No. 125550

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	Appeal from the Appellate Court of Illinois, Third Judicial 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.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ELDAD Z. MALAMUTH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2235
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
4/21/2021 10:48 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

TABLE OF CONTENTS

Page(s)

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

ARGUMENT

At every stage, officers in this case acted prudently to ensure that their conduct comported with the Fourth Amendment. They obtained a warrant to search defendant's hard drive for evidence of criminal sexual assault. When this initial search revealed evidence of unauthorized video recording of a separate victim, police obtained a second warrant to search for evidence of that crime. After the second search revealed evidence of child pornography, officers obtained a third search warrant permitting a search for evidence of that third crime. Thus, the officers' conduct comported with the Fourth Amendment. Even if it did not, the good-faith exception to the exclusionary rule should apply to avoid the drastic remedy of excluding evidence of defendant's guilt of child pornography.

I. The July 24, 2013 Warrant Sanctioned a Search for Evidence of Unauthorized Video Recording of Another Victim.

Throughout his brief, defendant mischaracterizes the second warrant obtained in 2013 as being limited to evidence of the sexual assault of a single victim, the crime for which he was acquitted in March 2014. But the complaint for the second warrant, which was obtained on July 24, 2013, explained that "[a]dditionally recovered videos display an unidentified female using the bathroom and taking a shower" and this "unidentified female appears to have no knowledge she was being recorded." A27. The second warrant application expressly targeted the crime of "Unauthorized Video Recording/Live Video Transmission in violation of 720 ILCS 5/26-4." A25.

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

And the warrant issued authorized the search of all digital images for "Unauthorized Video Recording/Live Video Transmission 720 ILCS 5/26-4." A28. Thus, the July 24, 2013 warrant authorized law enforcement to search for evidence of the unauthorized video recording of another victim, a crime for which defendant was later charged and convicted in addition to the child pornography convictions in this case. *See* Peo. Br. 5. Indeed, the circuit court specifically found that that the second warrant sanctioned a search for unauthorized video recording, C71, and noted that the warrants were never challenged, C74; *see also* C76 (finding again that second warrant authorized search for evidence of unauthorized video recording and noting that the warrant and resulting search were not challenged and presumptively reasonable). As now explained, defendant's failure to distinguish the two warrants undercuts several of his arguments.

II. Feehan Did Not Need a New Search Warrant In March 2014.

A. The property-based approach is inapplicable because there was no common law trespass.

Defendant faults the People's opening brief for failing to defend the search of the hard drive copy under the property-based approach. *See* Def. Br. 3. To be sure, this was not the focus of the opening brief, both because that approach was not relied upon below by either defendant or the appellate court, and because it is entirely inapposite.[1]

[1] Contrary to defendant's assertion, Def. Br. 3, the parties briefed the property-based claim in *People v. Lindsey,* 2020 IL 124289. More to the

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

"For much of our history, Fourth Amendment search doctrine was 'tied to common-law trespass' and focused on whether the Government 'obtains information by physically intruding on a constitutionally protected area.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *United States v. Jones,* 565 U.S. 400, 405, 406, n.3 (2012)). This tradition informs the property-based analysis, under which a search occurs "[w]hen the government obtains information by physically intruding on persons, houses, papers, or effects." *Lindsey*, 2020 IL 124289, ¶¶ 17, 20; *see also Jones*, 565 U.S. at 404-05 ("It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information."). The cases defendant cites confirm that this approach is "focused on the common law of property," and the key is "whether the police committed a trespass when conducting the search." *United States v. Sweeney*, 821 F.3d 893, 899 (7th Cir. 2016) (cited Def. Br. 4).

As defendant recognizes, "[u]sing the property-based construct to determine whether a search has occurred is 'easy.'" Def. Br. 6 (citing *Florida v. Jardines*, 569 U.S. 1, 11 (2013)). Here, the government did not physically intrude on a constitutionally protected area when it viewed the copy of the EnCase file. Nor did it commit any common law trespass. Thus, there was no search under the property-based approach.

