videotaping. The resulting search and inspection of the hard drive by Detective Avery pursuant to said warrant was presumptively reasonable. As noted above, neither the warrant nor the search has been challenged. Furthermore, the court finds nothing wrong with the copying of the hard drive onto the detective's computer for further forensic evaluation. The defense really didn't challenge that action, and the testimony from the detective suggests it is common practice to do so, and was necessary in light of some of software and/or hardware had been loaded onto the computer. In other words, it was necessary to make a copy of the hard drive to accomplish the purpose of the 2013 warrant.

Once the police have the right to a copy of the hard drive, and the right to perform a forensic examination of the hard drive for evidence of certain crimes, Defendant's reasonable expectations of privacy in the information stored on the hard drive are substantially diminished. The court is not willing to say his expectations of privacy are totally frustrated or evaporate at that point. A number of courts of appeal, both in the state and federal courts, have noted the vast amount of personal information that can be stored on computers and cell phones. The recent Supreme Court case of Riley v. California, which involved searches of smart phones, includes a lengthy discussion of how omnipresent smart phones have become as well as the vast amount of personal information that can be stored on them. The same, if not more, can be said of personal computers, like the one in issue here. Therefore, although the police had the right to search the hard drive for certain types of files and for evidence of certain types of offenses, the police did not have cart blanche to review everything on the hard drive.

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For instance, the court found a case where a defendant consented to the search of his computer for evidence of credit card fraud that supposedly had been perpetrated on the defendant. The police used the consent to search for evidence of child pornography on the computer. The resulting search by police looked through different types of computer files and directories than would have been needed for evidence of credit card fraud. The reviewing court in that case found the search was beyond the scope of that which was authorized by the consent. While the instant case does not raise a question of consent, it does raise a question of scope. Was Feehan's examination of the copy of the hard drive within the scope of the warrant pursuant to which Detective Avery had made the copy of the hard drive?

The court would note as an initial matter, Feehan examined a copy of the hard drive. In essence, Detective Feehan was reviewing of another police officer's file. This is no different than a police officer taking a photograph or photo copy of something in a defendant's house during the execution of a search warrant, and then another police officer later reviewing the photo or photocopy, perhaps with a microscope or some other device, and discovering something that wasn't originally noticed by the first officer. It's hard for the court to see how an individual has an expectation of privacy in a police officer's work product file.

Nonetheless, in light of the nature of the types and amounts of personal information that can be stored on computers, the court believes it is important to further evaluate Defendant's position. Feehan's exam of the copy of the hard drive was for evidence which had been previously been approved for search and seizure by a neutral magistrate when the warrant was issued in 2013. Even though the search warrant was almost a year old at the time of Feehan's exam, computer files are not the type of evidence that become stale. More importantly, Defendant's expectation of privacy in the types of files Feehan was looking through had already been compromised by the prior warrant. Therefore, while Defendant still may have held expectations of privacy in such things as a diary, daily planner, family history, drafts of papers for classes, and the like, if present on his computer, he no longer held a "reasonable" expectation of privacy in the types of files and directories which were or could be related to evidence of unlawful restraint and/or improper videotaping.

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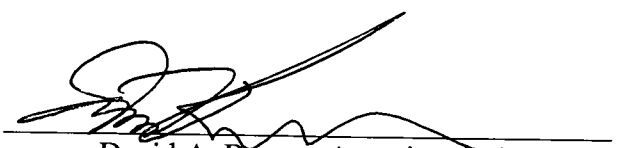
When Feehan reviewed the EnCase evidence file for evidence of videotaping and unlawful restraint, he no more infringed on Defendant's expectation of privacy in the hard drive than had already been done months before by Detective Avery. Detective Avery's infringement was authorized by a search warrant and was therefore reasonable. As a result, the court finds Detective's Feehan's examination of the copy of the hard drive was also authorized, as it was within the scope of the original warrant.

Assuming Feehan had the right to exam the copy of the hard drive, his coming upon the two (2) images of child pornography implicates the plain view doctrine. There was no testimony that the child porn images were in different areas or directories of the computer, were of different file types, or where somehow different than those which Feehan could properly look into pursuant to the prior search warrant. Once Feehan encountered evidence of crimes other than those he was authorized to search for, he was then obligated to seek a new search warrant to conduct further searches of the hard drive for evidence of child pornography. That's exactly what he did. He sought and obtained a search warrant so he could conduct further forensic exams of the copy of the hard drive for child pornography.

Based upon the foregoing analysis, this court finds Detective Feehan's initial forensic exam of the copy of the hard drive was consistent with the scope of the 2013 search warrant, was not unreasonable, and was therefore not unconstitutional. The evidence obtained during his exam of the copy of the hard drive was not the fruit of a poisonous tree that requires application of the exclusionary rule. His discovery of the initial two (2) images of suspected child pornography was justified under the concepts or principles of the plain view doctrine, and therefore don't violate the 4th Amendment. His action of ceasing further investigation at that time and seeking a warrant to search the copy of the hard drive for evidence outside the scope of the original warrant was reasonable. I find no police misconduct or constitutional violations which need to be deterred. Therefore, Defendant's Motion to Suppress is **DENIED**.

IT IS SO ORDERED this October 21, 2014.



David A. Brown, Associate Judge

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

13MR406

FILED
CLERK OF THE
CIRCUIT COURT
PEORIA COUNTY, IL

2013 AUG 15 A 10:58

ROBERT M SPEARS

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
COUNTY OF PEORIA

COMPLAINT FOR SEARCH WARRANT

Trooper Adam Hendrick of the Illinois State Police, complainant, now appears before the undersigned Associate Circuit Judge of the Tenth Judicial Circuit of Illinois, and requests the issuance of a Search Warrant to search the residence, attached garage, and any outbuildings located on said property of John T. McCavitt, who resides at 1710 W. West Aire Avenue, Peoria, Illinois.

