No. 18-50440

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

LUKE WILSON,
DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Southern District of California
15CR2838-GPC

ANSWERING BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

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JURISDICTION AND BAIL STATUS

The district court had jurisdiction under 18 U.S.C. § 3231, as Wilson stood charged in an Indictment with child pornography offenses against the United States. Excerpts of Record (ER) 1-4. On December 20, 2018, the court entered an amended final judgment, sentencing Wilson to 132 months of imprisonment concurrent to an undischarged state sentence of 45 years to life. ER 384, 415-20. Wilson timely noticed his appeal the same day. Fed. R. App. P. 4(b)(1); ER 414. Jurisdiction here rests on 28 U.S.C. § 1291. Wilson is in state custody. He is parole eligible in January 2042.

QUESTIONS PRESENTED

1. The private search exception to the Fourth Amendment allows police to look at information reviewed by a third-party private

actor without a warrant. Google's systems detected that four files Wilson uploaded to his Google email account had the same hash values of files that at least one Google employee previously viewed and identified as child pornography. The matched hash values told Google that Wilson's files were duplicates. Google sent copies of Wilson's files to law enforcement without re-reviewing the contents and reported they showed prepubescent minors in sex acts. Did an agent properly look at the copies without a warrant under the private search exception?

2. This Court first approved an oral waiver of a jury trial in 1971 notwithstanding the text of Fed. R. Crim. P. 23(a). Wilson indicated he did not want to "deal[] with" a jury trial, but the district court still told Wilson that he had a right to one, there would be 12 jurors, and all the jurors had to find him guilty. Wilson, a college graduate with a business degree and a six-figure salary as a marketing director, said he understood and had no questions. Did the court plainly err in finding that Wilson waived a jury trial?

STATUTORY PROVISIONS

The Fourth Amendment states in part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …."

Rule 23(a) of the Federal Rules of Criminal Procedure states in part: "If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves."

STATEMENT

1. Wilson uploaded four sexually explicit images of a five- to nine-year old girl to his Google email account. ER 191-94; Presentence Report (PSR) 4-5. One or more Google employees, trained by an attorney on federal law and the recognition of child pornography, had seen the images some time before. They qualified. So Google had classified the images as "A1," an industry standard meaning they show a prepubescent minor in a sex act. ER 79-80.

Google also had assigned unique hash values to the files—"digital fingerprint[s]"—and added the hashes "to [its] repository of hashes of apparent child pornography." ER 79. "[A] hash value is a string of characters obtained by processing the contents of a given computer file and assigning a sequence of numbers and letters that correspond to the file's contents." *United States v. Reddick*, 900 F.3d 636, 637 (5th Cir. 2018). "[A] good hashing algorithm will result in a hash value" that "will be, for all practical purposes, uniquely associated with the input. No other file will have the same hash value … except a file that is identical." Salgado, Fourth Amendment

Search and the Power of the Hash, 119 Harv. L. Rev. F. 38, 39 (2005). The idea is "[c]omparing these hashes" of known child pornography "to hashes of content uploaded to [Google's] services" allows Google to "identify duplicate images [and] prevent them from continuing to circulate on [Google's] products." ER 79.

The process worked. Google's automated system matched the hashes and flagged Wilson's four images. Google closed his account. As required by 18 U.S.C. § 2258A, it sent copies of the images—but not the email to which they were attached—to the National Center for Missing and Exploited Children (NCMEC). Google also reported IP addresses used to access the account, the account's subscriber information, and (signaling Google personnel at some point had viewed the images) Google's classification of the images as "A1." Google personnel did not re-review the images before sending them to NCMEC. ER 79-80, 86-100, 191-92.

NCMEC forwarded the images and report without review to agents in San Diego. ER 101-02, 192-93. An agent looked at the four images and confirmed they depicted child pornography. ER 107-08, 193-94. He identified the email account as Wilson's. ER 194-95; PSR 4. A warranted search of the account found several emails Wilson sent others with child pornography attached. Some exchanges

showed Wilson encouraging one Arriola to make and Arriola sending Wilson sexually explicit videos of herself with children and others for money. ER 195; PSR 5-8. That led to a search warrant at Wilson's residence. A backpack containing Wilson's checkbook flew from his balcony as agents entered. A thumb drive inside the backpack had thousands of images of child pornography, mainly prepubescent girls. ER 195-96; PSR 8. More than 10,000 images or videos of child pornography, including bondage and bestiality, were on other devices at the residence. PSR 8.