---

point, *Lindsey* does not hold that parties *must* brief both the privacy and property-based approaches in every case presenting a Fourth Amendment issue.

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

It makes no difference under the property-based approach that the government action secured information from defendant. In *Olmstead v. United States,* 277 U.S. 438 (1928), the Supreme Court held that wiretaps attached to telephone wires on public streets did not constitute Fourth Amendment searches even though they revealed information because "[t]here was no entry of the houses or offices of the defendants." *Id.* at 464.

Defendant cites no case from any jurisdiction that suggests that when a government actor views a copy of a digital file pursuant to a search warrant, it commits a trespass or a physical intrusion on a protected area. *United States v. Jefferson*, 571 F. Supp. 2d 696 (E.D. Va. 2008), cited Def. Br. 11, applied the privacy, not property, analysis. *See Jefferson*, 571 F. Supp, 2d at 701 (search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed"). And in *United States v. Loera*, 333 F. Supp. 3d 172 (E.D.N.Y. 2018), cited Def. Br. 11-12, the court noted the many cases that "emphasize how the copying of data does not meaningfully interfere with the data owner's possessory interest because the copying does not alter the data itself or the owner's ability to access it." *Id.* at 185; *see also id.* ("I agree with the reasoning in these district court cases – it is difficult to see how digital duplication interferes with a *possessory* interest because copying does not damage the data or interfere with its owner's ability to use it.") (emphasis in original). *Loera* did find, however, that duplication "could

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

be understood as an interference with the owner's privacy interest in its contents." *Id.* at 186.

Similarly, the cases defendant cites for the proposition that copies of digital files are "unmistakably constitutionally protected property and thus 'papers' within the scope of this term's original meaning," Def. Br. 8, do not establish that viewing the files was a common law trespass or otherwise implicated the property-based approach. *United States v. Ganias*, 755 F.3d 125, 138 (2d Cir. 2014), cited Def. Br. 8, was reversed on rehearing en banc, 824 F.3d 199 (2d Cir. 2016), and, in any event, involved a seizure, not a search, of files nonresponsive to a warrant. In *People v. Thompson*, 51 Misc. 3d 693 (N.Y. Sup. Ct. 2016), cited Def. Br. 8, the court relied on the subsequently overturned *Ganias* decision; moreover, it focused not on the property analysis but the "question of the degree to which reasonable expectations of privacy apply to electronic communications." *Id.* at 695-96, 727. Finally, *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), cited Def. Br. 9, involved a border search, did not address the property approach, but was rather "a case directly implicating substantial personal privacy interests." *Id.* 956.

Thus, it is clear — as the courts and parties recognized below — that here there was no search under the property-based approach.

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

B. Feehan's review of a copy of defendant's hard drive did not violate the Fourth Amendment because it was no broader than that authorized by the unchallenged search warrants.

Once law enforcement obtains a warrant authorizing it to seize and search a person's property, that reduces any expectation of privacy "for at least a reasonable time and to a reasonable extent." *United States v. Edwards*, 415 U.S. 800, 808-09 (1974) (internal quotation marks omitted). Thus, Feehan's examination of the copy was permissible because it was no broader than what was authorized by the 2013 warrants. *See* Peo. Br. 12-13.

Defendant responds that one has a legitimate expectation of privacy in one's computer (and cell phone). Def. Br. 14-19. But that is undisputed. Defendant overlooks that law enforcement officers had secured two valid warrants to seize defendant's computer and search any and all digital images for evidence of offenses including aggravated criminal sexual assault, unlawful restraint, and unauthorized video recording/live video transmission. *See* A29; *see also* A1, ¶ 4, A8. Thus, there was no unreasonable search of those digital images, which included the child pornography images that formed the basis for his convictions in this case.