- The above-listed address is a single family/single story dwelling with tan colored brick and attached garage. The numbers 1710 are affixed on the front of the residence.

and seize the following from the residence:

- Any electronic media cable of video/audio recording.
- Any electronic storage media capable of storing pictures, audio, or video.
- Any type of restraints that may have been used to restrain the victim.
- Any physical evidence resulting from the assault to include clothing, bed sheets, lubricant, or sleeping masks.
- Any additional items of evidentiary value pertaining to Criminal Sexual Assault.

which is/are contraband, or which constitute evidence or fruits of the offense(s) of Criminal Sexual Assault in violation of 720 ILCS 5/11-1.20.

I further say that I have probable cause to and reasonable cause to believe, and do believe, that the above-listed items to be seized are now located on the premises of, or known to be at a location of John McCavitt because of the following facts:

1. On July 17, 2013, Illinois State Police Zone 4 Investigations was requested to investigate an alleged sexual assault that occurred at the above-listed address. The alleged sexual assault involved an off-duty Peoria Police Officer. Trooper Hendrick and Special Agent Keri Englert #4695 interviewed the victim, Aimee E. Koch, F/W 07/29/82, at OSF St. Francis Hospital at approximately 10:10 a.m.
2. Koch informed us that she is a Nurse at OSF, and the sexual assault had occurred between the hours of 0500-0600. Koch had not changed her clothes, showered, or used the bathroom prior to being transported to the hospital by East Peoria Fire Department.
3. Koch stated she had met three friends at Cruzen's on War Memorial Drive at approximately 10:00 p.m. the previous night. Her friend and previous co-worker, Corey Bruff, is leaving for graduate school. Another co-worker, Rachael Broguard, and her boyfriend, John McCavitt, met with Koch and Bruff. Koch

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indicated McCavitt sexually assaulted her at his residence he shares with Broguard. Koch also stated McCavitt is a Peoria Police Officer.

4. Koch stated the four of them stayed at Cuzen's until approximately 12:30 a.m., then went to Big Al's until approximately 3:00 a.m., and lastly went to Ulrich's until approximately 4:00 a.m. All individuals were drinking alcohol and celebrating Bruff leaving for graduate school.
5. Koch stated that McCavitt drove all of them that night, and upon leaving Ulrichs drove back to Bruff's residence. Brogaurd and McCavitt offered to let Koch sleep at their residence in the spare bedroom since they all had been drinking.
6. Brogaurd drives Koch's vehicle (which was parked at Bruff's) back to her and McCavitt's house. Koch and Brogaurd are in her vehicle, McCavitt follows them in his vehicle.
7. Koch, Brogaurd, and McCavitt arrive at his residence. Koch indicated they played a short game of cards, McCavitt makes a drink for herself and Brogaurd before they both show her to the spare bedroom at approximately 5:15 a.m.
8. Koch related that she laid down in the spare bedroom fully clothed under the covers. A short time later she awoke face down wearing only her bra and in four point restraints. A black sleeping mask was placed over her head. Koch stated she heard a snap sound that she believed to be the cap to lubricant, and clicking noises that sounded like that of a camera. ~~Couch~~ Koch said her bra was also lifted over her breasts at this time.
9. Koch stated she was then sexually penetrated both anally and vaginally. Koch said she was afraid, and did not resist because she was restrained and did not want to make him angry. Koch stated that McCavitt would whisper in her ear statements such as "you know you want it, and tell me you want it".
10. Koch stated she was then released from the restraints, and the room was dark. She then quickly dressed herself and left the residence. She stated she passed McCavitt standing outside the room, but did not make eye contact. She left her cellular phone at the residence. Koch then drove to Bruff's house, but he was sleeping and did not answer the door, Koch drove to her residence in East Peoria and, spoke to a neighbor, and the neighbor called the Paramedics for Koch to be transported to OSF, arriving at the ER at approximately 7:40 a.m.
11. Corey Bruff was interviewed at his residence. Bruff corroborated the timeline of events that Koch had related in her interview. Bruff also stated he had not offered to allow Koch to spend the night because his wife was not home. Bruff displayed a text message he sent to McCavitt at 4:09 a.m. The text was thanking him for taking care of Koch so he did not have to.

Therefore, I have probable cause and reasonable cause to believe, and do believe, that said item(s) are now located in the digital storage media of a cellular telephone(s) currently in the possession of John McCavitt and I pray that a Search Warrant may issue in accordance with law.

#5797

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Search Warrant Complaint 3

Subscribed and sworn to before me on 7-17-13

Complainant

Judge of the Tenth Judicial Circuit

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

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FILED
CLERK OF THE
CIRCUIT COURT
PEORIA COUNTY, IL

2013 AUG 15 A 10:58

ROBERT M SPEARS

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
COUNTY OF PEORIA

SEARCH WARRANT

TO: ALL PEACE OFFICERS OF THE STATE OF ILLINOIS

On this date, **Trooper Adam Hendrick of the Illinois State Police,** complainant, has subscribed and sworn to a Complaint for Search Warrant before me. Upon examination of said Complaint for Search Warrant, I find that it states facts sufficient to show probable cause and reasonable cause for the issuance of this Search Warrant.

Therefore, I command that you search the following residence, attached garage, and any outbuildings located on said property of John T. McCavitt, who resides at 1710 W. West Aire Avenue, Peoria, Illinois.

- The above-listed address is a single family/single story dwelling with tan colored brick and attached garage. The numbers 1710 are affixed on the front of the residence.

and seize the following from said residence:

- Any electronic media cable of video/audio recording.
- Any electronic storage media capable of storing pictures, audio, or video.
- Any type of restraints that may have been used to restrain the victim.
- Any physical evidence resulting from the assault to include clothing, bed sheets, lubricant, or sleeping masks.
- Any additional items of evidentiary value pertaining to Criminal Sexual Assault. which is/are contraband, or which constitute(s) evidence or fruits of the offense of Criminal Sexual Assault, in violation of 720 ILCS 5/11-1.20.