2. The indictment charged Wilson with advertising child pornography and distributing and possessing images of minors engaged in sexually explicit conduct. ER 1-4. Wilson moved to suppress the agent's review of the four images received from Google. He said the agent should have obtained a warrant. ER 5-19. The district court denied the motion. It said the agent's review was proper under *United States v. Jacobsen*, 466 U.S. 109 (1984), and other cases. ER 200-06. *Jacobsen* said the Fourth Amendment does not apply to private searches, and a later warrantless government review of information unearthed by the private actor is fine. See 466 U.S. at 117.

Wilson orally waived his right to a jury trial. ER 216-24. The court convicted Wilson in a bench trial of distributing and pos-

sessing images of minors in sexually explicit conduct (the prosecution dismissed the advertising count). ER 323-35. Wilson has been sentenced to 132 months of imprisonment concurrent to his state sentence, which addressed his child molestation crimes with Arriola. ER 384, 394-95, 402, 415-20.

SUMMARY OF ARGUMENT

1. Wilson's suppression motion was correctly denied. The private search exception allows agents to review information discovered by a third-party private actor to the same extent the private actor reviewed it. Before the agent saw the contents of the four files, a Google employee had seen, described (prepubescent minors in sex acts), and classified (A1) the contents of each file. Google then assigned each a hash value that enabled it to search for and match duplicate images on its systems. The matching hashes told Google that Wilson's files were duplicates. The agent's look at copies of Wilson's files just confirmed what Google employees already knew and could say. The Fifth Circuit upheld essentially this search. *Reddick*, 900 F.3d at 637.

Wilson contends the exception requires a Fourth Amendment "search" by the private actor, and hash matching is not such a search. He compares it to a dog sniffing the outside of luggage. The analogy is shaky. Among other things, a matched hash identifies a

file's precise contents. It equates to a full-color, high-definition view of the inside. A dog hit just tells the handler the dog smelled a scent it is trained to detect. The luggage's contents remain unknown. There might not even be visible content; the scent could be from what was there before. At any rate, Wilson does not cite authority for his claim that the private actor must have done a Fourth Amendment "search"—infringed on a subjective expectation of privacy that was objectively reasonable or trespassed without license on a constitutionally protected area—as opposed to popular notions of a search or just giving or showing the police (or telling the police about) something it was entrusted with. Cases have applied the exception without a Fourth Amendment search by the private actor. And Wilson's view is odd. It subjects private action to a Fourth Amendment definition when the Amendment does not apply to private action. It means police use of less intrusive private action may be barred by the Fourth Amendment while allowing police to use information found through more intrusive private action.

Wilson alternatively says the agent physically trespassed on his four files by opening and viewing them. He argues the rationale for the private search exception only excuses searches that invade an expectation of privacy, not searches that trespass into protected areas. The Supreme Court has said a Fourth Amendment search

(also) occurs with an unlicensed trespass into a person's papers or effects. But the agent looked at *copies* of Wilson's files which might not be Wilson's papers or effects. In any case, the private search exception applies to both types of Fourth Amendment searches. One, the exception originated when the Amendment was exclusively concerned with trespasses into protected areas, well before Fourth Amendment reasoning expanded to privacy concerns. Two, the reason for the exception is assumption of risk: that disclosing private information to another assumes the risk the other may disclose the information to police. That is just as true when a property owner gives another complete or partial control over his papers, effects, or home. The owner assumes the risk the third party might frustrate the owner's ordinary ability to physically exclude others from his property.

Wilson's last major argument is the exception "should not be extended to email." That misidentifies what occurred. The agent looked at copies of files Wilson uploaded as attachments to his account. He did not look at emails before obtaining a warrant. Google did not send any in its initial report. And there is no reason to exclude NCMEC referrals from the private search exception. Wilson says two recent Supreme Court cases did not apply established war-

rant exceptions to newer technology. But those cases faced the prospect of allowing warrantless searches of an entire cell phone ("a digital record of nearly every aspect of" a person's life) or granting warrantless access to past around-the-clock location records (an "intimate window" into a person's movement and associations over an extended period). Applying the private search exception to NCMEC referrals just allows agents to look at specific material reviewed and sent by the provider—in this case, four .jpg files. That limited information cannot be used to reconstruct much of a person's life over an extended period. The intrusion is not comparable. The denial of the motion should be affirmed.