Defendant attempts to distinguish *Edwards* on the ground that it involved a "second look" at items seized during a lawful arrest, while this case involves items seized pursuant to a warrant. Def. Br. 34. But *Edwards* stands for the straightforward proposition that a second inspection of evidence, "when previously exposed to police view under unobjectionable

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

circumstances, does not invade any substantial privacy interest." *People v. Richards*, 94 Ill. 2d 92, 96 (1983). That reasoning is equally, if not more, applicable when it comes to searches pursuant to a warrant. Searches incident to custodial arrests are justified in large part by safety concerns, including searching for weapons and instruments of escape. *Edwards*, 415 U.S. at 802. A search pursuant to a warrant specifically aims to search for the target items, reducing the expectation of privacy further than when the search is justified by safety concerns only. And, as the People's opening brief pointed out, courts have applied the "second look" doctrine to items searched pursuant to a search warrant. *See United States v. Huntoon*, 796 F. App'x 362, 364 (9th Cir. 2019) (cited Peo. Br. 13) (federal agent's warrantless search of copy of hard drive made two years earlier when state police executed valid search warrant did not violate Fourth Amendment as later search did not exceed bounds of warrant); *United States v. Lackner*, 535 F. App'x 175, 180-81 (3d Cir. 2013) (cited Peo. Br. 13) (items lawfully seized pursuant to state search warrant for evidence of endangering welfare of child could be searched two years later by federal agents seeking evidence of same crime involving second minor).

Defendant is similarly mistaken when he argues that *Riley v. California*, 573 U.S. 373 (2014), means that the "second look doctrine does not apply in the context of digital searches because the user and owner of digital data stored on electronic device maintains the reasonable expectation

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

of privacy in his private digital information even if the device on which it is stored was lawfully seized." Def. Br. 35-36. *Riley* held that the *search incident to arrest* doctrine did not allow officers to search cell phone data. 573 U.S. at 401. But that does not mean that law enforcement may not rely on the "second look" doctrine to search digital files that are within the scope of a valid search warrant. Indeed, *Riley* expressly stated that its "holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* Here, officers obtained two warrants to search the copy of defendant's hard drive. Under *Edwards* and *Richards*, they did not need yet another warrant to search materials already exposed to police view under unobjectionable circumstances. *See also United States v. Beasley*, No. 13-10112-01-JTM, 2016 WL 502023, *8 (D. Kan. Feb. 8, 2016) (*Riley* inapplicable when cell phones searched via warrant authorizing examination of electronic information).

Further, *People v. Hughes*, No. 158652, 2020 WL 8022850 (Mich. Dec. 28, 2020), cited Def. Br. 34, 36, does not support defendant's assertion that *Riley* means *Edwards* does not apply here. In *Hughes*, officers obtained a warrant to search a cell phone for evidence of drug trafficking using certain search terms, then later searched the phone for evidence related to an armed robbery using different search terms. 2020 WL 8022850, *4-5. *Hughes* explained that *Riley* and *Edwards* together required the "conclusion that the

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

later review of defendant's cell-phone data for evidence of an armed robbery was only lawful if this review was permissible in the first instance, i.e., if it was within the scope of the warrant issued to search for evidence of drug trafficking." *Id.* at *10. *Hughes* quoted with approval *State v. Betterley*, 529 N.W.2d 216 (Wis. 1995), which held, based on *Edwards*, that "the permissible extent of the second look is defined by what the police could have lawfully done without violating the defendant's reasonable expectations of privacy during the first search." *Id.* at 220. In *Hughes*, the second look exceeded the scope of the first look because it used different search terms. Here, by contrast, because the 2013 warrants authorized the viewing of *all* digital images, Feehan's search was within the scope of the 2013 warrants.

The applicability of the "second look" doctrine here is not called into question by the fact that Feehan discovered evidence of a crime not listed in the "first look" warrants because the evidence was discovered in plain view. *See* Peo. Br. 16. 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 v. California*, 496 U.S. 128, 136-37 (1990) (internal quotation marks omitted). For computer searches, the question is whether an officer is exploring hard drive locations and opening files responsive to the warrant. *See, e.g.*, *United States v. Johnston*, 789 F.3d 934, 941-43 (9th Cir. 2015)

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

(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).

