BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 22-CF-447

ROBERT WILSON DEAN, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 2018-CF1-5520

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ISSUES PRESENTED

I. Whether the warrant to search appellant Robert Dean's cell phone for evidence that he murdered his girlfriend was supported by probable cause and sufficiently particular, or whether the evidence collected is at least protected from suppression.

II. Whether law enforcement reasonably executed the warrant by following the procedures provided by Criminal Rule 41(e)(2) and consistently approved by federal case law, or whether the evidence collected is at least protected from suppression.

III. Whether any error in denying suppression was harmless, where Dean repeatedly confessed to the killing to friends and law enforcement, and the cell-phone evidence largely was largely duplicated by other unchallenged evidence and had little bearing on self-defense.

INTRODUCTION

Appellant Robert Dean stabbed his girlfriend, Tamiya White, to death with a screwdriver. Moments later, he arrived at his friend's home yelling, "I hope I killed that bitch!" In the hours after the stabbing, Dean confessed to three friends. And he soon admitted to the stabbing in interviews with police. DNA evidence corroborated the confessions. At trial, Dean argued that he could have committed the stabbing in self-defense, but no evidence—including Dean's own accounts to detectives and friends—supported a claim of self-defense.

On appeal, Dean contends that evidence collected from his cell phone pursuant to a search warrant should have been suppressed. But there is no need for this Court to wade into that issue here. The cell-phone evidence clearly had no bearing on the trial, given the overwhelming evidence against Dean, the lack of a viable defense, and the insignificance of the phone evidence to self-defense.

In any event, Dean's legal argument fail on the merits. Given the overwhelming showing of probable cause and the targeted search authorized by the warrant, the warrant was valid. Moreover, the government reasonably executed the warrant—indeed, Criminal Rule 41(e)(2) authorizes the very process that Dean questions. At the very least, law enforcement who obtained and executed the warrant under the then-governing case law acted in good faith. This Court should affirm.

COUNTERSTATEMENT OF THE CASE

On January 16, 2019, Dean was indicted for first-degree murder while armed (D.C. Code §§ 22-2101, 22-4502) (Record (R.) 13). A jury trial was held from October 20 to November 4, 2021, before the Honorable Marisa J. Demeo (R. A at 48-55). The jury could not reach a unanimous verdict on first-degree murder while armed, but they convicted Dean of the lesser-included offense of second-degree murder while armed (R. 108; 11/4 Transcript (Tr.) 3-4). (Unless otherwise noted, all transcripts are from 2021.) On May 20, 2022, the court sentenced Dean to 300 months of incarceration and five years of supervised release (R. 117). Dean noted an appeal on June 18, 2022 (R. 118; see also R. 119 (amended)).

Suppression Litigation

Cell Phone Search Warrant

Five days after White's murder, on April 5, Dean was shot (App'x D ¶ 26). Responding officers arrested him for White's murder and took him to the hospital for treatment (*id.*). During that arrest, police recovered Dean's cellular phone (*id.*). Detective Richard Rice eventually obtained two warrants to search Dean's phone. In 2018, the day after the arrest, a Superior Court judge signed a warrant to search Dean's phone (App'x C). At the time, the D.C. Department of Forensic Sciences (DFS) analyst could take only a "logical extraction" of the phone, which contained "the contents of a phone that could be seen if one were to view the phone and scroll

through," but not deleted content (see App'x D ¶ 28; R. 88 at 1-2). Police had separately obtained Dean's phone records, and they could see that the logical extraction was "missing" "some call and text data" (see App'x D ¶¶ 27-28). By January 2020, there was new technology allowing a "physical extraction," which would recover "some information which had been deleted from the phone" (App'x D ¶¶ 29, 33). After the Honorable Judith Smith signed that second warrant, the DFS analyst successfully obtained a physical extraction (R. 88 at 2).[1]

According to Detective Rice's affidavit, on March 31 around 4:58 p.m., White drove into a McDonald's parking lot near her apartment building and walked into the McDonald's, bleeding heavily from her mouth, nose, and neck (App'x D ¶¶ 6, 7, 11). Life-saving efforts failed (*id.* ¶¶ 4-5). An autopsy ruled her death a homicide, caused by multiple stab wounds (*id.*).

On April 2, W2—identified at trial as James Morris—called the crime tip line and reported that Dean had stabbed White multiple times with a screwdriver (App'x D ¶ 8). W2 had known Dean for many years, and he believed that Dean and the decedent had been together for approximately four months (*id.* ¶¶ 9, 14). At approximately 3:59 p.m. on March 31, Dean texted W2: "I feel that am about to go

[1] The 2018 and 2020 affidavits were essentially identical. Given that the evidence at trial came from the 2020 warrant's execution, the trial court—following the parties' leads—"determined the validity of the warrant by reviewing" the 2020 warrant (App. B at 6). We (like Dean) do the same here (see Dean Brief (Br.) 26 n.2).

to jail" (*id.* ¶ 10). W2 then called Dean at approximately 4:16 p.m. (*id.*). Sounding "crazy," Dean said that "he was angry at the decedent because she blew through his social security check in two days and then kicked him out of their apartment" (*id.*). Dean added "that he had been living in the decedent's apartment building's communal laundry room for the past two days and that the decedent would not answer the door for him" (*id.*). W2 agreed to meet Dean (*id.*). They arranged for W2 to pick Dean up at 1070 Mount Olivet Road, NE (White's building) (*id.*).

Around 5:00 p.m.—moments after White drove into the McDonald's parking lot—Dean called W2 and said to pick him up at a nearby building instead, which W2 did (App'x D ¶ 11). Dean then confessed to the killing:

> [Dean] confided in Witness 2 that he had just been involved in an argument with [his] girlfriend. [Dean] told Witness 2 that, during the argument, the decedent hit [Dean] and that [Dean] responded by stabbing the decedent up to thirty times with a screwdriver. [Dean] mentioned that he has stabbed the decedent at least once in her neck. [Dean] told Witness 2 that, following the stabbing, the decedent got into her car and drove up Mount Olivet Road, Northeast. The Defendant noted that the decedent appeared disoriented because she drove out of the apartment complex's parking lot with her door open. (*id.* ¶ 14.)

On April 1, W2 texted Dean to ask for the name of his girlfriend (App'x D ¶ 15). Dean replied "Tamiy White" (*id.*). On April 2, W2 called Dean to encourage him to turn himself in, but Dean assured W2 that "he would be OK because the police had no evidence against him" (*id.* ¶ 16).

W2 gave police the phone number that Dean had been using, which detectives

used to obtain phone records from Cricket Wireless through a separate court order (App'x D ¶ 13). According to those records, the number was registered to Dean, and he "had been using his cellular phone throughout the days before and immediately after the murder" (*id.* ¶¶ 13, 27). Further, in the detective's experience:

> [P]eople who commit crime in Washington, D.C., often use their cell phones in ways that reveal their location and/or activities before, after, or while engaging in crime. For example, this may include location information (*e.g.*, GPS data), app usage information (*e.g.*, Internet search inquiries), and images or video recordings relevant to the criminal activity. . . . Furthermore, based on my training and experience, I know that from call logs, text messages, emails, and any app enabling communication with others frequently include communications that shed light on a cell phone user's relationship with others and its tenor at any particular time, for example, in the case described above, the decedent and her family members. (*id.* ¶ 30.)

"Searching for the evidence described in this warrant application may require a range of data analysis techniques," the affidavit explained, given potential criminal efforts to evade detection, the "vast array of apps now available," limited effectiveness of "word searches," and the "complex interrelatedness of cell-phone data" (*id.* ¶¶ 34, 35). Law enforcement "intend[ed] to use whatever data analysis techniques appear necessary to locate and retrieve the evidence described" (*id.*).

The warrant thus authorized "the forensic examination" of Dean's cell phone "for the purpose of identifying the electronically stored information in Attachment B" (App. D attach. A). Judge Smith inserted handwritten limitations on the evidence targeted by the warrant, including narrowing the records to March 1–April 5 and

declining to authorize searches related to the shooting of Dean:

ATTACHMENT B

(3/1/2018 – 4/5/2018/ORS)

1. All records on the Device described in Attachment A that relate to the offenses of murder ~~and assault with intent to kill~~, as described in the instant affidavit, including:

   a. Any and all evidence related to the murder of Tamiya White;

   b. ~~Any and all evidence related to the shooting of Robert Dean;~~

   c. Any and all evidence regarding the relationship between Tamiya White and Robert Dean;

   d. Information relating to Dean's ~~additional suspects~~ motives and/or intent to commit the Offenses describe in the above affidavit;

   e. Any and all evidence related to the whereabouts of Dean on or about March 31, 2018, before and after the murder of Tamiya White;

   f. Any and all evidence related to the relationship between W-2 and Dean;

   g. Any and all evidence related to Dean's location and/or activities when the offenses described above occurred and during the periods of time before and after the Offense;

   h. Information relating to the Suspect's possession of a screwdriver;

   i. Communications relating to the offenses described in the above affidavits, including any communications among accomplices who helped facilitate or participated in the Offenses described in the above affidavits;

   j. Information relating to the Suspects' distinguishing characteristics (such as hairstyle, tattoos, and clothing) as compared to witness descriptions and identifications.

2. Evidence of user attribution showing who used or owned the Device at the time the things described in this warrant were created, edited, or deleted, such as logs, phonebooks, saved usernames and passwords, documents, images, and browsing history.

As used above, the terms "records" and "information" include all of the foregoing items of evidence in whatever form and by whatever means they may have been created or stored, including any form of computer or electronic storage.

Initial Motion to Suppress

In February 2020, Dean moved to suppress the data seized from his cell phone, arguing that the affidavit failed to establish probable cause (R. 43 at 4-11) and the

warrant was overbroad (*id.* at 11-14). The government disagreed, emphasizing W2's reports of Dean using the phone to communicate about the murder (R. 54). In addition, since multiple Superior Court judges had approved the warrants, the good-faith doctrine would preclude suppression (*id.* at 8-9). The Honorable Ronna Lee Beck summarily denied the suppression motion "largely for the reasons stated in the Government's opposition" (2/18/20 Tr. 6; R. A at 28).

***Reconsideration Post*-Burns**

In August 2020, this Court issued its decision in *Burns v. United States*, this Court's "first case . . . analyz[ing] the validity of a cell phone search warrant." 235 A.3d 758, 767 (D.C. 2020). *Burns* deemed the warrants there overbroad and lacking in probable cause and particularity, and ruled that all evidence taken from the phones there should be suppressed. *Id.* at 767-81. In light of *Burns*, Dean filed a short motion to reconsider suppression, contending that the warrant in his case, too, "used overly broad language regarding the evidence sought," "[n]otwithstanding that there was arguably probable cause with respect to some data" (R. 72 at 2-3).