I further command that a return of everything so seized shall be made without unnecessary delay before me or before any Court of competent jurisdiction.

Time of Issuance: 5:08pm.

Date of Issuance: 7-17-13

Judge of the Tenth Judicial Circuit

STATE OF ILLINOIS)
) SS
COUNTY OF PEORIA)

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I executed this Search Warrant by searching the premises described herein and by seizing the instruments, articles, and things described herein, as indicated on the sworn inventory attached hereto.

M/SGT. K. Mueller
Executing Officer

Executed:

ISP Zone 4 - PEORIA
Agency

Date: 07/17/13

Time: 10:30 p.m.

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

13MR 400
FILED
CLERK OF THE CIRCUIT COURT
PEORIA COUNTY, IL
2013 AUG 15 A 10:58
ROBERT M SPEARS

State of Illinois)
) SS
County of Peoria)

The Circuit Court of the Tenth
Judicial Circuit of Illinois

SEARCH WARRANT INVENTORY

On July 17, 2013 at approximately 10:30 p.m., Master Sergeant Ken Mullen of the Illinois State Police executed a search warrant signed by Judge Brown on July 17, 2013 which directed Peace Officers of the State of Illinois to search the following residence, attached garage, and any out bulidings located on said property of John T. McCavitt, Who resides at 1710 W. West Aire Avenue, Peoria, Illinois, currently in the possession of the Illinois State Police, located at 1265 Lourdes Road, Metamora, Woodford County, Illinois:

- **Any electronic media cable of video/ audio recording.**
- **Any electronic storage media capable of storing pictures, audio or video.**
- **Any type of restraints that may have been used to restrain the victim.**
- **Any physical evidence resulting from the assault to include clothing, bed sheets, lubricant, or sleeping masks.**
- **Any additional items of evidentiary value pertaining to Criminal Sexual Assault.**

which is/are contraband, or which constitute evidence or fruits of the offense(s) of ______ Criminal Sexual Assault in violation of _720_ ILCS _5/11-1.20

In executing said warrant, the following items were seized from the premises described above, and have returned the presiding judge on the 15th day of August, 2013 (See attached inventory list).

[signature] 5797
Executing Officer

Signed and sworn before me this 15th day of August, 2013, at 10:42 a.m./p.m.

[signature]
Judge

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ILLINOIS STATE POLICE
EVIDENCE INVENTORY
AND RECEIPT

1. Date 7/17/13 3. File/Field Report # _____
2. Time 11:25 pm 4. District/Office # 24/PE

5. Name or Place of Business	6. Address
John T McCavitt	1710 W West Aires Ave City Peoria State IL Zip

ITEMIZED LIST OF EVIDENCE 7. (List all items by name and serial no., if any, amount of currency, coins, etc.)	LOCATION EVIDENCE FOUND 8. (Specify Location)
1 ~~Silver~~ / ~~Blue~~ Black I-Phone Model # A1349	Locked Safe. Basement
1 Red Digital Samsung camera S/N A3MBC90720128F	Kitchen Cabinet
1 Samsung Verizon Wireless Flip phone HEXA000001TD8DB7B	Bottom Drawer Kitchen
1 Red Samsung Verizon Wireless Slide Phone HEXA000001D6A6804	Bottom Drawer Kitchen
1 Blue Zip Drive	Office Bedroom Middle Desk drawer Bedroom
2 Kleenex box with cameras w/Manual.	Top of closet in basement South East.
1 Battery Charger ~~3~~ additional batteries	Drawer - Basement "
2 Flash drives	Desk, Middle Bedroom.
1 Silver IPOD	"

9. Received From (Signature) S/A KK #4695	10. Received By (Signature) X:
11. Received From (Signature)	12. Received By (Signature)
13. Received From (Signature)	14. Received By (Signature)
15. Received From (Signature)	16. Received By (Signature)

WHite—Agent/officer Yellow—Name of person copy given to Pink—Name of person copy given to

000128

IL 493-0007 ISP 1-10 (7/94)

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

ILLINOIS STATE POLICE
EVIDENCE INVENTORY
AND RECEIPT

1. Date 7/17/13
2. Time 11:25 pm
3. Case/Field Report No. _____
4. District No. 24/PE

5. Name or Place of Business	6. Address and City
JOHN T McCAVITT	1710 W West Aires AVE PEORIA IL

ITEMIZED LIST OF EVIDENCE (7. List all items by name and serial no., if any, amount of currency, coins, etc.)

LOCATION EVIDENCE FOUND (8. Specify Location)

	7. ITEMIZED LIST OF EVIDENCE	8. LOCATION EVIDENCE FOUND
1	1 Sheet of paper w/ passwords	Middle Bedroom
1	LG Computer Tower, Black in Color No Serial #'s	"
2	Operating System CD's.	"

9. Received From (Signature) S/A KK 4695	10. Received By (Name, Rank and ID #) X
11. Received From (Signature)	12. Received By (Name, Rank and ID #)
13. Received From (Signature)	14. Received By (Name, Rank and ID #)
15. Received From (Signature)	16. Received By (Name, Rank and ID #)

A23

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

Illinois State Police

Division of Forensic Services
Forensic Sciences Command
CALMS History 7/21/2013 12:10:09 PM
ISP Crime Scene # 4732-13-3033

4732-13-3033

Case Information

Primary Agency	ISP DOO ZONE 4, INVEST PEORIA
Secondary Agency	
CSSC Case Number	4732-13-3033
Agency Case #	IL13AA12373
Investigating CSI	Matthew Vien #4732
Primary Agency Officer	S/A Adam Hendrick
Offense	Sexual Assault
County	Peoria
Offense Date	07/17/2013