Defendant's assertion that the plain view doctrine does not apply because "Feehan did not have a lawful right to start a search after [defendant's] acquittal because he did not have a warrant," Def. Br. 39, misses the mark. Defendant does not, and cannot, dispute that, before his trial, the first warrant authorized a search of all digital images for evidence of criminal sexual assault (the first look), and that the child pornography Feehan discovered during the second look was among the images already exposed to police during this first look. And, as discussed, the second warrant authorized a search for evidence of unauthorized video recording, for which defendant had not yet been charged, but ultimately was convicted, *see* Section I, *supra*, rendering defendant's acquittal for criminal sexual assault immaterial. Contrary to amici's suggestion, ACLU Br. 9, 11, it makes no difference that a different law enforcement agency secured the earlier warrants. *See Richards*, 94 Ill. 2d at 93-97, 100 (Peoria County detective's "second look" at necklace legally searched and inventoried upon defendant's arrest by Tazewell County officer did not violate the Fourth Amendment); *see also* Peo. Br. 14. Thus, Feehan's examination of the copy of the hard drive was permissible because it was no broader than that authorized by the 2013 warrants.

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

C. Feehan's examination was not a Fourth Amendment search because of defendant's diminished privacy interests in copies of his hard drive.

Even if this Court declines to hold that Feehan's search was a permissible "second look" at the files the July 2013 warrants gave officers authority to search, three factors demonstrate that his examination was not a Fourth Amendment search for the independent reason that defendant's privacy interest in the copy of his hard drive were diminished: (1) officers had already viewed the copy pursuant to the presumptively valid warrants; (2) the item searched was merely a copy of a copy of the computer's hard drive; and (3) defendant did not seek the return or destruction of the hard drive copies (or the computer itself) when pursuing return of his seized property. *See* Peo. Br. 17-26.

Defendant responds that his privacy interests remain the same even though the item searched was a copy of a copy of the hard drive obtained pursuant to a valid warrant, Def. Br. 19-23, but none of the cases he cites supports his position. In *Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992), cited Def. Br. 20, the Supreme Court held that under circumstances where the government had retained copies of records obtained via an *unlawful* summons, the case was not moot and meaningful relief could be provided (namely, the return or destruction of the copies). The case says nothing about the nature of privacy interests implicated when the government makes copies of records that were lawfully obtained.

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

Similarly, *United States v. Metter*, 860 F. Supp. 2d 205 (E.D.N.Y. 2012), cited Def. Br. 21-22, held that it was unreasonable for the government to wait more than 15 months to begin determining whether seized electronic data fell outside the scope of a search warrant. *Id.* at 212. Like *Church of Scientology*, *Metter* provided no comment on the scope of the privacy interests implicated by copies of data that were responsive to a valid search warrant. *See United States v. Jarman*, 847 F.3d 259, 266-67 (5th Cir. 2017) (distinguishing *Metter* and holding that suppression was not required when government completed privilege review of electronic data in eight months and full review in 23 months).

Finally, *Carpenter*, cited Def. Br. 24, involved cell site location information obtained *without* a warrant; the Supreme Court noted that the outcome would have been different had the government obtained a warrant. 138 S. Ct. at 2221. Thus, *Carpenter* also sheds no light on the privacy interests implicated by copies of electronic data seized and searched pursuant to a valid warrant.

Defendant similarly misses the point when he argues that citizens cannot "expect to keep sensitive, private affairs private if the government can have unfettered access to that information though a forensically manufactured duplicate." Def. Br. 23. Defendant overlooks that the officers here acted pursuant to a lawful search warrant, and viewed materials within the scope of that warrant.