2. Wilson validly waived a jury trial. Notwithstanding Fed. R. Crim. P. 23(a) and Wilson's claim that it is structural error not to obtain a written waiver, this Court has accepted oral waivers for almost half a century. Wilson is a college graduate with a business degree who had a well-paying job. He said he understood he had a right to a jury of 12, and all had to find him guilty. Wilson made clear he did not want a jury by questioning the court's attempt to tell him his jury rights: "We're not dealing with a jury, though. Correct?" ER 218. Wilson wrongly contends the court erred by not also telling him he would help pick the jury and a jury waiver meant the court decides guilt. The latter was implied and, at any rate, this

Court has "declined … to impose an absolute requirement of [that more extensive] colloquy in every case." *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997). The mandatory warning of four facts (a jury constitutes 12 community members, defendants help pick the jury, jury verdicts must be unanimous, and a waiver means the court decides guilt) arises when specific evidence of the defendant's mental or language impairment indicates a waiver may not be knowing and intelligent. That is not this case. There was no plain error.

ARGUMENT

A. The Court Correctly Denied Wilson's Suppression Motion

Wilson argues the agent needed a warrant to review the four images received from Google. The claim is baseless. The agent did not learn anything from his review that Google's private actions had not already found. The suppression motion was correctly denied.

1. *Standard of Review*: This Court "review[s] a denial of a suppression motion *de novo* and the underlying factual findings for clear error." *United States v. Soto-Zuniga*, 837 F.3d 992, 1003 (9th Cir. 2016); see also *United States v. Mulder*, 808 F.2d 1346, 1348 (9th Cir. 1987) (reviewing ruling that government action "did not exceed the scope of the private search *de novo* because it is a mixed question of fact and law requiring a determination 'whether the

rule of law as applied to the established facts is or is not violated'"). Findings are not clearly erroneous if they "are plausible in light of the record viewed in its entirety, even if [the appeals court] would have weighed the evidence differently had [it] been the trier of fact." *United States v. Alexander*, 106 F.3d 874, 877 (9th Cir. 1997). "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *United States v. Salcido-Corrales*, 249 F.3d 1151, 1155 (9th Cir. 2001); see also *United States v. Awad*, 371 F.3d 583, 592 (9th Cir. 2004) ("we would not be permitted to reverse the district court's findings of fact absent evidence so overwhelmingly convincing that the trial court had no alternative but to find in the defendant's favor").

2. *The Private Search Exception Allowed the Agent to Review the Files to the Same Extent as Google*

a. The Supreme Court has "consistently construed [Fourth Amendment] protection as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Jacobsen*, 466 U.S. at 113 (internal quotation marks omitted). The Amendment also allows warrantless government review and use of information provided by the private actor.

Id. at 117 ("Once frustration of the original expectation of privacy occurs" through private action, "the Fourth Amendment does not prohibit governmental use of the now-nonprivate information.").

The limitation is a government review may not exceed, more than to a *de minimis* extent, "the scope of the private search." *Id.* at 115. The agent in *Jacobsen* searched a package more than FedEx had. He tested a substance inside which FedEx had not done. *Id.* at 111. *Jacobsen* said the test did "not compromise any legitimate interest in privacy," because there is no legitimate interest in privately possessing cocaine, and the test could "reveal … no other arguably 'private' fact." *Id.* at 123. It "did affect respondents' possessory interest" protected by the Fourth Amendment prohibition on unreasonable seizures "by ["permanent[ly]"] destroying a quantity of the powder." *Id.* at 124-25. But that "infringement was *de minimis* and constitutionally reasonable." *Id.* at 126.