Exhibit Information

Hold 5
DESCRIPTION: Sealed Illinois State Police Biological Standards Collection Kit, collected from John T. McCavitt M/W DOB 05/19/81.
COMMENTS: buccal swabs, pulled pubic hair

Hold 6
DESCRIPTION: Sealed paper bag containing five bottles/tubes of personal lubricant, collected from nightstand drawer, master bedroom at 1710 W. West Aire Peoria.
COMMENTS:

Hold 7
DESCRIPTION: Sealed paper bag containing black blind fold and black fabric restraints, collected from nightstand drawer, master bedroom, 1710 W. West Aire Peoria.
COMMENTS:

Hold 8
DESCRIPTION: Sealed paper bag containing one black nylon webbed restraint system, collected from area between mattress and box spring, master bedroom, 1710 W. West Aire Peoria.
COMMENTS:

CSSC#	Date	Time	Returned by	Released to
5-8	07/18/13	1:10 AM	[illegible] 733	MORTON LAB CSSC EVIDENCE
5,7,8	07/23/13	12:16	[illegible] 733	[illegible]
6	07/23/13	16:00	[illegible] 733	S/A [illegible] 4695
			A24	

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

13MR402
#1/53

FILED
CLERK OF THE
CIRCUIT COURT
PEORIA COUNTY, IL

2013 JUL -8 A 11:00
ROBERT M SPEARS

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
COUNTY OF PEORIA

COMPLAINT FOR SEARCH WARRANT

Trooper Adam Hendrick of the Illinois State Police, complainant, now appears before the undersigned Associate Circuit Judge of the Tenth Judicial Circuit of Illinois, and requests the issuance of a Search Warrant to further inspect, and search in greater detail, the digital storage media of items seized during the execution of a search warrant on July 17, 2013. The search warrants were executed at the residence of John T. McCavitt, 1710 W. West Aire, Peoria, Illinois.

- Telephone possessing telephone number (309) 657-4218.
- LG Computer Tower SN#WMAZA2914641.

and examine the following from the device:

- Any and all digital images including, but not limited to JPG, GIF, TIF, AVI, MOV, and MPEG Files.
- Any and all stored data/deleted data to determine which particular files are evidence or instrumentalities of criminal activity.
- Any evidence of the crimes listed below that may be discovered from separate incidents.

which is/are contraband, or which constitute evidence or fruits of the offense(s) of

Aggravated Criminal Sexual Assault in violation of 720 ILCS 5/11-1.30.
Unlawful Restraint in violation of 720 ILCS 5/10-3.
Unauthorized Video Recording/Live Video Transmission in violation of 720 ILCS 5/26-4.

I further say that I have probable cause to and reasonable cause to believe, and do believe, that the above-listed items to be examined may contain valuable evidence pertaining to the investigation of John T. McCavitt because of the following facts:

1. On July 17, 2013, Illinois State Police Zone 4 Investigations was requested to investigate an alleged sexual assault that occurred at the above-listed address. The alleged sexual assault involved an off-duty Peoria Police Officer. Trooper Hendrick and Special Agent Keri Englert #4695 interviewed the victim, Aimee E. Koch, F/W 07/29/82, at OSF St. Francis Hospital at approximately 10:10 a.m.

2. Koch informed us that she is a Nurse at OSF, and the sexual assault had occurred

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between the hours of 0500-0600. Koch had not changed her clothes, showered, or used the bathroom prior to being transported to the hospital by East Peoria Fire Department.

3. Koch stated she had met three friends at Cruzen's on War Memorial Drive at approximately 10:00 p.m. the previous night. Her friend and previous co-worker, Corey Bruff, is leaving for graduate school. Another co-worker, Rachael Broguard, and her boyfriend, John McCavitt, met with Koch and Bruff. Koch indicated McCavitt sexually assaulted her at his residence he shares with Broguard. Koch also stated McCavitt is a Peoria Police Officer.

4. Koch stated the four of them stayed at Cuzen's until approximately 12:30 a.m., then went to Big Al's until approximately 3:00 a.m., and lastly went to Ulrich's until approximately 4:00 a.m. All individuals were drinking alcohol and celebrating Bruff leaving for graduate school.

5. Koch stated that McCavitt drove all of them that night, and upon leaving Ulrich's drove back to Bruff's residence. Brogaurd and McCavitt offered to let Koch sleep at their residence in the spare bedroom since they all had been drinking.

6. Brogaurd drives Koch's vehicle (which was parked at Bruff's) back to her and McCavitt's house. Koch and Brogaurd are in her vehicle, McCavitt follows them in his vehicle.

7. Koch, Brogaurd, and McCavitt arrive at his residence. Koch indicated they played a short game of cards, McCavitt made a drink for Koch and Brogaurd before she is shown to the spare bedroom at approximately 5:15 a.m.

8. Koch related that she laid down in the spare bedroom fully clothed under the covers. A short time later she awoke face down wearing only her bra and in four point restraints. A black sleeping mask was placed over her head. Koch stated she heard a snap sound that she believed to be the cap to lubricant, and clicking noises that sounded like that of a camera. Koch said her bra was also lifted over her breasts at this time.

9. Koch stated she was then sexually penetrated both anally and vaginally. Koch said she was afraid, and did not resist because she was restrained and did not want to make him angry. Koch stated that McCavitt would whisper in her ear statements such as "you know you want it, and tell me you want it."

10. Koch stated she was then released from the restraints, and the room was dark. She then quickly dressed herself and left the residence. She stated she passed McCavitt standing outside the room, but did not make eye contact. She left her

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

cellular phone at the residence. Koch then drove to Bruff's house, but he was sleeping and did not answer the door, Koch drove to her residence in East Peoria and spoke to a neighbor. The neighbor called the Paramedics for Koch to be transported to OSF, arriving at the ER at approximately 7:40 a.m.