In its written response, the government emphasized the warrant's strong probable-cause showing that Dean had committed the murder, and the multiple ways that W2 reported Dean using his phone (R. 74 at 2-6). Moreover, "[g]iven the nature of the relationship between the decedent and the defendant it would be expected that the defendant's cell phone would also contain communications and/or messages

between the two" (*id.* at 6, 9). Attachment B was "tailored and strictly limited" to specific information relevant to this crime, not a "mere template" (*id.* at 6-9). And it was even restricted to records from 36 days surrounding the murder, "compl[ying] with the additional timing requirements set forth" in *Burns* (*id.*). In any event, the government explained, the police had obtained the warrant in good faith, meaning that evidence collected pursuant to the warrant would not be subject to suppression (R. 74 at 9-12). Two judges had signed parallel search warrants, two other judges had used the same information to find probable cause (in granting the arrest warrant and at the preliminary hearing), and "Superior Court judges have long approved warrants like the one at issue here" (*id.* at 4-5, 11-12). Far from acting like a "rubber stamp," Judge Smith had "meticulously reviewed" the warrant and imposed independent limitations (*id.* at 6). And even if some parts of the warrant were somehow invalid, the valid portions were severable (*id.* at 12-13).

While the pleadings addressed the *written* warrant, at the hearing Dean's counsel (from amicus PDS) focused on the government's *execution* of the warrant. In response, the AUSA made various proffers about the warrant's execution (10/5 Tr. 17-36). *See also* R. 86 (supplemental proffers); R. 92 at 12 (trial court's opinion summarizing proffers and noting that they were "not challenged").

To begin, the DFS analyst had downloaded "the entire content of the phone" (10/5 Tr. 17-18). Given current technology and software, there was no way to

accurately limit the download to specific data—"it's not like the analyst can go look at a cell phone and pull just call logs only from March 1st to April 5th of 2018" (*id.* at 17-18, 25-27). Nor could DFS analysts "figure out what is evidence of the murder," because "they don't know any of the facts" and "aren't intertwined with the investigation" (*id.* at 19). Dean subsequently clarified that he was focused on police and prosecutors, "conced[ing]" that DFS was "an independent entity," and "when they . . . download everything, we've agreed that that's not the execution of the warrant" (*id.* at 20-21, 28, 31-32).

Next, either the detective or AUSA picked up an electronic version of the full extraction from DFS (10/5 Tr. 21-22; R. 88 at 2). Extractions "come[ ] in PDF format," with "some thumbnails" linking to photos and videos (10/5 Tr. 19).

Finally, the AUSA reviewed the extraction (10/5 Tr. 21-23, 36-37). Here, the AUSA used the table of contents to navigate the PDF (*id.* at 19-20). For example, when seeking calls related to the murder, the AUSA would click on "call logs" in the PDF, then go to "the timeline that we're allowed to look at," and then "start looking at that and see if there's anything relevant" (*id.* at 20, 25). The AUSA did not "look[ ] at the entirety of all of the pages of the extraction" (*id.* at 28-29). Indeed, extractions are "thousands and thousands of pages," making cover-to-cover reading effectively impossible (*id.* at 20, 36). Instead, the AUSA here "focus[ed] on a more specified view of the timeline": around March 18th, which was "a significant date

between the decedent and the defendant," as well as "a day before [the murder] and then leading up to the time that" Dean was arrested (*id.* at 28-29).

Based on these representations, the defense argued that the government had violated the Fourth Amendment simply by "*getting* th[e] entire universe of information" from the extraction (10/5 Tr. 26-32) (emphasis added). That was true "*[r]egardless [of] whether [the AUSA] looked at it*" (*id.* at 29-30, 38) (emphasis added). To execute cell-phone searches, the defense contended, the government needed to establish "something akin to the taint review"—"a Warrant Compliance Unit, if you wanted to call it that—to make sure that [the AUSA] is just given information from one date to the next and not the entirety of Mr. Dean's life" (*id.* at 31-32). The government countered that such an arrangement would be impossible, given speedy-trial and resource limitations, the ubiquity of cell-phone warrants, and the inability of someone uninvolved in the investigation to identify evidence (*id.* at 32-33, 39-40). Indeed, it would effectively mandate "two sets of prosecutors" (*id.* at 33).

A week later, the trial court orally granted Dean's motion for reconsideration based on the government's execution of the warrant, suppressing the evidence collected. The court focused on *Burns*, which it described as "the first decision that really focused in on the privacy rights as it relates to cell phones and warrants *and the execution of warrants*" (10/12 Tr. 9-12) (emphasis added). Even assuming that

the warrant was valid, "what cause[d] the Court concern" was that "the Government ultimately received, seized and received the entire contents of the cell phone" (*id.* at 12-13). While recognizing the AUSA's "efforts to stay within the confines of what the Court had permitted," "it just doesn't change the key fact that" the AUSA "was given all of the extract of the defendant's phone," despite attempts by the issuing judge "to narrow down the evidence" (*id.* at 13-14). The court suggested no feasible alternative methods for execution (*id.* at 14-17). But the court was "unconvinced at this point that the Government could not have taken additional steps in some manner to protect the privacy of the defendant before the entire extract was transported and given access to the Prosecutor" (*id.* at 16-17).

Reconsideration of Reconsideration

The government moved for reconsideration, noting that the written filings did not "give any . . . indication that [Dean] objected to the execution of the warrant," so the government "had not prepared to discuss [those] issues" during the hearing (R. 88 at 2-3). The government highlighted D.C. Superior Court Criminal Rule 41(e)(2), which endorses a two-step process for searching electronic devices, first copying the entire storage medium, and then reviewing it later for information that falls within the scope of the warrant (*id.* at 3-5). Also, the warrant itself warned that the police might have to conduct more searches on the full phone to find responsive data (*id.* at 4-5). The government explained (and offered to prove) that the execution

method here was the most reasonable and forensically sound way to search the phone, supported by federal case law (*id.* at 5-9). And other proposals, like trying to limit the extraction through the Cellebrite software, would miss huge swaths of responsive data (*id.* at 6-8 & n.3). Notably, "[t]here is no allegation that the search in this case was outside the scope of the search warrant, or even that the execution of the search warrant led to the viewing of information . . . that was outside the scope of the search warrant" (*id.* at 9). At the very least, the warrant was executed in good faith, as the issuing judge understood and approved the process (*id.* at 9-14).

Dean offered a three-page reply, citing no case law or legal authority beyond *Burns* (10/17 R.). He clarified, though, that he was not objecting to the fact that the AUSA (instead of the detective) had executed the search (*id.* at 2 n.1).

In a 17-page opinion, the trial court granted the government's motion for reconsideration, vacating its prior oral ruling and denying the defendant's motion to reconsider (R. 92). To begin, the trial court found that "the Warrant meets the Fourth Amendment probable cause requirement and particularity requirement" even after *Burns* (R. 92 at 11). The affidavit established at least a fair probability that the phone would contain evidence of the murder, given W2's accounts of Dean's phone usage and Dean's contentious 4-month romantic relationship with White (*id.* at 9-10). And whereas the *Burns* warrants were faulted for permitting wide-ranging exploratory searches covering "literally all of the data on both phones," Judge Smith limited

"what could be searched by placing in date limits and other edits," resulting in a warrant "carefully tailored to [its] justifications" (*id.* at 10-11).

The court explained that the execution challenge was raised "for the first time orally at argument," but the government's new filing "has now provided a more fulsome response" (R. 92 at 11). Preliminarily, the court recognized that its oral ruling "was incorrect to suggest that *Burns* was a controlling precedent on the issue of the lawfulness of the execution of the warrant," since *Burns* expressly "did not reach" that issue (*id.* at 11-12) (citing 235 A.3d at 775 n.2). On the merits, the court explained that the defense claims "did not focus on what [the AUSA] did but rather on the very fact that she received the extraction" (*id.* at 13). But "[i]t is clear upon a review of Fourth Amendment case law and . . . Rule 41 that the receipt by the prosecutor of more data than is contained in the warrant does not as a matter of law mean that the Defendant's rights were violated" (*id.* at 16). And as far as "what was actually done in this case," the court found that the AUSA did not "'rummage' through [Dean's] private information" (*id.* at 16-17). Instead, "guided by Attachment B, [the AUSA] looked for data that fell within the time frames and categories of data outlined in the warrant," making "the execution of the warrant . . . lawful" (*id.*).

The Trial

The Government's Evidence

Aside from Dean's statement to detectives (discussed separately below), most evidence at trial about Dean's relationship with White and the details of her killing came from Dean's own accounts to three friends: James Morris, Dean's long-time best friend (10/26 Tr. 8-10, 117-18); Ruth McNeal, who had grown up with Dean and lived across the street from White (*id.* at 89-91); and Milton Lewis, McNeal's husband (*id.* at 87, 215).

Sixty-year-old Dean was homeless when he met White—a 38-year-old mother with two young children (10/27 Tr. 16-18; 10/28 Tr. 160, 176; 11/1 Tr. 82). White offered that Dean could stay at her apartment for $400 of rent, using money from his Social Security disability checks (10/27 Tr. 16-18). Around March 1, Dean received a long-awaited Social Security payment of nearly $4,000 (10/26 Tr. 96-99; 10/27 Tr. 24-25, 217-19). Dean and White soon spent it all, however, and White kicked him out of the apartment (10/26 Tr. 111; 10/27 Tr. 24-26).

In the early morning hours of March 18, White called the police to ask for help getting Dean out of her apartment (10/28 Tr. 18-22). Seeming "agitated," she explained, "I don't want to escalate things. I just wanted to come out and separate myself from the situation and call you guys." (10-28 Tr. 21; Exhibit (Ex.) 404 at 4:04-4:14.) Officers tried to "d[e]fuse the situation" by giving "the parties a chance

to air their grievances" (*id.* at 36). In front of Dean, White told officers, "I'm tired. I cannot sleep. I can't even lay my head down without knowing what this man is about to do next." (Ex. 404 at 8:35-8:45.) She added: "I'm not gonna force him to leave, he's a grown man. He's bigger than me. I'm not gonna force him so I called law enforcement." (*Id.* at 9:00-9:11.) White also complained that Dean kept asking for money that she did not have (*id.* at 9:56-10:06; 10/28 Tr. 37.) Dean became more "agitated" after "words [were] exchanged," but he agreed to leave (*id.* at 36, 43).

In the days leading up to March 31, Dean lived in White's laundry room, without food or money (10/26 Tr. 112; 10/27 Tr. 26-27). The room was adjacent to White's apartment, with a small window in the door (10/28 Tr. 179).

At 3:59 p.m. on March 31, Morris got a text message from Dean: "I feel that am about to go to jail." (10/28 Tr. 199; see 10/26 Tr. 10-11, 58; Ex. 403.) Recognizing that Dean "sounded upset," Morris called Dean at 4:16 p.m. (10/26 Tr. 11). Dean was "upset and crying," telling Morris he had been sleeping in the laundry room because "Tamiya" "wouldn't let him back in the house" (10/26 Tr. 11-16, 57-58). Morris told Dean he would drive in from Virginia and "get him out of the situation," arriving in "probably a couple of hours" (*id.* at 17, 60-61).