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

Defendant next contests the People's representation that he did not seek the return or destruction of the hard drive copies (or the computer itself) following his acquittal, contending that he "steadfastly asserted that he owned and possessed his desktop tower, personal computer and accompanying hard drive when the police seized it from his home." Def. Br. 23 (citing R10). But defendant cites to his testimony at the September 2014 suppression hearing in *this* case, given months after Feehan had already discovered the child pornography.

The evidence contemporaneous to his acquittal of sexual assault tells the true story. On March 19, 2014, defendant's attorney orally requested the return of "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." A36. The circuit judge requested a written motion, and counsel filed one on March 24, 2014, addressing "various property from [defendant's] residence which belonged to him and his father, including but not limited to collector weapons." A38; *see also* A39 (asserting that the property sought "is legal and Defendant . . . is properly credentialed to receive and possess such property"). By the time counsel filed his motion on March 24, officers had already restarted their review, and Feehan discovered the child pornography that same day. A2, ¶ 6, A10. It was not until April 24, 2014, that the circuit court held a hearing on the motion and ordered that the "Illinois State Police shall return all guns

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

and weapons instanter." A40. In short, defendant never specifically requested return of his computer or his hard drive, or the destruction of any copies of his hard drive, even though copies of the digital files had been used in his previous trial. *See* R16, 23. And the court's order makes plain that it, too, understood defendant's request to encompass chiefly, if not exclusively, the firearms.[2]

Thus, not only would any formal request for the return of his computer and any copies of his hard drive have come too late, but neither defendant's oral nor written motion requested the return, or destruction, of his computer and/or any hard drive copies.[3] Even putting the "second look" doctrine to one side, then, defendant did not have sufficient privacy interests in the copies of his hard drive to render a search of materials responsive to the 2013 warrants a search.

---

[2] The assertion that the "various property" defendant sought return of meant all of his seized property, including his computer, is also belied by the other items seized during the execution of the original July 2013 warrants, which included "restraints, [a] black blindfold, lubricant, and a covert recording system hidden inside Kleenex boxes." A27. Defendant cannot seriously contend that his motion asked for return of all seized property, which omitted any mention of the blindfold and restraints.

[3] Defendant misinterprets the People's argument as being that his failure to seek the return of the computer or destruction of hard drive copies is relevant to whether there was a Fourth Amendment search because he "abandoned" his property. Def. Br. 24. But the People did not have to demonstrate that defendant abandoned his computer, which was seized pursuant to a valid search warrant. Nor did he have to abandon the digital images that the warrant specifically authorized the People to search.

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

III. Even if Feehan's Examination Was a Search, It Was Reasonable.

While defendant begins by criticizing "the State's invitation to apply an *ad hoc* balancing test to determine whether the warrantless search was reasonable," Def. Br. 26-27, he soon concedes (as he must) that the "reasonableness of a particular type of search is initially assessed by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests," Def. Br. 27 (internal quotation marks omitted). Feehan's search of the hard drive copy was reasonable given the minimal intrusion on defendant's diminished privacy interests in copies of his hard drive and law enforcement's compelling, and diligently pursued, interests in reviewing evidence that defendant committed serious crimes. *See* Peo. Br. 23-26.

Defendant asserts that the "type of search" made it unreasonable — i.e., because "the search of the duplicate hard drive was undertaken to investigate [defendant's] alleged participation in criminal activity other than the crimes listed in the original warrant." Def. Br. 27-28. But Feehan first searched for evidence of unauthorized video recording, an offense that was included in the July 24, 2013 warrant. *See* Section I, *supra*. While conducting this search, Feehan *also* discovered images of child pornography.