11. Corey Bruff was interviewed at his residence. Bruff corroborated the timeline of events that Koch had related in her interview. Bruff also stated he had not offered to allow Koch to spend the night because his wife was not home. Bruff displayed a text message he sent to McCavitt at 4:09 a.m. The text was thanking him for taking care of Koch so he did not have to.

12. Three search warrants were executed on July 17, 2013, at approximately 10:30 p.m. ISP Zone 4 Investigations, ISP District 8 Patrol, and two Peoria Police Department Command Officers waited outside McCavitt's residence for approximately two hours before McCavitt answered the door. McCavitt's lawyer arrived at approximately the same time.

13. McCavitt had called in sick to the police department that evening. It was later discovered (by interviewing Broquard) that McCavitt was in contact with Broquard, and he knowingly ignored phone calls from his supervisors, investigators, and did not answer the door as law enforcement attempted to execute a search warrant.

14. Broquard further stated during her interview that McCavitt told her he removed the four point restraints from the spare bedroom, and replaced them back under the mattress in the master bedroom while the State Police were outside. McCavitt's cell phone was locked in his gun safe in the basement, and his computer showed over 16,500 files had been deleted. After consulting a computer forensics investigator, I was informed it would take a few hours to delete such a large amount of files.

15. Items seized from the residence included restraints, black blindfold, lubricant, and a covert recording system hidden inside Kleenex boxes. Initial examination of the computer tower has revealed pictures and video of the victim face down in four point restraints, naked (with her top pulled up), and a pillow over her head. The victim appears motionless. It was also discovered the pictures and video were downloaded from McCavitt's Apple I-phone.

16. Additionally recovered videos display an unidentified female using the bathroom and taking a shower. The unidentified female appears to have no knowledge she was being recorded.

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Therefore, I have probable cause and reasonable cause to believe that further evidence of the above-listed offenses exists or may be retrieved from the items listed on this request for search warrant. These items had previously been in the possession of John T. McCavitt, and I pray that a Search Warrant may be issued in accordance with law.

5797

Complainant

Subscribed and sworn to before me on 7/24/13

Judge of the Tenth Judicial Circuit

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

13MR402
#53

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
COUNTY OF PEORIA

FILED
CLERK OF THE
CIRCUIT COURT
PEORIA COUNTY, IL

SEARCH WARRANT 2013 AUG 15 A 11:01

ROBERT M SPEARS

TO: ALL PEACE OFFICERS OF THE STATE OF ILLINOIS

On this date, **Trooper Adam Hendrick of the Illinois State Police,** complainant, has subscribed and sworn to a Complaint for Search Warrant before me. Upon examination of said Complaint for Search Warrant, I find that it states facts sufficient to show probable cause and reasonable cause for the issuance of this Search Warrant.

Therefore, I command that you search/examine in greater detail the following items previously in the possession of John T. McCavitt, who resides at 1710 W. West Aire Avenue, Peoria, Illinois.

- Telephone possessing telephone number (309) 657-4218
- LG Computer Tower SN#WMAZA2914641

and examine the following from the device:

- Any and all digital images including, but not limited to JPG, GIF, TIF, AVI, MOV, and MPEG files.
- Any and all stored data/deleted data to determine which particular files are evidence or instrumentalities of criminal activity.
- Any evidence of the crimes listed below that may be discovered from separate incidents.

Aggravated Criminal Sexual Assault 720 ILCS 5/11-1.30
Unlawful Restraint 720 ILCS 5/10-3
Unauthorized Video Recording/Live Video Transmission 720 ILCS 5/26-4

I further command that a return of everything so examined shall be made without unnecessary delay before me or before any Court of competent jurisdiction.

Time of Issuance: 2:05 P.M.

Date of Issuance: 7/24/13

Judge of the Tenth Judicial Circuit

STATE OF ILLINOIS)
) SS
COUNTY OF PEORIA)

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

THE STATE OF ILLINOIS VS MCCAVITT, JOHN T

Lead Attorney: SULLIVAN , K.
Retained: 08/06/2013

Status **Jury Verdict Not Guilty**
Filed 08/06/2013
Type **Criminal Felony**
Division Criminal Division
Judicial Officer
Financial Balance 0.00

Charges			Dispositions
1. AGG CRIM SEX ASSAULT/FELONY (X) 07/17/2013 Disposition Not Guilty Prosecutor Decision: Charge Filed 07/17/2013 *Filed As:* AGG CRIM SEX ASSAULT/FELONY (Charge Is The Substantive Offense Cited) (X)			
2. CRIM SEX ASSAULT/FORCE (1) 07/17/2013 Disposition Not Guilty Prosecutor Decision: Charge Filed 07/17/2013 *Filed As:* CRIM SEX ASSAULT/FORCE (Charge Is The Substantive Offense Cited) (1)			

Most Recent Events & Hearings

Case Summary

	12/08/2016	Special Closings by Tyler
	04/24/2014	Order (Judicial Officer: Lyons, Kevin W)
	04/24/2014	COURT REPORTER PRESENT AT HEARING (Judicial Officer: Lyons, Kevin W) *GINA FEEHAN*
	04/24/2014 11:00 AM	**MOTION HEARING** (Judicial Officer: Lyons, Kevin W) Result: Held *for return of property*
	04/14/2014	Order
	03/24/2014	MOTION FILED *FOR RETURN OF CONFISCATED PROPERTY*
	03/19/2014	Jury (ADR) (Judicial Officer: Lyons, Kevin W)
	03/19/2014	VERDICT *TRIAL ORDER*
	03/19/2014	Jury Instructions *JURY COPY*