Later that afternoon, according to Dean's accounts to friends, he was in the laundry room when he heard White come out of her apartment door (10/26 Tr. 22, 25, 66, 113; 10/27 Tr. 27, 84). Dean followed her out of the building door to the

parking lot, where he "confronted her," asking White to help him pay a joint drug debt (10/26 Tr. 109, 113, 140; 10/27 Tr. 27-28, 84). White said she was "not paying for nothing" (10/26 Tr. 113). She also refused Dean's requests for drugs or to go with her in the car (10/26 Tr. 114; 10/27 Tr. 29-30, 113). They began to argue, with White lobbing insults (10/27 Tr. 30-31). White then suddenly "hit him in the face with something and scratched his face" (potentially after reaching into her car)—though Dean "didn't know what she hit him with" and never claimed White had a weapon (10/26 Tr. 22, 78, 107, 114-15, 141-44, 228; 10/27 Tr. 31, 84, 109). White told Dean to "go fuck off" (10/26 Tr. 80).

Dean then "went to stabbing her," using a screwdriver from his coat pocket (10/26 Tr. 22, 25, 66, 228-29; 10/27 Tr. 101). Dean described stabbing White "like 30 times or something," including in the neck and on her left side (10/26 Tr. 23-24, 67-68, 148-49, 151; 10/27 Tr. 103). He said he "hit" or "stabbed" her with the screwdriver "all over, everywhere": "[i]n her neck, in her stomach, in her side, in the chest" (10/26 Tr. 106, 229). Bleeding from the mouth, White drove out of the parking lot with her door open (10/26 Tr. 22-25, 115, 231). When Lewis asked why Dean believed White was dead, Dean explained, "[b]ecause she was bleeding from everywhere" (10/26 Tr. 230). Dean threw the screwdriver into the bushes, where "[t]he police will never find it" (10/26 Tr. 25, 232; 10/27 Tr. 38).

White made it to a McDonald's a one- or two-minute drive away (10/25 Tr.

120; 10/28 Tr. 174). She approached the counter holding her neck with her hand, wet from blood (10/25 Tr. 95). White tried to speak, but the cashier could not understand her because her mouth was full of blood (*id.* at 95-96, 121). An employee called 911 at 5:04 p.m. (*id.* at 96-97, 116-20). Paramedics arrived and treated her, but White died minutes later (*id.* at 96-97, 116-22, 143).

An autopsy concluded that White died from multiple stab wounds, including two separate wounds that would have killed her (10/28 Tr. 145, 150-53, 159-60). The first was a two-and-a-half-inch wound entering her neck, going through the soft tissue and muscles, and puncturing the carotid artery, causing a hematoma that obstructed the jugular vein (*id.* at 146-51). The second was a four-inch wound entering White's left breast, going through the breast tissue into the left chest, hitting a rib, and puncturing her left lung (*id.* at 141-43). The second wound caused her chest cavity to begin to fill with blood, which would have caused breathing problems and deprived her brain of oxygen-rich blood (*id.* at 143-45). Both appeared to be caused by a thin cylindrical instrument, consistent with a screwdriver (*id.* at 156-57). In addition, White had two small cuts on the inside of her left upper lip—one of which was X-shaped, like a Phillips head on a screwdriver (*id.* at 153-56). And she had a circular scraped bruise near the neck wound, consistent with a screwdriver going so deep into her neck that the handle hit the skin (*id.* at 157-58).

Around 5:00 p.m., Lewis saw Dean cross the street while walking "sort of

erratic" and calling out for "Ruth" (10/26 Tr. 218-22). Lewis walked Dean inside (10/26 Tr. 222). Dean appeared "real excited," "very, very hyper," and "all over the place" emotionally (10/26 Tr. 102, 148, 223). According to Lewis, Dean was shouting, "That bitch dead. I hope that bitch dead. That bitch is dead. I hope she dead." (10/26 Tr. 222.) According to McNeal, he kept repeating, "I killed that bitch. I hope I killed that bitch." (10/26 Tr. 103, 165-66.) When Lewis asked what Dean was talking about, Dean described the stabbing (10/26 Tr. 113-15, 223). Dean was "very angry" and showed no remorse (10/27 Tr. 38-41).

Meanwhile, Morris had driven up from Virginia, and Dean instructed Morris to pick him up across the street by McNeal's (10/26 Tr. 18-22). Dean was "upset still," and upon getting into the truck, Dean told Morris about the stabbing (10/26 Tr. 18-22). Dean explained he had felt "used" by White, because "he helped her pay rent and buy groceries or whatever, and she put him out after his money was gone" (10/26 Tr. 40-41, 73-74). Morris drove around with Dean for a couple of hours, getting Dean some food before dropping him back at McNeal's, where Dean spent the night (10/26 Tr. 27-28, 68, 116, 119-20; 10/27 Tr. 44-45).

Dean's friends saw only one minor injury on his face that evening. McNeal recalled a "scratch" underneath his eye that was "like a nick" and "not even a half an inch" (10/26 Tr. 107-08). It did not look "serious"—"[i]t was just a scratch" (10/26 Tr. 107-09). Because it was bleeding (though "not much"), she gave Dean a

washcloth for his face (10/26 Tr. 109). Lewis saw a swollen knot the size of a fingernail on Dean's face with a puncture inside—"like maybe he'd been hit with" a "key"—that may have been bleeding (10/26 Tr. 225-26; 10/27 Tr. 36-37, 85-87, 89, 93). Dean requested nothing beyond the washcloth, and "it wasn't nothing that he may have to go to the hospital for" (10/26 Tr. 226-28; 10/27 Tr. 37). Morris described an inch-long "scratch" with a small amount of blood—like something that could have been caused by a "key" (10/26 Tr. 26, 52-54, 64, 69-70, 75). Again, Dean was not complaining about the scratch or seeking medical treatment (10/26 Tr. 53-54). Aside from hurt "feelings," Dean mentioned no other injuries (10/26 Tr. 26, 108, 227; 10/27 Tr. 37).

On April 1 (Easter Sunday), McNeal and Lewis watched Dean call hospitals, pretending to be White's brother and trying to figure out if she was dead (10/26 Tr. 120-21; 10/27 Tr. 45-49). They also saw him search for news reports on his phone (10/26 Tr. 120-21). That evening, Dean got a phone alert reporting that White had died from a stabbing at the McDonald's and announcing a standard $25,000 reward for the case (10/26 Tr. 122; 10/27 Tr. 50; 11/1 Tr. 60-61). Dean read the alert aloud to McNeal and Lewis (10/26 Tr. 122-23). This was a "game changer," underscoring the seriousness of the situation, and making clear that they were now potential witnesses (10/26 Tr. 122-23, 148; 10/27 Tr. 51-53). Treading carefully, McNeal and Lewis allowed Dean to stay one more night, though McNeal "slept with a knife and

some mace" (10/26 Tr. 120, 123-24, 153-54). In the morning, they convinced Dean to leave (10/26 Tr. 124-25, 127-28; 10/27 Tr. 53-54, 59-62). Deciding they had a moral obligation to report what they knew, on April 2 they phoned Lewis's nephew, a police detective who put them in contact with Detective Rice (10/26 Tr. 128-30, 157-58; 10/27 Tr. 64-68, 82, 114, 209).

Morris likewise saw a news report about White's death on April 1 (10/26 Tr. 28-35). To verify it was the same person, Morris texted Dean to ask his "girl's" name, and Dean responded "Tamiy White" (*id.* at 48). Morris told Dean that the news was reporting that she had died and encouraged Dean to turn himself in, but Dean refused, saying the government "didn't have any evidence or know who did it" (*id.* at 36-38, 41-42, 48). On April 2, Morris called the police tip line, and he was soon put in touch with a detective (*id.* at 42-52, 72; 10/28 Tr. 197-201). Morris showed the government his text messages and calls with Dean on his phone, which the detective photographed and filmed (*id.*).

Dean left behind a beige winter coat at McNeal and Lewis's home (10/26 Tr. 116, 125-27, 131-32; 10/27 Tr. 63-64, 68; see 10/28 Tr. 29, 212-13). Forensic testing on a red-brown stain on the sleeve of the coat yielded a positive test for the presumptive presence of blood and matched White's DNA (10/27 Tr. 156-57; 10/28 Tr. 110-11). The coat wrist cuffs also had DNA from both White and Dean (10/27 Tr. 157-59). Detectives also found the screwdriver based on Dean's descriptions

during his post-arrest interview (discussed below) (see 11/1 Tr. 63-72; Ex. 405 at 23:25-25:30). DNA testing on the handle showed a mixture of Dean's and White's DNA, with White contributing 97% to Dean's 3%, consistent with White's DNA being blood and Dean's being skin cells (10/27 Tr. 122-25, 151-56, 161-62, 164-65). Dean's DNA was also found under White's fingernails (11/1 Tr. 131-37).

Dean's phone records from AT&T—including his call records—were entered by stipulation as Exhibit 601 (11/1 Tr. 144-45). They showed two gaps of inactivity between 4:30 and 5:00 p.m. on March 31, when the phone was neither sending texting nor calling: 4:36-4:44 p.m. and 4:44-4:50 p.m. (*id.* at 148-49).

Dean's cell phone was recovered on April 5, during his arrest (10/26 Tr. 192). A DFS analyst performed a physical extraction and used Cellebrite software to put the data into a 14,778-page PDF (10/26 Tr. 194-201). At trial, the government introduced Exhibit 501, a heavily redacted and duplicative 124-page excerpt from the full extraction report (10/26 Tr. 202-12).

An investigator combined and organized the information in Exhibits 501 and 601, removing duplicative entries and standardizing times, to create Exhibit 605 (11/1 Tr. 147-55; 11/2 Tr. 23-37). Exhibit 605 showed:

- *Phone call records*: There were many calls between White and Dean from March 28 to 31. On March 31, Dean made 18 consecutive unanswered to White between 1:54 a.m. and 9:45 a.m.; then they exchanged calls; and then Dean made 12 more unanswered calls to White between 11:23 a.m. and 3:36 p.m. (see 11/2 Tr. 28-29). Dean also made a handful of calls to Morris and McNeal. Both Exhibits 501 and 601 had the call records.

- *Text messages with White*: Dean sent 10 text messages to White between March 19 and 31, asking her to call him or let him into the house. These had been deleted. There were also three messages from Dean to White on the evening of April 1 (which were not deleted), purporting to ask where she was and accusing her of being with "that guy."

- *Text Messages with Morris*: The series of text messages that Morris described in his testimony were included. First Dean's "I feel that am about to go to jail" before the killing. Then Morris telling Dean that White had died. And then Morris unsuccessfully trying to convince Dean to turn himself in. Dean deleted "I feel that am about to go to jail" and a couple of other messages. These messages were also described or independently introduced in Morris's testimony.