Defendant incorrectly argues that the People forfeited this argument. Def. Br. 29-30. But the People argued at trial that Feehan did not need an additional warrant to view the files, *see* R51; R60-61, and repeated this

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

argument before this Court, Peo. Br. 20. Defendant points to the People's purported concession in the appellate court "'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.'" Def. Br. 30 (quoting A5). But it is the *July 24*, 2013 warrant that authorized the search for evidence of unauthorized video recording. And defendant has provided this Court with no copies of the appellate court briefs, *see* Ill. S. Ct. R. 318(c), forfeiting any argument about forfeiture in the appellate court. Finally, this Court "only requires parties to preserve issues or claims for appeal. They are not required to limit their arguments in this court to the same ones made in the trial and appellate courts." *1010 Lake Shore Ass'n v. Deutsche Bank Nat'l Trust Co.*, 2015 IL 118372, ¶ 18 (citing *Brunton v. Kruger*, 2015 IL 117663, ¶ 76).

Defendant also mistakenly argues that Feehan needed a new warrant because he was broadening the scope of the examination beyond the first warrant's authorization to search for evidence of the sexual assault and that lone victim. Def. Br. 31, 33. As discussed, however, the second, July 24, 2013 warrant authorized search for evidence of unauthorized video recording of a different victim. While searching for evidence of that crime, officers discovered two images of child pornography, at which point they paused their search until they obtained a third warrant. None of the cases defendant cites demonstrates any impropriety about such a procedure. *See United States v.*

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

Nasher-Alneam, 399 F. Supp. 3d 579, 584-92 (S.D.W. Va. 2019) (cited Def. Br. 31) (government searched files nonresponsive to warrant); *People v. Raehal*, 401 P.3d 117, 124 (Colo. Ct. App. 2017) (cited Def. Br. 31) (no second warrant required because evidence searched for was within scope of original warrant, despite passage of time); *United States v. Hulscher*, 4:16-CR-40070-01-KES, 2017 WL 657436, *2 (D.S.D. Feb. 17, 2017) (cited Def. Br. 31) (electronic data searched unresponsive to warrant); *United States v. Schlingloff*, 901 F. Supp. 2d 1101, 1102, 1104-06 (C.D. Ill. 2012) (cited Def. Br. 31) (officers with warrant to search for evidence of passport fraud or identity theft impermissibly used program designed to discover child pornography).

Indeed, the cases defendant cites confirm that the officers here acted appropriately. In *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), cited Def. Br. 31, the Tenth Circuit held that a warrant authorizing the search of a computer for evidence of drug trafficking did not authorize a search of all JPG files, and once one JPG file revealed evidence of child pornography, the officer should have obtained another warrant. *Id.* at 1274. That is, of course, exactly what Feehan did here. Indeed, the Tenth Circuit subsequently held that "the *Carey* holding was limited" and "fact intense," while finding no Fourth Amendment violation when officers with a warrant to search for evidence of illegal drug manufacturing and trafficking examined a copy of digital files for trophy photos — photos of a person holding drugs and money — and discovered child pornography, then obtained an additional

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

warrant. *United States v. Burgess*, 576 F.3d 1078, 1084, 1094-95 (10th Cir. 2009); *see also United States v. Mann*, 592 F.3d 779, 783-84 (7th Cir. 2010) (officers did not exceed scope of warrant allowing search of computers of man alleged to have filmed females changing in locker room when they discovered child pornography, explaining that in *Carey*, officer "'made clear as he opened each of the JPG files he was not looking for evidence of drug trafficking'" and had "'abandoned that search to look for more child pornography.'") (quoting *Carey,* 172 F.3d at 1273); *United States v. Raney*, 342 F.3d 551, 559 (7th Cir. 2003) (explaining that in "*Carey,* the Tenth Circuit held the first image of child pornography, which the agent had stumbled upon in his search for narcotics-related evidence, admissible under the plain-view doctrine").

Second, while defendant focuses on the fact that Feehan believed that there were more victims, Def. Br. 32, that is because officers had already seen the images of the unidentified victim during the original search, prior to the acquittal, R32. Law enforcement acted reasonably and had a compelling interest in reviewing evidence of another victim already observed in plain view while executing a valid warrant.