View more events View more hearings

statistical closure

03/19/2014 Not Guilty - Jury Trial

defendant demographics

DOB /1981
DL 1143
SSN -6500
SID IL-IL61292620

White Male
6'3" 250 lbs
Hair Brown
Eyes Blue

case cross reference

Police Incident Number
130AA12373

flags & actions due

Exhibits Exist
Media Coverage

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

THE STATE OF ILLINOIS VS MCCAVITT, JOHN T **Inactive**
Type Criminal Felony

Events Previous Next

Date	Type and Comment
12/08/2016	Special Closings by Tyler
04/24/2014	Order Judicial Officer: Lyons, Kevin W
04/24/2014	COURT REPORTER PRESENT AT HEARING GINA FEEHAN Judicial Officer: Lyons, Kevin W
04/14/2014	Order
03/24/2014	MOTION FILED FOR RETURN OF CONFISCATED PROPERTY
03/19/2014	Jury (ADR) Judicial Officer: Lyons, Kevin W
03/19/2014	VERDICT TRIAL ORDER
03/19/2014	Jury Instructions JURY COPY
03/19/2014	Jury Instructions FROM INSTRUCTION CONF.
03/19/2014	COURT REPORTER PRESENT AT HEARING TANA HESS Judicial Officer: Lyons, Kevin W
03/19/2014	Order trial order Judicial Officer: Lyons, Kevin W
03/17/2014	WITNESS LIST
03/17/2014	Order Judicial Officer: Lyons, Kevin W
03/17/2014	COURT REPORTER PRESENT AT HEARING JILL DAVID / TANA HESS Judicial Officer: Lyons, Kevin W
03/11/2014	MOTION FILED Motion in Limine (2)
03/11/2014	MOTION FILED Motion in Limine (1)
03/07/2014	REQUEST Request for Media Coverage
03/07/2014	COURT REPORTER PRESENT AT HEARING CRYSTAL MASON NO WRITTEN ORDER Judicial Officer: Lyons, Kevin W
01/09/2014	Subpoena Served James Feehhan Jr Peoria Police Department 12/5/13
12/20/2013	Subpoena Served Aimee Koch 12/20/13

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

THE STATE OF ILLINOIS VS MCCAVITT, JOHN T **Inactive**

Type Criminal Felony

Events Previous Next

Date	Type and Comment
12/20/2013	Subpoena Not Served Corey Bruff 12/16/13 - Madison County
12/18/2013	Subpoena Served Phil Trompeter 12/16/13
12/18/2013	Subpoena Served Adam Hendrick 12/16/13
12/18/2013	Subpoena Served Keri Englert 12/16/13
12/17/2013	Order Judicial Officer: Kouri, Stephen A
12/11/2013	Subpoena Served Stephanie Clark 12/11/13
12/11/2013	MOTION FILED Motion to Continue
12/11/2013	MOTION FILED Affidavit Supplementing Motion to Continue
12/11/2013	Notice Filed Notice of Hearing
12/02/2013	Order
11/04/2013	MOTION DENIED Judicial Officer: Kouri, Stephen A
08/06/2013	OPEN CASE
08/06/2013	WARRANT RETURNED SERVED
08/06/2013	Indictment Warrant Judicial Officer: Kelley, Kim L
08/06/2013	CASE ASSIGNED TO JUDGE Judicial Officer: Kouri, Stephen A

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
PEORIA COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	Case No. 13 CF 741
JOHN MCCAVITT,	)	
Defendant.	)	

JURY TRIAL - DAY 3

REPORT OF PROCEEDINGS of the Jury Trial had before **CIRCUIT JUDGE KEVIN W. LYONS**, on March 19, 2014.

APPEARANCES:

MR. GERALD W. BRADY, JR.,
State's Attorney of Peoria County, and by
MS. NANCY MERMELSTEIN and MR. JEREMY BEARD,
Assistant State's Attorneys,
For the People of the State of Illinois.

MR. KEVIN F. SULLIVAN,
Attorney at Law,
For the Defendant, John McCavitt.

Tana J. Hess, RMR, CRR
Official Court Reporter
Peoria County Courthouse
324 Main Street, Room 215
Peoria, IL 61602

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

has knocked indicating a verdict; is that the case?

THE BAILIFF: That's correct.

THE COURT: Okay. Are the parties ready to have the jury come in?

MS. MERMELSTEIN: Yes.

MR. BEARD: Yes, Judge.

THE COURT: Let's bring them in.

(Whereupon the jury entered the courtroom.)

THE COURT: All right. Let the record reflect the jury has re-entered the room, and Mr. Allison, it appears to me that you're holding an envelope, so I will presume that you are the foreperson; is that right?

THE FOREPERSON: Yes, sir.

THE COURT: Has the jury reached a unanimous verdict?

THE FOREPERSON: Yes, we have.

THE COURT: Would you please pass the envelope to the bailiff who will give it to me?

All right. And the verdict reads, "We, the jury, find the Defendant, John McCavitt, not guilty."

Do either side wish to have the jury

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

polled?

MS. MERMELSTEIN: The People waive.

MR. SULLIVAN: No, Your Honor.

THE COURT: Okay. Ladies and gentlemen, thank you for your service on behalf of your friends and neighbors and those of us who are part of the County of Peoria and own this courthouse, we appreciate that. We know that justice can only be arrived at one case, one face, one name at a time, and that's how we approached this case.

If you need some assistance in getting to where you need to go to, Kenny will assist you, or if you have some questions, you may also stick around.

The admonition I gave you before about not discussing the case with anyone is removed. You may discuss the case or not with whomever you want. Thank you very much.

(Whereupon the jury was excused from the courtroom.)

THE COURT: All right. There is the question of bond, but that's something that can be returned; is that right?

MR. SULLIVAN: Yes.

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

THE COURT: Okay. Then all the conditions of bond that had been applied before, Mr. McCavitt, are removed, and the case would be concluded with return of bond. Thank you.