- *Text Messages with McNeal*: Dean sent three text messages to McNeal on the night of March 31 asking to sleep at her house.

- *Homeless shelters*: Dean searched for and called homeless shelters, both before and after the killing.

- *News Articles*: Dean's web and search history showed him repeatedly visiting news articles about White's death and searching her name.

After Dean was shot on April 5, he was placed under arrest for White's murder, and detectives interviewed him at the hospital on April 7 (11/1 Tr. 48-55, 83; Ex. 405; see also Ex. 713 (demonstrative transcript)). Dean waived his *Miranda* rights (Ex. 405 at 0:00-5:00, 30:35-30:55). Dean said he had been living with White for about six months, but she had gotten mad and taken his key a month before (*id.* at 5:00-7:45). Dean described his Social Security payments, including a recent $3,800 payment for back pay, though he quickly "ran through it before [he] met up with her" buying crack (*id.* at 7:45-11:00). Initially, Dean suggested that White "was having some issues with her kids' father," and he claimed he had been watching TV

at "Ruth's" on March 31 (*id.* at 5:00-6:00, 11:00-16:20). When detectives expressed skepticism, Dean switched to saying he had seen White "fussing" with an unknown man in the parking lot, but Dean had chosen not to intervene (Ex. 405 at 17:00-21:00). When detectives were again dubious, and they floated the possibility of "self-defense," Dean's account changed once more (*id.* at 21:00-22:55).

According to Dean's final version, he was "mad" White had kicked him out, and he had been waiting for her in the laundry room (Ex. 405 at 28:00-28:55, 31:30-32:00). He followed her down the stairs and "walk[ed] up on her," confronting her about "where is the rest of the money at" and why he was "sleeping in the laundry room" when he was "paying [her] to live there" (*id.* at 22:55-23:05, 28:45-29:20). Then they "got into it"—first with words, then with "tussling" (*id.* at 29:15-30:05). Dean "pushed her first" (*id.* at 30:00-30:20). White "retaliated" by "poking" Dean above his eye with "something small," though he "d[id]n't know what it was" (*id.* at 23:55-24:05, 30:00-30:20). Then Dean "retaliated" by "sticking her back" with a yellow-handled Phillips head screwdriver (though he initially claimed it was a "long nail") (*id.* at 23:05-23:25, 24:00-25:30, 30:00-30:20). Dean did not know how many times he stabbed her—he "just was poking at her" (*id.*). Detectives saw "no discernable injury" where Dean said White had "poked him" (11/1 Tr. 92).

The Defense Evidence

The defense offered two experts on PCP. One expert described the breadth of

effects that PCP can cause, ranging from meekness to violence (10/28 Tr. 71-76, 81-88). Detective Rice had likewise encountered "a spectrum between peaceful and violent" for people on PCP, including some people whom he could not tell were on PCP at all (11/1 Tr. 107-09). The expert added that White's mental-health issues could potentially be exacerbated by PCP use (10/28 Tr. 76-81). The other expert testified that the level of PCP in White's blood at the time of her death would be sufficient to cause "behavioral effects" (10/27 Tr. 181-84). But because PCP does not follow the usual excretion process from the body, it may be present in the body long after the person has used the drug and returned to normal (see 10/28 Tr. 73). Both experts agreed that "it's hard to tell, without knowing the person," what "behavior effects" PCP would have caused White, given the general variability of PCP effects, as well as the lack of specific information here about White's PCP experience, her prior reactions to PCP, her baseline behavior, or when she had ingested the PCP that was in her blood (10/27 Tr. 200; 10/28 Tr. 84-95).

SUMMARY OF ARGUMENT

The warrant affidavit made a robust showing that Dean was guilty of domestic-violence murder and his phone likely contained a range of digital evidence related to the crime. The warrant narrowly targeted key categories of evidence (like Dean's relationship with White and Morris), and it contained narrow date limitations like *Burns* recommends. Moreover, this Court's post-*Burns* precedent (which Dean

and PDS ignore) already holds that, in circumstances like this, the good-faith doctrine bars suppression of evidence collected under the pre-*Burns* warrant.

Dean also offers no viable challenge to the warrant's execution. His key objection is not to how the prosecutor *reviewed* the extraction report, but to the mere fact that she *possessed* the report at all. Yet Rule 41(e)(2) clearly authorizes possession of the full report as a precursor to review. And the ex ante limits on execution that Dean and PDS propose have been rejected across the country. Their execution challenges would not justify suppression anyway, both because the evidence presented at trial all fell within the written warrant and because the issuing judge authorized the challenged execution.

Finally, there is no reason to reach the constitutional issues, as this is an easy case for harmlessness. The evidence against Dean was overwhelming, featuring a taped confession to detectives, multiple admissions to friends, and heaps of forensic evidence. Dean's own accounts did not support a claim of self-defense—he freely admitted to approaching White and pushing her first, and nothing in his reports ever suggested that the vicious stabbing was performed out of fear for his own safety. His own experts acknowledged that the PCP in White's system did not mean that she would have been acting violently. And the phone evidence was entirely peripheral to self-defense issues anyway, particularly once one sets aside digital evidence duplicated by other sources. The conviction should be affirmed.

ARGUMENT

I. The Warrant Was Valid.

A. Standard of Review, Applicable Legal Principles, and *Burns*

"This [C]ourt reviews motions to suppress *de novo* and the [trial] court's factual findings for clear error." *Armstrong v. United States*, 164 A.3d 102, 107 (D.C. 2017). It "view[s] the evidence in the light most favorable to the prevailing party, and draw[s] all reasonable inferences in favor of sustaining the trial court's ruling." *Id.* Below, Dean had the burden to show that suppression was required. *See Malcolm v. United States*, 332 A.2d 917, 918 (D.C. 1975).

Under the Fourth Amendment, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Probable cause "is not a high bar," requiring "'only a probability or substantial chance of criminal activity, not an actual showing of such activity.'" *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018); *see also Jenkins v. District of Columbia*, 223 A.3d 884, 890 (D.C. 2020). It is a "practical, common-sense decision" based on "all the circumstances set forth in the affidavit." *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

The Fourth Amendment also requires that "the scope of the authorized search [be] set out with particularity." *Kentucky v. King*, 563 U.S. 452, 459 (2011). Particularity prevents "general searches" and "assures the individual whose property

is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh v. Ramirez*, 540 U.S. 551, 561 (2004); *see also Buckner v. United States*, 615 A.2d 1154, 1155 (D.C. 1992). Because the affidavit here was "attached to the warrant and incorporated therein by reference," this Court construes the warrant's particularity by reference to the affidavit. *United States v. Moore*, 263 A.2d 652, 653 (D.C. 1970); *see Groh*, 540 U.S. at 557-58; App'x D attach. B.

Four recent precedents address cell phone search warrants. In *Riley v. California*, 573 U.S. 373 (2014), the Court forbade routine warrantless searches of cell phones seized incident at an arrest. The Court recognized that cell phones have become "important tools" for criminals that "can provide valuable incriminating information about dangerous criminals." *Id.* at 401. But given privacy concerns, the Court's "answer to the question of what police must do before searching a cell phone seized incident to an arrest [was] . . . simple—get a warrant." *Id.* at 403.

Six years later—after the execution of the warrants in this case—this Court decided *Burns v. United States*, 235 A.3d 758 (D.C. 2020). The police had seized two phones from Burns, a witness who was the decedent's best friend. While the detective did not consider Burns to be "a suspect at the time his phones were seized," the police secured warrants to search all the data on both phones, using a "standard" template found to authorize searches unconnected to the murder investigation. *Id.* at

769, 771. The warrants "yielded a highly incriminating set of internet search inquiries" by Burns before the murder. *Id.* at 770. *Burns* held the warrants unconstitutional. Although the affidavits established probable cause that the phones contained three "discrete items" of evidence from the day of the murder—like text messages between Burns and the decedent—they "stated no facts that even arguably provided a reason to believe that any other information or data on the phones had any nexus to" the murder investigation. *Id.* at 774. The warrants were also fatally overbroad by "authoriz[ing] the review of literally all of the data on both phones," including "several expansive categories of data never even mentioned in the affidavits." *Id.* And the warrants lacked particularity, "describing the objects of the search in the most general terms imaginable," with "no meaningful limitations as to how far back in time police could go." *Id* at 774-75. Further, the warrants were so "obviously deficient" that the normal presumption of good faith did not apply, so the evidence had to be suppressed. *Id.* at 778-79.

Since *Burns*, this Court has twice revisited cell-phone warrants, each time painting the *Burns* warrants as outliers and applying the good-faith doctrine to prevent suppression of evidence. *See In re J.F.S.*, 300 A.3d 748, 757-59 (D.C. 2023); *Abney v. United States*, 273 A.3d 852, 862-67 (D.C. 2022). Whereas Burns had been merely viewed as a witness, the warrants in *Abney* and *J.F.S.* "established probable cause to believe that the phone's owner was a suspect and that the phone 'contained

a range of relevant evidence' about that crime, distinguishing it from the 'slender' showing of probable cause in the *Burns* affidavit." *J.F.S.*, 300 A.3d at 758 (D.C. 2023); *see Abney*, 273 A.3d at 863-67. The reason to expect a "range of relevant evidence" came primarily from affidavit paragraphs explaining, based on "training and experience, [how] persons who commit crimes often use their cell phones in ways that leave evidence of crime on those phones." *Abney*, 273 A.3d at 863-65; *see J.F.S.*, 300 A.3d at 758-59. *Abney* and *J.F.S.* also stressed that, until *Burns*, "courts had generally held cell phone search warrants to be sufficiently tailored and particularized where they 'limited the officers to searching for and seizing evidence of a specific crime.'" *J.F.S.*, 300 A.3d at 758 (quoting *Abney*, 273 A.3d at 865) (citing *United States v. Bass*, 785 F.3d 1043, 1049-50 (6th Cir. 2015)). Officers executing pre-*Burns* warrants could reasonably rely on similar limitations.

B. The Affidavit Established Robust Probable Cause for a Range of Evidence.

Even under *Burns*, the warrant here easily passes muster.[2] While Dean and

[2] Although we recognize this Panel is bound by *Burns*, we respectfully disagree with its conclusions and reserve the right to challenge them in future proceedings. Under Supreme Court precedent, a warrant limited to searching for evidence of a particular crime violating a particular statute satisfies the Fourth Amendment's particularity requirement. *See Andresen v. Maryland*, 427 U.S. 463, 479-82 (1976). Federal circuits have accordingly recognized that a warrant to search a cell phone or (continued . . .)

PDS primarily raise particularity objections, that argument is premised on an unduly narrow view of the probable cause. So we begin there. Dean and PDS concede that the affidavit established probable cause to search the phone for Dean's text messages and phone calls with W2 that are specifically detailed in the affidavit, as well as "location data" for Dean's "whereabouts between March 31 and April 2" (Dean Br. 26-29, 35; PDS Br. 10-16). But they maintain that the affidavit offered no probable cause for evidence on the phone beyond that.