Third, even if officers had not already seen evidence of other victims, the search was a proper means of conducting the Department's internal investigation, which could have resulted in employment action regardless of defendant's acquittal in the criminal prosecution. The fact that Feehan may have suspected that the review could lead to additional criminal charges, *see*

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

Def. Br. 32, is irrelevant. "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton*, 496 U.S. at 138.

Finally, no Fourth Amendment concern was raised by the fact that Feehan conducted his examination five days after defendant's acquittal for the sexual assault charges, because, in addition to the fact that the July 24, 2013 warrant authorized searching for evidence of unauthorized video recording of another victim, defendant's acquittal did not restore a legitimate privacy or possessory interest in any copies of his hard drive. Peo. Br. 27-32. Neither the Constitution nor Illinois law required that police immediately return all seized property (much less copies of that property) to defendant. *See id.* Indeed, even defendant appears to recognize that the appellate majority erred in holding that a Fourth Amendment violation occurred here because police, although entitled to retain copies of defendant's hard drive during his sexual assault trial, were required to "quickly" or "immediately" return the copies to him once the trial ended. A3-4, ¶¶ 21, 22, 24-26; *see also* Def. Br. 38 (asserting that whether law enforcement's retention of hard drive and copies post-acquittal was consistent with Fourth Amendment "is non-responsive to the pertinent issues" here).

Therefore, even if Feehan's examination was a search, it was reasonable given the minimal intrusion on defendant's diminished privacy

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

interests in materials subject to the unchallenged and presumptively valid search warrants and law enforcement's compelling interests in reviewing evidence that defendant committed sexually based criminal conduct. *See* Peo. Br. 23-26.

IV. Alternatively, the Good-Faith Exception to the Exclusionary Rule Applies.

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 of child pornography because a reasonably well-trained officer would have believed that his search was valid under the circumstances. *See* Peo. Br. 32-35.

Defendant's arguments to the contrary do not hold water. He asserts that the good-faith exception should not apply because the search exceeded the scope of the warrant. Def. Br. 42-43. But, again, the July 24, 2013 warrant authorized review of all digital images for a crime defendant had not yet been charged with, but ultimately would be, in addition to the child pornography convictions in this case. *See* Section I, *supra*. Nor was it a "general warrant." Def. Br. 43. Law enforcement obtained a warrant, based on probable cause, to search defendant's hard drive for digital images of a specific crime, criminal sexual assault. While doing so, they saw, in plain view, evidence of another crime, unauthorized videotaping. They then obtained a second warrant authorizing them to search for evidence of this crime. While searching for evidence of unauthorized videotaping, they saw,

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

in plain view, evidence of a third crime, child pornography. They then obtained a third warrant to search the digital images for this crime. At each juncture, officers viewed only material authorized by warrant. At each juncture, they obtained a new warrant to search for evidence of the newly suspected crime even though the material being viewed largely, if not entirely, overlapped. The circumstances were thus the opposite of a general warrant.

Finally, defendant relies on *Riley* for the proposition that digital data is treated differently, Def. Br. 35-36, but even if that were true, *Riley* was not issued until June 2014, after the child pornography was discovered on the copy defendant's hard drive. Because Illinois precedent at the time of the search authorized Feehan's review, the exclusionary rule should not apply. *See United States v. Miller*, 641 Fed. Appx. 242, 245 (4th Cir. 2016) (exclusionary rule did not apply to 2013 search even if improper under *Riley*).

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

CONCLUSION

This Court should reverse the judgment of the appellate court.

April 21, 2021

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ELDAD Z. MALAMUTH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2235
Eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

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, and the certificate of service is 5258 words.

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM

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 April 21, 2021, the **Reply Brief 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

James K. Leven
jameskleven@attorneyleven.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

Rebecca K. Glenberg
Roger Baldwin Foundation of ACLU, Inc.
rglenberg@aclu-il.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.

E-FILED
4/21/2021 10:48 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General

SUBMITTED - 13034576 - Criminal Appeals, OAG - 4/21/2021 10:48 AM