MR. SULLIVAN: Judge, there were also some items confiscated at the time I believe that the search warrant was executed. Those involved I think some guns, some -- more like collector guns, not anything out of the ordinary. We'd ask that those be returned as well.

THE COURT: Well, I'll tell you what. Since there are a few of this and a few of that and involve weapons, maybe you could put that in the form of a motion, and we could address it sometime shortly. That way everybody would have a chance to digest it.

MR. SULLIVAN: Okay. Will do.

THE COURT: Okay? Thank you all.

3:52 p.m.

WHICH WERE ALL THE PROCEEDINGS HAD

ON SAID DAY IN SAID CAUSE

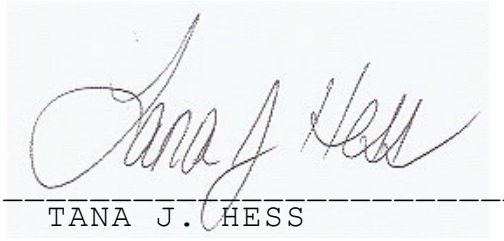
SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

IN THE TENTH JUDICIAL CIRCUIT OF
THE STATE OF ILLINOIS
PEORIA COUNTY, ILLINOIS

REPORTER'S CERTIFICATE

I, **TANA J. HESS,, RMR, RPR, CRR, CBC, CCP,** an Official Court Reporter in and for the Tenth Judicial Circuit of the State of Illinois, Peoria County, do hereby certify that I reported in machine shorthand the foregoing proceedings had before **CIRCUIT JUDGE KEVIN W. LYONS**, Judge of said Court on said date, and that I thereafter caused the same to be transcribed into typewriting, which I now certify to be a true and accurate transcript of the proceedings had on said date in said cause.

Dated this 28th day of August, 2020.



TANA J. HESS
RMR, RPR, CRR, CBC, CCP
Official Court Reporter

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

CLERK OF THE
CIRCUIT COURT
PEORIA COUNTY, IL

UNITED STATES OF AMERICA
STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
PEORIA COUNTY

14 MAR 24 A 10:10
ROBERT M SPEARS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No.: 13 CF 741**
	)	
JOHN T. MCCAVITT,	)	
	)	
Defendant.	)	

MOTION FOR RETURN OF CONFISCATED PROPERTY

NOW COMES Defendant, **JOHN T. MCCAVITT**, by and through his Attorney, **KEVIN F. SULLIVAN**, and states the following in support of this Motion for Return of Confiscated Property:

Introduction

1. That on August 6th, 2013, Defendant, **JOHN T. MCCAVITT**, was charged by Indictment with the offenses of Aggravated Criminal Sexual Assault (720 ILCS 5/11-1.30(a)(4) *et seg.*)(Class X Felony) and Criminal Sexual Assault (720 ILCS 5/11-1.20(a)(1) *et seg.*)(Class 1 Felony);

2. That at the time of the arrest of Defendant, **JOHN T. MCCAVITT**, law enforcement personnel confiscated various property from his residence which belonged to him and his father, including but not limited to collector weapons;

3. That on March 19, 2014, this Court entered a judgment of

Kevin F. Sullivan
Attorney at Law
110 SW Jefferson
Suite 530
Peoria, IL 61602
(309) 672-2009

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

acquittal after a verdict of not guilty as to all charges;

4. That all property confiscated by law enforcement personnel is legal and Defendant, **JOHN T. MCCAVITT**, is properly credentialed to receive and possess such property, and therefore, he should be entitled to return of the same;

5. That Defendant, **JOHN T. MCCAVITT**, has been discharged from the jurisdiction and authority of this Court and law enforcement personnel should be ordered to return such seized property *instanter*;

6. That this Motion for Return of Confiscated Property is filed in good faith, this pleading is not filed for any vexatious or improper purpose, or to create any additional or unnecessary work for law enforcement personnel.

Conclusion

WHEREFORE, Defendant, **JOHN T. MCCAVITT**, hereby requests this Court, upon reviewing this Motion for Return of Confiscated Property, and after considering the circumstances herein, grant the requested relief, and grant such further and other relief this Court deems appropriate and just under these circumstances.

Date: March 22nd, 2014.

JOHN T. MCCAVITT, Defendant,

KEVIN F. SULLIVAN
Attorney at Law

Kevin F. Sullivan
Attorney at Law
110 SW Jefferson
Suite 530
Peoria, IL 61602
(309) 672-2009

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

STATE OF ILLINOIS, PEORIA COUNTY
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff

FILED
ROBERT M. SPEARS
APR 24 2014
CLERK OF THE CIRCUIT COURT
PEORIA COUNTY, ILLINOIS

VS. John McCourtt Defendant

Case No. 13 CF 741

Order

Judge: Lyons	Court Reporter: CF	Pltf. Atty: Voss
Date: 4-24-14 Court Room 222	Clerk: Deb	Deft. Atty: Sullivan

The Defendant having been called in ~~Open Court~~ on this date, and:

- [X] 1. Defendant is present in custody / out of custody;
- [ ] 2. Defendant is informed of the charge in the _____ and furnished with a copy thereof;
- [ ] 3. The Defendant desires Court appointed counsel and the Court determines the Defendant is / is not indigent;
- [ ] 4. The Defendant request additional time for private counsel to appear;
- [X] 5. Counsel identified above appears for the Defendant;
- [ ] 6. The Defendant waives the reading or explanation of the charge;
- [ ] 7. The Defendant moves that the People furnish Discovery pursuant to Illinois Supreme Court Rules;
- [ ] 8. The People move that the Defendant furnish Discovery pursuant to Illinois Supreme Court Rules;
- [ ] 9. The Defendant enters a plea of Not Guilty to each count of the charge;
- [ ] 10. The Defendant is advised pursuant to 725 ILCS 5/115-4.1 of the consequences of the failure to appear for trial and sentencing;
- [ ] 11. The Defendant waives a Jury Trial and requests a Bench Trial after admonition;
- [ ] 12. The People / Defendant move(s) for a continuance;
- [ ] 13. The Defendant moves for reduction of bail;
- [ ] 14. The Defendant fails to appear;
- [X] 15. Hearing held on People's / Defendant's Motion for: RETURN OF SEIZED PROPERTY
- [ ] 16. Defendant advised that Bond Money is presumed to be the property of the Defendant and Bond Money maybe used for Costs, Fine, Restitution, Attorney Fees, or other purposes authorized by the Court;
- [ ] 17. Other: _____