The warrant, however, justified a far broader search. To begin, the affidavit "made robust showings of probable cause" that the phone's owner murdered White. *Burns*, 235 A.3d at 776. W2 came forward and told the police that his friend Dean had confessed to the crime—damning evidence far exceeding probable cause's "fair probability" standard. W2 even gave details buttressing his account, like (a) Dean

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computer for evidence of a specified crime is sufficiently particular. *See, e.g.*, *United States v. Cobb*, 970 F.3d 319, 328-29 (4th Cir. 2020); *United States v. Castro*, 881 F.3d 961, 964-65 (6th Cir. 2018); *United States v. Bass*, 785 F.3d 1043, 1049-50 (6th Cir. 2015); *United States v. Bishop*, 910 F.3d 335, 336-37 (7th Cir. 2018); *United States v. Russian*, 848 F.3d 1239, 1245 (10th Cir. 2017); *United States v. Christie*, 717 F.3d 1156, 1165 (10th Cir. 2013) (Gorsuch, J.). *Burns* ignored *Andresen* and, as one federal judge has explained, was "articulated . . . without citation to any authority beyond *Riley*"—a case that "addressed only *warrantless* searches and said nothing about the appropriate scope of the search of a cell phone pursuant to a warrant." *United States v. Smith*, No. CR 19-324, 2021 WL 2982144, at *10 (D.D.C. July 15, 2021) (Howell, C.J.). Given the conflicting federal consensus, *Burns*'s refusal to apply the good-faith exception is especially problematic. *Burns* accordingly should be overruled.

saying he stabbed White with a screwdriver, confirmed by the autopsy's finding that she died of stab wounds; (b) descriptions of Dean's movements that matched the location and timeline for the murder; (c) Dean saying White drove away after the stabbing, consistent with her driving into the nearby McDonald's parking lot; and (d) W2 giving Dean's correct phone number, with phone records verifying his usage of the phone. That formidable showing of guilt was "worlds away" from the "'slender' showing of probable cause" in *Burns*. *J.F.S.*, 300 A.3d at 758.

Moreover, Dean's suspected offense of domestic-abuse murder demands close examination of the relationship between the defendant and the decedent. As the detective explained "based on [his] training and experience," "call logs, text messages, emails, and any app enabling communication with others frequently include communications that shed light on a cell user's relationship with others and its tenor at any particular time, for example, in the case described above, the decedent" (App'x D ¶ 30). Prior incidents between domestic partners will inevitably bear on the suspect's mens rea, motive, and potential claims of self-defense. *See Giles v. California*, 554 U.S. 353, 377 (2008) (recognizing that "[e]arlier abuse, or threats of abuse," may be "highly relevant" "[w]here such an abusive relationship culminates in murder"). That could even include exculpatory information, if (for example) the decedent was threatening the suspect. And the "tenor" of their relationship here was inevitably relevant to the crime. Indeed, *any* communications

between the decedent and Dean—good or bad, friendly or threatening, constant or irregular—will become evidence at trial. A detective investigating a suspected domestic-abuse murder like this who fails to collect the communications between the decedent and boyfriend would not be doing his job. The trial here bears that out, featuring evidence (largely through other sources) of how Dean and White met, the financial and housing tensions in their relationship, and the March 18 police visit.[3]

The robust showing of probable cause that Dean killed White also justified an expectation that the phone would contain an array of other evidence of the crime—based on both the specific facts here and general criminal behavior. For example:

- *Motive*: The affidavit here offers a possible motive for the crime—that (per W2) Dean was angry at White "because she blew through his social security check in two days and then kicked him out of their apartment" (App'x D ¶ 10). A search of the phone could have verified (or disproved) whether Dean received Social Security payments, offered a timeline for his receipt of checks, and reflected any communications with White or others about the money (see also 10/26 Tr. 96-99; 10/27 Tr. 24-25, 217-19).

- *Other Relationships*: The affidavit painted W2 as a key potential witness in any murder trial (as, indeed, Morris turned out to be). The police justifiably wanted to investigate that relationship. A close friendship could have made W2's account more credible, while soured relations might undercut his story.

- *Surrounding Movements and Activities*: The affidavit explained, based on the detective's training and experience, that people who commit crimes

[3] If anything, given that W2 reported a *four*-month relationship, Judge Smith's edits restricting the warrant's search to just *one* month before the murder were unduly restrictive, preventing law enforcement from collecting obviously relevant evidence from the first three months of the relationship.

"often use their cell phones in ways that reveal their location and/or activities before, after, or while engaging in criminal activity" (App'x D ¶ 30). W2's account reflected Dean doing just that—using text messages and phone calls to arrange W2 picking him up after the murder. The police were entitled to explore whether Dean used his phone in other ways that offered similar revelations.

- *Accomplices*: Based on training and experience, the detective knew that "a cell phone recovered from a participant in such criminal activity frequently contains evidence of communications among accomplices" about the crime (App'x D ¶ 31). Again, W2's account showed that to be true here—Dean arranged to have W2 pick him up from near the crime scene and drive him away. And there was a fair probability that Dean would have also used his phone to seek help from others, especially after the crime, when he could no longer stay in White's building.

- *Screwdriver*: Dean told W2 that he had stabbed White 30 times with a screwdriver (App. D ¶ 8). Just as warrants commonly look for evidence of a suspect's possession of weapons used in crimes, the police could search for any ties between Dean and the screwdriver.

- *Appearance*: W2 reported that Dean had an injury to his face and appeared to be bleeding. The affidavit also recounted White's heavy bleeding from multiple stab wounds. That justified searching for evidence that would bear on when and how Dean got the injury (like "selfies" before and after the murder), as well as any evidence of White bleeding on Dean.

Suspicions that this sort of evidence could be found on the phone were especially justified here because the phone records showed Dean using his phone "throughout the days before and immediately after the murder" (App'x D ¶ 27). W2's account likewise showed that Dean using the phone to communicate and leave behind incriminating evidence after the murder. And the initial logical extraction showed missing call and text data, (accurately) indicating that Dean had deleted data, another sign of inculpatory evidence. *Cf. Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759,

765 (D.C. 1990) ("deliberate destruction of evidence" may "give[ ] rise to a strong inference that production of the document would have been unfavorable").

Dean and PDS largely ignore these categories of evidence that the police could reasonably expect to find on Dean's phone—even though (as addressed below) those are precisely the categories of evidence spelled out by Attachment B. They never offer a theory as to why (say) police investigating White's suspected domestic-abuse murder would lack probable cause to think that communications between Dean and White would be relevant evidence. They instead seem to assert that the police can use a warrant only to search for evidence already known to exist (see Dean Br. 26-29; PDS Br. 11-16). But search warrants are a key tool for *investigating* crime, not a mere confirmation of what the police already know or simply a means of obtaining a specific, preidentified object. Indeed, they are "often employed early in an investigation," before the contours of the crime are known. *Zurcher v. Stanford Daily*, 436 U.S. 547, 561 (1978); *see also Moats v. State*, 168 A.3d 952, 962 (Md. 2017) ("direct evidence" "linking the crimes and the cell phone" "has never been required by the Fourth Amendment"). The counterarguments that Dean and PDS muster do not work.

First, Dean and PDS suggest that a detective's inferences based on training and experience should be discarded (PDS Br. 12-14; Dean Br. 30-31). But LaFave nicely puts this argument to rest: "[M]ay the experience and expertise of the officer

making the arrest or search be taken into account in determining whether probable cause is present? The answer is yes." 2 Wayne R. LaFave, *Search & Seizure* § 3.2(c) (6th ed. Oct. 2022 update) [hereinafter LaFave] (collecting cases). And indeed, courts routinely rely on how people *generally* commit crimes to justify suspicion (and Fourth Amendment intrusion) as to a *specific* person.[4] Further, the inferences described here based on "training and experience"—that data on cell phones routinely reveals information on a person's location, activities, and relationships—could equally be based in simple "common sense." *See Kansas v. Glover*, 140 S. Ct. 1183, 1188-90 (2020). After all, cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 573 U.S. at 385; *see also United States v. Garay*, 938 F.3d 1108, 1114 (9th Cir. 2019). In any event, each inference urged by the affidavit was also supported by specific evidence that Dean himself was acting consistent with the detective's "training and experience": W2 reported messages and calls coordinating Dean's escape from the crime scene, revealing his location, and

[4] *See, e.g.*, *Kansas v. Glover*, 140 S. Ct. 1183, 1190 (2020) (noting "the significant role that specialized training and experience routinely play in law enforcement investigations"); *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *United States v. Cortez*, 449 U.S. 411, 418 (1981) (analyzing suspicion requires "consideration of the modes or patterns of operation of certain kinds of lawbreakers"); *see also In re J.F.S.*, 300 A.3d at 758-59 (relying on similar "training and experience" paragraphs to find good-faith basis for cell-phone search); *Abney*, 273 A.3d at 863-65 (same).

explaining his activities.[5]

Second, Dean and PDS object to the detective's mention of potential communications with "accomplices" (Dean Br. 31-32; PDS Br. 14-16 & n.10), on the theory that there were no accomplices here. Dean even cites the reference to "accomplices" as the smoking-gun evidence that the detective used a template. *But see Burns*, 235 A.3d at 775 ("Templates are, of course, fine to use as a starting point."). Here, however, the affidavit did describe a potential accomplice: W2. While W2 was never charged in the case, driving Dean from the crime scene and offering him food or shelter are classic actions of an accessory after the fact. *See Outlaw v. United States*, 632 A.2d 408, 411 (D.C. 1993); *Clark v. United States*, 418 A.2d 1059, 1061 (D.C. 1980). And since Dean could no longer live out of White's laundry room, it was reasonable for the police to think that others sheltered Dean after the murder—as McNeal and Lewis indeed did.

Third, Dean and PDS criticize the trial court for attaching significance in the probable-cause analysis to the fact that Dean was the suspect in the murder, not

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[5] Seeking to analogize to *Burns*, Dean and PDS also claim the "training and experience" paragraphs are "bare bones" or "conclusory" (Dean Br. 30-31; PDS Br. 12-14). But *Burns* did not (and could not) overturn the precedent requiring consideration of police training and experience. Instead, the "bare bones" criticism was raised when, "[i]n lieu of facts, Detective Littlejohn simply stated it was his 'belief' there was probable cause that evidence related to the homicide would be found on the phones." 235 A.3d at 774; *see also United States v. Underwood*, 725 F.3d 1076, 1081, 1083 (9th Cir. 2013) (similar case cited by *Burns*).

merely a witness (Dean Br. 36-37; PDS Br. 13-14). But that distinction comes from *Burns* itself, as this Court's later decisions explain: "*Burns* involved circumstances quite different from those of the present case, because—as the court emphasized in *Burns*—the cell phones in *Burns* were seized from someone who was not a suspect in a crime." *Abney*, 273 A.3d at 867 (citing *Burns*, 235 A.3d at 771, 776, 779); *see also J.F.S.*, 300 A.3d at 758. The distinction also fits common sense. A witness may have only a single, discrete connection to the crime, whereas the perpetrator will often use his phone in a range of relevant ways.