Jacobsen establishes a government review need not paint fully within the lines of private action. But when the government just reviews what the private actor already found, the cases say that is proper. *United States v. Tosti*, 733 F.3d 816, 822 (9th Cir. 2013), upheld a government review of information from a private search, because "the police learned nothing new through their actions." The

search in *Reddick*, 900 F.3d at 640, was lawful, as "[t]he government effectively learned nothing from Detective Ilse's viewing of the files that it had not already learned from the private search." In short, "*Jacobsen* directs courts to inquire whether the government learned something from the police search that it could not have learned from the private searcher's testimony." *United States v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001).

The agent in this case saw only what Google already found. Before the agent saw the contents of the four digital files, a Google employee had seen, described (prepubescent minors in sex acts), and classified (A1) the contents of each file. Google then assigned each a "digital fingerprint ('hash')" that enabled it to search for and "match[]" "duplicate images" on its systems. ER 79-80. The matching hashes told Google that Wilson's files were duplicates. Google's no-look referral indicates it thought the process reliable, and—though every business wants to keep customers, not mistakenly close their accounts for false reasons—nothing could be gained by making its employees view the images again.

Reddick affirmed essentially this search. That defendant uploaded digital files to Microsoft SkyDrive, a cloud service. SkyDrive used "a program called PhotoDNA to automatically scan the hash values of user-uploaded files and compare them against the hash

values of known images of child pornography." 900 F.3d at 638. The hashes for Reddick's files matched hashes of known files, Microsoft sent a tip and copies of Reddick's files to the police via NCMEC, and a detective "opened each of the suspect files and confirmed that each contained child pornography." *Id.* The Fifth Circuit affirmed the detective's review "under the private search doctrine." *Id.* "The government effectively learned nothing from [the detective's] viewing of the files that it had not already learned from the private search." *Id.* at 640.

b. Wilson says the agent in this case did more than Google, but the argument rests on the premise that Google just "hashed" Wilson's files. Appellant's Opening Brief (AOB) 37-44. Wilson acts like a Google employee did not view the contents of the duplicate files earlier, describe and categorize them, assign the hash, and it was the hash match that told Google that Wilson's files were the same. This is not *Walter v. United States*, 447 U.S. 649 (1980). AOB 37-40. Google saw and described what the images depicted. The employees in *Walter* did not before giving the films to the FBI. The FBI saw the contents first—the agents exceeded what the employees could have described—when they "viewed the films with a projector." 447 U.S. at 652.

This is also not *United States v. Keith*, 980 F. Supp.2d 33 (D. Mass. 2013). AOB 41-43. The service provider in that case did not classify or describe the contents of the file in its report to NCMEC, 980 F. Supp.2d at 37, and did not know "how the file came to be originally hashed and added to [its] database." *Id.* *Keith* suggests the outcome would have been different with the hash match if, like here, the record established an AOL employee or other private actor saw the original file's contents and identified child pornography. *See id.* at 43 ("matching the hash value of a file to a stored hash value … does say that the suspect file is identical to a file that someone, sometime, identified as containing child pornography, but [in Keith's case] the provenance of that designation is unknown").

c. Wilson contends it was not "virtually certain" the agent looked at the same files that Google's employee saw earlier, because any of three hypothetical errors could have infected the company's methods. AOB 45-46. But Google's process eliminates potential for what Wilson calls "downstream error." AOB 45; Electronic Privacy Information Center (EPIC) Br. 11. Google adds hashes to its repository after "the corresponding image first ha[s] been visually confirmed by a Google employee to be apparent child pornography." ER 79. It does not "flag an image based [solely] on a list of hash values that it received from some other entity." AOB 45.

Wilson and amicus also say some image-matching methods produce "false positives" unlike bit-for-bit hash matching. *Id.*; EPIC Br. 11-12. The basis for the claim beyond *ipse dixit* is not provided. Neither Wilson nor amicus backs it up with authority or the record. It is not clear if Google even uses image matching. That actually is one of amicus' complaints: it does not know the method or reliability of Google's proprietary technology. EPIC Br. 3. Somehow that does not stop it from also saying Google's process is "fundamentally different" from traditional hashing, *id.* at 13, and has "significant" "risk of error." *Id.* at 8. (Amicus also devotes several pages to Microsoft PhotoDNA, EPIC Br. 12, 14-17, which it knows Google does not use. *Id.* at 3; see also ER 79.)