IT IS HEREBY ORDERED THAT:

- [ ] A The Public Defender is / is not appointed for the defendant.
- [ ] B. This matter is continued on Defendant's / People's Motion to _____, 20___, at _____ A.M. / P.M. for _____.
- [ ] C. The People are to furnish Discovery pursuant to Supreme Court Rules By _____, 20___.
- [ ] D. The Defendant is to furnish Discovery pursuant to Supreme Court Rules By _____, 20___.
- [X] E. The People's / Defendant's Motion _____
- [ ] F. The Scheduling Conference is set for _____, 20_____, at _____ A.M. /P.M.
- [ ] G. The Jury / Bench Trial is set for _____, 20_____, at _____ A.M. /P.M.
- [ ] H. The Defendant's Motion for bond reduction is [ ] granted [ ] denied. Bail set at $_____
- [ ] I. A Warrant of Arrest for the Defendant issue with bail set at $_____
- [ ] J. The Bond Forfeiture Order entered herein on _____ is vacated.
- [ ] K. The Warrant of Arrest ordered to issue on _____ is recalled.
- [ ] L. People to Elect within _____ days.
- [ ] M. Trial / Hearing Date of _____ is vacated.
- [ ] N. Subpoenas to remain in full force and effect.
- [X] O. Other: ILLINOIS STATE POLICE SHALL RETURN ALL GUNS & WEAPONS INSTRUMENT TO JOHN MCCOURTT INCLUDING AMMUNITION

DATE ENTERED: 4-24-14

JUDGE OF THE TENTH JUDICIAL CIRCUIT

AS MOTION IS GENERALLY CONTINUED

WHITE - CLERK'S COPY CANARY - STATE'S COPY PINK - DEFENDANT'S COPY GOLD- SHERIFF'S COPY

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL DISTRICT
PEORIA COUNTY, ILLINOIS

FILED
ROBERT M. SPEARS
DEC 01 2017
CLERK OF THE CIRCUIT COURT
PEORIA COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 14 CF 282**
	)	
JOHN McCAVITT,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: Third District Appellate Court of Illinois.

(2) Trial Judge: Honorable Judge Albert L. Purham, Jr.

(3) Name of appellant and address to which notices shall be sent.

Name: All notices may be sent to Defendant's attorney listed below.

(4) Name and address of appellant's attorney on appeal.

Name: Joshua B. Kutnick, 900 W. Jackson Blvd., Ste. 5W, Chicago, Illinois 60607,

jkutnick@gmail.com, 312-441-0211.

If appellant is indigent and has no attorney, does he want one appointed? N/A

(5) Date(s) of judgment or order: July 14, 2016 and November 17, 2017.

(6) Offense(s) of which convicted: Child Pornography, 3 counts, Class 3 and 11 counts, Class 2.

(7) Sentence: 5 yrs IDOC + 4 yrs. Probation (Sex Offender)

(8) Date Notice Filed: December 1, 2017.

(Signed) J Kutnick

Joshua B. Kutnick – Attorney for Defendant

SUBMITTED - 10755530 - Criminal Appeals, OAG - 10/13/2020 11:14 AM

Direct appeals

People of the State of Illinois
VS

Case No. 14 CF 282

John McCavitt

NOTICE OF APPEAL

FILED
ROBERT M. SPEARS
DEC 11 2017
CLERK OF THE CIRCUIT COURT
PEORIA COUNTY, ILLINOIS

(1) Court to which appeal is taken:

Appellate Court of Illinois, Third Judicial District

(2) Name of defendant and address to which notices shall be sent:
Name: John McCavitt
Address: Peoria County Jail
301 Maxwell Road
Peoria, IL 61604

(3) Name and address of defendant's attorney on appeal:

Name: Peter A. Carusona
Address: Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531

(4) Date of judgment or order: 12/1/2017
Sentencing Order and Motion to Reconsider

(5) Offense(s) of which convicted: 720 ILCS 5/11-20.B(a)(6)Child Pornography

(6) Sentence(s): 5 Years DOC

(7) Nature of order appealed from:

Robert M Spears
Clerk of the Circuit Clerk
By: Deputy

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Address: Peoria County Jail
301 Maxwell Road
Peoria, IL 61604

(3) Name and address of defendant's attorney on appeal:

Name: Joshua Bateman Kutnick
Address: 900 W Jackson Blvd Suite 5W
Chicago, IL 60607
(312-441-0211

(4) Date of judgment or order: 12/1/2017
Sentencing Order, Motion to Reconsider

(5) Offense(s) of which convicted: 720 ILCS 5/11-20.B(a)(6)
Child Pornography

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By: **Deputy**

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 13, 2020, the **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses of the persons named below:

Joshua Kutnick
Joshua@kutnicklaw.com
Counsel for Defendant-Appellee

Thomas Arado
Deputy Director
Justin Nicolosi
Staff Attorney
State's Attorneys Appellate Prosecutor
3rddistrict@ilsaap.org

Hon. Jodi Hoos
Peoria County State's Attorney
Dave Gast
First Assistant State's Attorney
DGast@peoriacounty.org

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen duplicate paper copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Leah M. Bendik
LEAH M. BENDIK
Assistant Attorney General

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