C. The Warrant Particularly Described the Evidence Sought.

The warrant also described the evidence sought with reasonable particularity. Indeed, as the trial court recognized, Paragraph 1 of Attachment B was "carefully tailored" to categories for which the affidavit established probable cause (R. 92 at 11). *See supra* Part I.C. Here, that was cell-phone records from March 1 to April 5, 2018, providing evidence about: (c) Dean's relationship with White; (d) his motive and intent; (e) his whereabouts surrounding the murder; (f) his relationship with W2; (g) his activities surrounding the murder; (h) his possession of a screwdriver; (i) communication related to the murder, including among accomplices who helped facilitate the murder; and (j) his appearance. These are exactly the time-limited "specific description of the items subject to seizure" that *Burns* called for. 235 A.3d

at 777. Indeed, they are similar to the precise descriptions that the Supreme Court has called "models of particularity." *Andresen*, 427 U.S. at 479 & n.10; *see also Irving v. United States*, 673 A.2d 1284, 1287 (D.C. 1996) ("a search warrant authorizing seizure of documents showing a connection between" defendant and suspected conspirator was sufficiently particular).

Paragraph 1 permissibly included a catchall for (a) "[a]ny and all evidence related to the murder of Tamiya White." The Supreme Court has specifically held that a catchall "to search for and seize evidence relevant to the crime" under investigation, found "at the end of a sentence containing a lengthy list of specified and particular items to be seized," satisfies the particularity requirement. *Andresen*, 427 U.S. at 479-82 & n.10. The fact that the catchall here appeared at the start of Dean's warrant rather than the end makes no difference; switching categories (a) and (j) effect no change in meaning.[6]

Paragraph 2 also permissibly authorized a search for "user attribution" evidence showing who used or owned the phone "at the time the things described in this warrant were created, edited, or deleted." As the affidavit explained (and is obvious from common sense), cell phones generally contain such information, which

[6] Insofar as dicta in *Burns* casts doubt on catchalls for "any and all evidence" of the crime, it is the Supreme Court's holding in *Andresen*—not the panel's dicta in *Burns*—that binds this Court.

"is analogous to the search for 'indicia of occupancy' while executing a search warrant at a residence" (App'x D ¶ 32). To establish the relevance and admissibility of any evidence collected from the cell phone here, the government had to connect the phone to Dean by establishing that he possessed it when it (say) sent text messages to White. So for any Paragraph 1 evidence collected from the phone, the warrant also permissibly allowed the government to simultaneously collect the user-attribution information associated with that evidence.

Notably, none of the aspects of the warrants that caused the *Burns* Court special concern are present here. And Dean and PDS's insistence that the warrants in the two cases are indistinguishable leads them to ignore the substance of the actual warrant issued and instead attack phantoms.

First, because Judge Smith limited the search to records from March 1 to April 5, the warrant here did not (cf. PDS Br. 19-20) fail to "impose . . . meaningful limitations as to how far back in time police could go." *Burns*, 235 A.3d at 775. We agree (Dean Br. 37) that March 1 was the wrong starting date, but only because it should have been *earlier*—the government at least should have been able to look back to the start of Dean's and White's relationship. *See supra* note 3. An overly restrictive limitation, however, does not undermine the warrant's legality.

Second, as the court explained below (R. 92 at 10), the warrant did not authorize review "of literally all of the data" on the phones. *Burns*, 235 A.3d at 774.

Dean's protests to the contrary (Dean Br. 35) ignore the time limitations and the categories spelled out in Paragraph 1. And the warrant's execution confirms those limits. Whereas in *Burns*, "investigators scrutinized all of the nearly 3,000 pages of the extraction reports," 235 A.3d at 770, here the court found that the AUSA "did not" "'rummage through [Dean's] private information," but instead, "guided by Attachment B, [the AUSA] looked for data that fell within the time frames and categories of data outlined in the warrant" (R. 92 at 16-17).

Third, in explaining that analysts "may" have to do "more extensive searches" to find the evidence in Paragraph 1, such as "perusing all stored information briefly to determine whether it falls within the scope of the warrant" (App'x D ¶ 35), the affidavit did not undo the limits of Attachment B or permit unrestricted scrutiny of the phone. The word "peruse" carries two near-opposite meanings: "to examine or consider with attention and in detail" or "to look over or through in a casual or cursory manner." Peruse, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/peruse. PDS and Dean seem to assume the first close "examination" meaning (see PDS Br. 2, 5, 18, 26; Dean Br. 38-40). But Paragraph 35 clearly uses the second meaning of "cursory" "looking over," warning about "perusing . . . *briefly*" to find records that are "within the scope of the warrant." In any event, Paragraph 35 of the affidavit did not override Attachment B.

Fourth, Judge Smith was not "'a rubber stamp for the police'" (cf. Dean Br.

31) (quoting *Burns*, 235 A.3d at 774). As the name implies, a "rubber stamp" automatically approves a warrant as written. But far from "minor edits" at the edges (cf. Dean Br. 34), Judge Smith massively narrowed the search, imposing an (overly) aggressive time restriction to limit the search to 36 days of records, and nixing the government's request to also search for evidence about Dean's shooting.

Fifth, *Burns*'s criticism of "broadly authoriz[ing] the seizure of 'any evidence' on the phones" with no further specificity, 235 A.3d at 775, casts no doubt on Paragraph 1's authorization to search for (say) "any and all evidence regarding the relationship between Tamiya White and Robert Dean" (cf. Dean Br. 29-30). A "search warrant authorizing seizure of documents showing a *connection* between" two specified people is sufficiently particular. *Irving*, 673 A.2d at 1287 (emphasis added). And Dean never explains what police should be aiming for, if not *all* evidence in a specified category—just some narrow slice?

Sixth, and finally, seeking "evidence of user attribution" is not a "backdoor[ ]" for rummaging through the phone (cf. Dean Br. 35; PDS Br. 14-15). The user-attribution evidence was tied to any evidence recovered, "showing who used or owned the Device *at the time the things described in this warrant were created, edited, or deleted*" (App'x D attach. B ¶ 2) (emphasis added). Dean and PDS do not dispute that user-attribution evidence is necessary: At trial, to introduce (say) a text message sent from the phone a few weeks before the murder, the government would

also need to offer some reason to think it was Dean who sent the message.

PDS suggests that the government did not really need user-attribution evidence, given that the phone was registered to Dean and W2 had identified him as the possessor (PDS Br. 14-15). The point was not as secure as PDS imagines: W2 could disappear or die, and defense attorneys could argue that a registered owner may loan out his phone. In any event, the Fourth Amendment does not require the police to establish that a warrant is "necessary." The Amendment "require[s] only three things" for search warrants: issuance by neutral and disinterested magistrate, probable cause, and particularity. *Dalia v. United States*, 441 U.S. 238, 255 (1979); *see also United States v. Grubbs*, 547 U.S. 90, 97 (2006) ("only two matters . . . must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized"). And the Supreme Court has "rejected efforts to expand the scope of this provision to embrace unenumerated matters." *Grubbs*, 547 U.S. at 97. Once the government establishes probable cause to search for particular evidence, a judge cannot second-guess whether the government "really" needs it.

Had the government rummaged through the phone under the guise of seeking user-attribution evidence—which did not happen here (see R. 92 at 16-17)—Dean could have could have moved to suppress on the theory that the government executed the search unreasonably. *See infra* Part II. But the Fourth Amendment does not bar the government from looking for user-attribution evidence in the first place.

D. Suppression Would Not Be Appropriate

1. Good Faith

At the very least, the police relied on the warrants in good faith. Good faith protects evidence recovered pursuant to a warrant from suppression unless the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 923 (1984). The "fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner.'" *Messerschmidt v. Millender*, 565 U.S. 535, 546, 547 n.2 (2012). To assess good faith, this Court uses the pre-*Burns* law that governed when the warrant issued. *Abney*, 273 A.3d at 862.

For all of the reasons given above as to why the warrants were lawful, it was at least reasonable for detectives to *think* that they were valid. Indeed, this Court's precedent requires that conclusion. In both *Abney* and *J.F.S.*, this Court applied the good-faith doctrine to pre-*Burns* warrants similar to Dean's, distinguishing *Burns* both times based on the "slender" showing of probable cause in that case and the fact that Burns (in contrast to the others) was not established as a suspect. *See J.F.S.*, 300 A.3d at 758-59; *Abney*, 273 A.3d at 867. Both *J.F.S.* and *Abney* emphasized that until *Burns*, "courts had generally held cell phone search warrants to be sufficiently tailored and particularized where they 'limited the officers to searching for and seizing evidence of a specific crime.'" *J.F.S.*, 300 A.3d at 758 (quoting *Abney*, 273

A.3d at 865) (citing federal case law discussed above). Further, the warrant to search Dean's phone appears stronger than the *J.F.S.* warrant, which apparently lacked any time limitations. *See* 300 A.3d at 753. And it is far stronger than the *Abney* warrant, which allowed a search for "data, in whatever form," "that is evidence of the carjacking / robbery and / or the location, motive, intent, or associates," with no narrower list of individualized evidence like Attachment B here. *See* 273 A.3d at 863. Under *J.F.S.* and *Abney*, this Court should find good faith. Notably, while *J.F.S.* was issued after the opening briefs were filed here, *Abney* was decided in 2022. Yet neither Dean nor PDS acknowledges *Abney*, let alone tries to distinguish it.

Equally indicative of good faith is the fact that *four separate Superior Court judges* found the warrant to search Dean's cell-phone valid: the two issuing judges and the two judges who denied suppression. That includes Judge Demeo's careful written opinion explaining why Dean's warrant was valid even under the *Burns* legal regime (see R. 92 at 1-11). While Judge Demeo initially expressed concern about the warrant's *execution*, the court never doubted the validity of the *written* warrant. Nor has anyone disputed that "D.C. Superior Court judges have long approved search warrants and the physical extractions like the one at issue here" (R. 88 at 13). Further, the warrant follows the model suggested by the Department of Justice. *See* CCIPS, U.S. Dep't of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 73-74, 249 (3d ed. 2009), *available*

at https://www.justice.gov/d9/criminal-ccips/legacy/2015/01/14/ssmanual2009_002.pdf. When judge after reviewing judge thinks the warrant valid, there is no colorable argument for refusing to apply the good-faith doctrine.

2. Severability

Finally, if somehow this Court ruled a portion of Attachment B invalid and unworthy of good-faith reliance, the rest of Attachment B should be severed and would remain valid and enforceable (see R. 54). *See Burns*, 235 A.3d at 780. For example, if (say) collection of user-attribution data were rejected, the government could still have collected (say) March 2018 data on Dean's communications with White. And because the data introduced at trial all came from valid authorizations in Attachment B, suppression still would not be warranted.

II. The Warrant Was Executed Reasonably.

A. Rule 41 Authorized Law Enforcement to Seize, Copy, and Possess the Cell Phone's Contents.

Dean fares no better in his challenge to the warrant's execution. Dean and PDS accept the regime established by Rule 41(e)(2) (Dean Br. 38-39; PDS Br. 24), which authorizes warrants to seize and copy electronically stored information and review it later. That regime alone, however, forecloses Dean's claims.

"[C]omputers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to

review all of the information during execution of the warrant at the search location." Super. Ct. Crim. R. 41(e)(2) cmt. (2017) (citing Fed. Crim. R. 41(e)(2) adv. comm. n. (2009)). So Rule 41(e)(2) "acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant." *Id.* In other words, at Step 1 of executing a cell-phone warrant, law enforcement seizes and copies *the entire* contents of the cell phone. At Step 2, law enforcement reviews the copy to look for information falling within the scope of the warrant.

Dean's and PDS's execution challenges focuses entirely on the AUSA's *possession* of the Cellebrite report containing the full contents of Dean's phone. They formulate the objection in various ways—"receiving" the report, "seizing" it, "having access" to it, it being "in the prosecutor's hands," or DFS "providing" it (see Dean Br. 38, 40-43; PDS Br. 20-27). But all come down to the AUSA possessing the full report. The trial court's initial suppression ruling—which they defend (*id.*)—was likewise based entirely on the fact that "the Government ultimately . . . seized and received the entire contents of the cell phone" (App'x E at 12-13).[7]

[7] Their complaint would be the same if the report had been handed to the detective or any other "official participating in the investigation or prosecution" (PDS Br. 21 & n.16; see Dean Br. 41-43). While DFS performed the cell-phone extraction here, such extractions are often performed by FBI agents, U.S. Attorney's Office investigators, or MPD detectives. That is what Rule 41(e)(2) anticipates, explaining that "*officers* may seize or copy the entire storage medium and review it later," given

(continued . . .)

Yet possession of the full phone contents is exactly what Rule 41 allows—it is part of the Step 1 "seiz[ing] or copy[ing] [of] the entire storage medium." "Later *review*" of the information at Step 2 does not occur until law enforcement opens the report and begins to sift through its contents (by, for example, reading through the report or running keyword searches).[8] Dean and PDS try to collapse the steps, suggesting that *giving* the AUSA the report entitles her to *read* the report from cover to cover, with no Step 2 limits (see Dean Br. 39; PDS Br. 20). But that is plainly wrong, as Rule 41(e)(2), the warrant itself (see App'x D cover), and the trial court's opinion (see R. 92 at 13-17) all make clear. The Fourth Amendment required the AUSA to act reasonably in reviewing the report in order to comply with Attachment

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that "it is often impractical for *law enforcement* to review all of the information during execution of the warrant at the search location." Super. Ct. Crim. R. 41(e)(2) cmt. (2017) (emphasis added).

[8] Borrowing PDS's analogy to a Fourth Amendment search (PDS Br. 20 n.15), the prosecutor's mere possession of the Cellebrite report did not "*expose[ ] to view* concealed portions of the [phone] or its contents." *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *see also* Orin S. Kerr, *Searches and Seizures in A Digital World*, 119 Harv. L. Rev. 531, 551 (2005). PDS's footnoted suggestion that handing the report to the prosecutor was itself an additional search under *Hicks* doubly fails. First, simply handing the report to the prosecutor did not "exposed to view concealed . . . contents" of the cell phone or "produce a new invasion of respondent's privacy." The cell phone's contents were only "exposed" at Step 2, when the report was reviewed. Second, unlike in *Hicks*, giving the report to law enforcement is "[ ]related to the objectives of the authorized intrusion," 480 U.S. at 324-25—indeed, it is the precisely what the warrant authorizes (see App'x D ¶¶ 33-35). In any event, PDS as amicus cannot raise this novel argument. *See Apartment & Off. Bldg. Ass'n of Metro. Wash. v. Pub. Serv. Comm'n of D.C.*, 203 A.3d 772, 784 (D.C. 2019).

B. *See infra* Part B.2. But Dean chose not to challenge the AUSA's review: he "did not focus on what [the AUSA] did but rather on the very fact that she received the entire extraction" (R. 92 at 13). And mere receipt of the report is allowed.

B. A Warrant's Execution May Be Challenged for Reasonableness After the Fact, but Dean Has Made No Such Challenge Here.

The Supreme Court has repeatedly rejected calls for courts authorizing a warrant to "set forth precisely the procedures to be followed by the executing officers." *Dalia*, 441 U.S. at 258. "Nothing in the language of the Constitution or in [the Supreme] Court's decisions interpreting that language suggests that . . . search warrants also must include a specification of the precise manner in which they are to be executed." *Grubbs*, 547 U.S. at 98 (citation omitted). "On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant . . . ." *Dalia*, 441 U.S. at 257. Afterwards, "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Id.* at 258. As then-Judge Gorsuch explained, courts reviewing execution of a computer or cell-phone warrant can examine "the reasonableness of the search protocols the government actually employed in its search after the fact, when the case comes to court, and in light of the totality of the circumstances." *United States v. Christie*, 717 F.3d 1156, 1167 (10th Cir. 2013). But a defendant who fails to elicit such details fails to carry his

burden to justify suppression. *See id.*

Like in *Christie*, Dean preserved no objection to the search protocols employed here. Below, the court specifically explained that Dean was not making that sort of challenge—his argument in the trial court focused entirely "on the very fact that [the AUSA] *received* the entire extraction" (R. 92 at 12-13) (emphasis added). Dean accepted that characterization, waiving any new execution-related challenge. *See Poth v. United States*, 150 A.3d 784, 789 n.8 (D.C. 2016); *see also Campbell v. United States*, 163 A.3d 790, 798 n.13 (D.C. 2017) (new suppression arguments barred on appeal absent showing of "good cause"). Even on appeal, Dean and PDS have not disputed the trial court's findings showing that the AUSA acted reasonably. "[G]uided by Attachment B," the AUSA "looked for data that fell within the time frames and categories of data outlined in the warrant" (R. 92 at 16). The AUSA did not "'rummage' through his private information" (*id.* at 17). *See also id.* at 12 (summarizing unchallenged proffer about AUSA's review). Dean has not argued that those factual findings are clearly erroneous or otherwise suggested that the AUSA selected unreasonable methods.[9]

[9] Dean's brief includes occasional skeptical (and conflicting) asides about the AUSA's review (see Dean Br. 38-41). Those sarcastic, undeveloped musings are not enough to present an issue for appeal, if that is what Dean is seeking to do here. *See Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008).

C. Courts Consistently Reject Rigid, Ex Ante Limits on a Warrant's Execution Like Those that Dean and PDS Propose.

PDS and Dean suggest that in executing the warrant, law enforcement should have been required to follow some preset protocols, like judge-approved search terms or taint teams. But courts consistently reject these sorts of solutions—especially after a warrant lacking such requirements has been executed.

Again, Supreme Court precedent has already rejected predetermined limits on how law enforcement should go about executing a warrant. *See Grubbs*, 547 U.S. at 98; *Dalia*, 441 U.S. at 258. Federal circuits thus consistently reject fixed, ex ante limits on which files may be viewed in executing a digital search warrant.[10] The "deeply flawed" "ex ante strategy" "wrongly assumes that prosecutors and magistrate judges have the knowledge needed to articulate search strategies before the search begins. In truth, the forensics process is too contingent and unpredictable for judges to establish effective ex ante rules." Orin S. Kerr, *Searches and Seizures in A Digital World*, 119 Harv. L. Rev. 531, 572 (2005). Investigators are "at a loss

[10] *See, e.g.*, *United States v. Crespo-Rios*, 645 F.3d 37, 43 (1st Cir. 2011); *United States v. Galpin*, 720 F.3d 436, 447 (2d Cir. 2013); *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011); *United States v. Williams*, 592 F.3d 511, 521 (4th Cir. 2010); *United States v. Richards*, 659 F.3d 527, 538 (6th Cir. 2011); *United States v. Mann*, 592 F.3d 779, 782 (7th Cir. 2010); *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1176 (9th Cir. 2010) (en banc); *United States v. Burgess*, 576 F.3d 1078, 1094 (10th Cir. 2009); *United States v. Khanani*, 502 F.3d 1281, 1290 (11th Cir. 2007).

to know ex ante what sort of search will prove sufficient to ferret out the evidence they legitimately seek." *Christie*, 717 F.3d at 1166.

Dean cites no authorities supporting ex ante limits, and the feebleness of the citations that PDS provides (see PDS Br. 26 & n.18) is telling. Hundreds of thousands—perhaps millions—of computer and cell phone search warrants have been executed in recent decades, and Dean and PDS point to nothing special about the warrant here. So their proposed restrictions would appear to apply to every cell-phone and computer warrant in every jurisdiction in every case, marking a massive upheaval. Yet they fail to identify a single appellate court that has agreed with them, or a recent Supreme Court precedent justifying the overhaul of nationwide practice. Indeed, PDS cites (*id.*) a Ninth Circuit case that specifically *rejects* any argument that "the absence of these [search] protocols . . . violates the Fourth Amendment." *United States v. Schesso*, 730 F.3d 1040, 1047 (9th Cir. 2013). Even the hodge-podge of magistrates and unpublished district courts that PDS cites are decisions declining to *issue* warrants without search protocols (see PDS Br. 26 n.18). PDS offers no cases suggesting that a warrant issued without such protocols would be subject to suppression *after* the warrant is executed. *Cf. Leon*, 468 U.S. 897. Their half-baked theories justify no Fourth Amendment revolution.

Moreover, Dean's and PDS's concern about seeing non-criminal information while searching for evidence is not unique to digital warrants. Indeed, that is a

standard feature of warrants in the physical world: in executing a warrant, "it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." *Andresen*, 427 U.S. at 482 n.11. Yet the possibility of finding medications in a nightstand being searched for a gun, or legitimate bank records in a filing cabinet being searched for counterfeit money, has never resulted in further constitutional limits being superimposed on how the police may execute the warrant. In any event, each solution floated by the briefs quickly fails under scrutiny.

Search terms. Requests for pre-specified search terms or other digital search protocols (see PDS Br. 25-26 & n.18) have been consistently rejected.[11] Beyond the legal barriers discussed above, perhaps "the most compelling point . . . may be simply that such an approach is not feasible." LaFave § 4.10(d). An infamous Ninth Circuit decision a decade ago instructed magistrates to require disclosure and approval of the government's search protocols. *See United States v. Comprehensive Drug Testing, Inc.* (*CDT II*), 579 F.3d 989 (9th Cir. 2009) (en banc). But the court soon reversed course, moving the suggestion into a concurring opinion, and making

[11] *See Galpin*, 720 F.3d at 451; *Stabile*, 633 F.3d 219; *United States v. Triplett*, 684 F.3d 500 (5th Cir. 2012); *United States v. Evers*, 669 F.3d 645 (6th Cir. 2012); *Mann*, 592 F.3d 779; *United States v. Cartier*, 543 F.3d 442 (8th Cir. 2008); *Schesso*, 730 F.3d at 1047; *United States v. Brooks*, 427 F.3d 1246 (10th Cir. 2005); *Khanani*, 502 F.3d 1281.

clear that it was offered "not as [a] constitutional requirement[ ] but as 'guidance,' which, when followed, 'offers the government a safe harbor.'" *Schesso*, 730 F.3d at 1049 (discussing *CDT III*, 621 F.3d 1162, 1178 (9th Cir. 2010) (en banc) (Kozinski, C.J., concurring)). Courts since have wisely avoided *CDT II*'s path.

Taint teams. "[G]overnment taint teams are primarily used in cases . . . where the government has already gained control of the *potentially privileged* documents through a search warrant," such as when searching a lawyer's office, and the taint team must "sift the wheat from the chaff." *United States v. Snyder*, 71 F.4th 555, 568 (7th Cir. 2023) (emphasis added). Here, by contrast, the notion of "taint" makes little sense. Someone who views unresponsive items is not "tainted." Rather, every execution of a search warrant requires sorting through unresponsive items to find the targeted evidence. *See Andresen*, 427 U.S. at 482 n.11. Indeed, the issue is most acute in the physical world, where a home search for "small, easily concealed objects" like drugs requires the police to "go through the premises 'with a fine tooth comb.'" LaFave § 4.10(d). Yet PDS offers no examples of using taint teams for routine search warrants (see PDS Br. 23 & n.17). On the other side of the scales, taint teams are hugely burdensome (see 10/5 Tr. 32-33, 39-40). A taint team requires a separate "team of prosecutors and agents," *United States v. Lentz*, 524 F.3d 501, 516 n.3 (4th Cir. 2008), whose lengthy review will significantly delay the case. *See United States v. Jarman*, 847 F.3d 259, 266 (5th Cir. 2017) ("the taint team review

only took eight months"). This is not something a "Warrant Compliance Unit" could knock out in a couple of hours (see 10/5 Tr. 24-25, 32-33, 39-40), especially since the members of such a unit would have to learn the details of each case to know what evidence was relevant and what was not. If required for all digital warrants, the entire process would be unworkable. *See Riley*, 573 U.S. at 381 ("the ultimate touchstone of the Fourth Amendment is 'reasonableness'").

Cellebrite redaction. On appeal, Dean "does not argue that there was anything improper about DFS extracting the entirety of the data from Mr. Dean's phone" (Dean Br. 40)—consistent with his affirmative waiver of any challenge to DFS's actions below (when represented by PDS) (see 10/5 Tr. 20-21, 28, 31-32). The trial court cited and relied on that concession (see 10/5 Tr. 31; 10/12 Tr. 13). Yet PDS now suggests (see PDS Br. 3 n.3, 21 & n.16) as a factual matter that Cellebrite actually could have redacted the extraction—without addressing the government's detailed representations to the contrary below (see 10/5 Tr. 19-28), which relied on expert testimony (see R. 88 at 5-8 & nn.2-3). *See also* LaFave § 4.10(d) ("limiting files to certain types" or imposing a date restriction during execution of search for digital evidence "will not work"). PDS evidently also regrets Dean's concession (by a PDS attorney) that DFS is not part of the prosecution team. But PDS as amicus cannot reopen that factual issue on appeal. *See Apartment & Off. Bldg. Ass'n of Metro. Wash. v. Pub. Serv. Comm'n of D.C.*, 203 A.3d 772, 784 (D.C. 2019).

Manual redaction. Finally, PDS suggests in passing (PDS Br. 23) that "DFS or USAO staff still could have manually redacted or removed pages with content from dates that clearly did not include the target data from March and April 2018." Cell phones often misdate data, especially for particular categories like deleted items (R. 88 at 5-8 & nn.2-3), so there is no easy way to do such a dating sort. And anyway, if pages are so obviously unresponsive that they could be quickly cut by a paralegal unconnected to the case, Fourth Amendment reasonableness requirements would already bar the government from reviewing those pages during execution.

D. Dean's Execution Challenges Would Not Justify Suppression Anyway.

In any event, even if Dean could establish that the government acted unreasonably in executing the warrant, that still would not justify suppression here.

1. No Execution Challenge Lies to Recovery of Evidence Covered by the Warrant.

Because all of the cell-phone evidence introduced at Dean's trial fell within the authorized scope of the written warrant, claims that the government's execution went beyond that scope in other ways cannot justify suppression. Absent "'a flagrant disregard' for the limitations of their authorized search" (which Dean does not claim here), "'only the improperly-seized evidence will be suppressed; the properly-seized evidence remains admissible.'" *Porter v. United States*, 37 A.3d 251, 265 (D.C. 2012); *see also Nix v. Williams*, 467 U.S. 431, 443 (1984) (exclusionary rule puts

police "in the same, not a worse, position that they would have been in if no police error or misconduct had occurred"). In other words, evidence that the warrant authorized the government to seize will not be suppressed, even if some aspect of the search was unreasonable.

These principles apply fully to digital search warrants. Challenges to a digital warrant's execution commonly arise when police investigating one crime (say, fraud) stumble on evidence of another crime (say, child pornography), and the police charge the second crime. *See United States v. Loera*, 923 F.3d 907, 916-22 (10th Cir. 2019) (collecting such cases). When that happens, the police must explain why their search for financial records reasonably led them to the child pornography. If the police acted unreasonably, that may lead to suppression of the child pornography. But the defendant cannot seek to suppress the financial records that the police were entitled to search for. "If the scope of the government's search was too broad," the defendant (absent unusual circumstances) "would only be entitled to suppression of those emails that were introduced at trial and that reasonably fell outside the scope of the warrant." *United States v. Aboshady*, 951 F.3d 1, 9 (1st Cir. 2020).

Here, all of the evidence introduced at trial fell comfortably within the scope of the warrant. Exhibit 605 contained only records from March 19 to April 4. The vast majority of the communications were with Morris or White, plus a few inconsequential communications with McNeal. And the web history all related to

White's death (or finding homeless shelters). Indeed, the very fact that Dean fails to "clearly identif[y] which [digital records] that were introduced at trial fell outside the scope of the warrant" means he has not carried his burden in raising an execution challenge and is not entitled to suppression. *See Aboshady*, 951 F.3d at 9.

2. Good-Faith and Related Doctrines

The records are also immune from suppression under the good-faith doctrine. *See supra* Part I.E.1. While warrants do not typically describe how they will be executed, here the warrant did, explaining that the search could require "a range of data analysis techniques," potentially including "more extensive searches, such as scanning storage areas not obviously related to the evidence described in this warrant application or perusing all stored information briefly" to find responsive records (see App'x D ¶¶ 33-35). Further, Dean has never disputed the government's representation that Detective Rice talked to Judge Smith about the extraction process while obtaining the warrant, and Judge Smith "acknowledged that she was authorizing a limited search but understood that the technology did not reliably allow a limited timeframe for the extraction" (R. 88 at 13). Because the issuing judge blessed the execution method through issuance of the warrant, the good-faith doctrine bars suppression.

Moreover, given that Rule 41 authorizes the very method of execution that Dean and PDS now challenge, and federal courts uniformly endorse the procedure,

any error in following Rule 41 was a reasonable mistake of law that offers no basis for suppression. *See Heien v. North Carolina*, 574 U.S. 54 (2014).

III. Any Error Was Harmless.

Finally, this Court need not reach the Fourth Amendment issues, as it is clear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

The government presented overwhelming independent evidence of Dean's guilt. Dean's counsel acknowledged at trial that he had killed White by repeatedly stabbing her with a screwdriver—a point made indisputable by his repeated confessions to friends, his taped confession to detectives, and the supporting forensic and autopsy evidence. Dean's own accounts did not support self-defense. *See* 11/2 Tr. 147-50 (self-defense instruction). Dean told detectives that he followed White out to her car and pushed her first, making him the first aggressor. And in his various confessions, he never suggested that he felt in imminent danger of death or serious bodily injury from White—the key ingredient of a self-defense claim. Instead, Dean explicitly told detectives that he "retaliated" after White "pok[ed]" him with "something small." His account to friends of stabbing White 30 times "all over" with a screwdriver after she scratched his face, declaring "I hope I killed that bitch," telegraphed the same point: this was retribution for White locking him out of the house and scratching him, not an effort to save his own life.

No one—including Dean—saw the scratch from White as especially serious. It was inflicted by something small (keys, both Lewis and Morris surmised). The defense's suggestion that White was wielding the screwdriver herself and Dean disarmed her (11/2 Tr. 90) made no sense, as Dean insisted he did not know what she scratched him with. Nor did the mere fact that White had PCP in her body at death create grounds for self-defense, given that PCP may remain in the body long after its effects have worn off, and even those under its effects may act peaceful. Dean himself never suggested that PCP was causing White to act violently, and her behavior at McDonald's minutes after being stabbed showed no violence.

By contrast, the data extracted from Dean's cell phone added little. The records had some relevance to establishing Dean as White's killer and proving premeditation for first-degree murder (of which Dean ultimately was not convicted). But they had no meaningful bearing on the self-defense issue relevant now—particularly once we set aside the records separately proven by other sources, like the call records and the messages with Morris.[12] The single most notable message was Dean's text to Morris minutes before the killing that "I feel that am about to go to jail," but that was introduced through *Morris's* phone (see 10/28 Tr. 199), and

[12] The jury requested copies of Exhibit 605 during deliberations (R. 103). But that is consistent with the jury debating premeditation (which ultimately led to a hung verdict on first-degree murder) and the fact that Exhibit 605 nicely organizes the already-admitted call records and Morris text messages.

indeed had been used to *obtain* the search warrant at issue (see App'x D ¶ 10). As far as records found only in the extraction, messages from Dean to White asking to be let inside added nothing—Dean's confessions already established the point, and it did not matter for self-defense. Likewise, the messages with McNeal about sleeping arrangements, communications with homeless shelters, and searches for news articles about White's death tell us nothing about Dean's potential self-defense claim. There is, in short, no chance that the jury convicted Dean because of the disputed cell phone records.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
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(6) Financial account numbers

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(a) the acronym "SS#" where the individual's social-security number would have been included;
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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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Signature

22-CF-447
Case Number(s)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Anne Keith Walton, Esq., on this 15th day of December, 2023.

/s/
ERIC HANSFORD
Assistant United States Attorney