That leaves "record entry error": "a Google employee mistakenly believes a non-contraband image contains contraband." EPIC Br. 11; AOB 45. But this is not a flaw in the hashing technology that could lead the police to see a different image than one seen by the employee. And it is otherwise unclear why the employee's mistaken impression or mistake in categorizing the image is a Fourth Amendment defect. A private third party entrusted with the image saw something suspicious and showed it to the police. Police review of the image fits squarely within *Jacobsen*. Searches occasionally do not produce expected evidence; suppose the powder in *Jacobsen*

turned out to be sugar. That does not make the search improper. No authority says the private party must have probable cause or reasonable suspicion before going to the police or that either is needed for police to look at what the private party found.

A second version of record entry error, say Wilson and amicus, is "the hash value of a contraband image is recorded incorrectly in the repository." EPIC Br. 11; AOB 45. This at least is a conceivable flaw in hashing technology. It may not be realistic: Google probably does not resort to manual data entry for hash values. The record admittedly does not address this point; Wilson did not make this argument below.

In any case, the district court found that "Google's multi-tiered screening process ensured" Wilson's images were "duplicate[s]" of the images the Google employee saw before. ER 192 n.5. This finding is factual and plausible given the record, so it cannot be clear error. See *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985). Google did not re-review these copies of the files before saying they depicted pre-pubescent minors in sex acts. How the files proved to show that and not cats, a landscape, or any of millions of other possible photo subjects cannot be explained by coincidence or magic. Google's representative provided the reason: the company's technology "identif[ied] duplicate images" uploaded to its systems, and it

reported hashes "that match[] a hash of a known child sexual abuse image." ER 79-80. "Duplicate" and "match" connote Google looks for and reports the same images it identified as child pornography, not "'similar images" as posited by amicus. EPIC Br. 12. Wilson passed on his chance to question the witness's word choice before the district court. Crim. LR 47.1(g)(4) (in Southern District, a party is entitled to cross-examine opposing declarants). The last nail is the agent testified that after several years reviewing NCMEC reports from Google, he could not recall an instance when a file Google referred based on a hash match to an A1 file depicted something besides child pornography. ER 157-58, 164. The court's finding that Wilson's files were duplicates is more than plausible. Every indicator before the district court was the technology works.

Two other points. First, to the extent amicus makes arguments about Google's hashing methods that Wilson has not, the arguments of amicus cannot be considered. *United States v. Wahchumwah*, 710 F.3d 862, 868 (9th Cir. 2013) ("arguments not raised in a party's opening brief are deemed waived, and the court will not consider arguments raised only in amicus briefs"; citation omitted).

Second, the discussion above assumes Wilson is right, and the hash match must "provide 'a virtual certainty' that the suspect file is necessarily an image that has been previously identified as child

pornography." AOB 45. The district court plausibly found it did, so the point is moot. Wilson, however, may not be right. "Virtual certainty" comes from *Jacobsen*. The Court said even if the powder seen by the FedEx employee was not still visible by the time the agent examined the package, "there was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell [the agent] anything more than he already had been told." 466 U.S. at 119. The significance of the phrase for the private search test is unclear. The Court's reasoning for why the agent's look complied with the Fourth Amendment seems spelled out more by the explanation that followed after: "[r]espondents do not dispute that the Government could utilize the Federal Express employees' testimony concerning the contents of the package," and "[i]f that is the case, it hardly infringed respondents' privacy for the agents to reexamine the contents of the open package." *Id.* That is how this and other courts read *Jacobsen*: the dispositive question is whether the agent learned more in his warrantless review than the private actor could have described. *Tosti*, 733 F.3d at 822; *Runyan*, 275 F.3d at 461.

3. *Wilson Wrongly Claims the Exception Does Not Apply*

a. Wilson tries to get around the private search exception. First he argues it does not apply here, his main contention being a hash

match is not a Fourth Amendment search so the private "search" part of the exception is missing. AOB 31. But this assumes that instead of lay notions of search or a private party entrusted with something telling or showing the government what it found, the private actor must have conducted a more technical Fourth Amendment "search" and specifically acted in a way that infringed a reasonable expectation of privacy or trespassed without license on a constitutionally protected area. E.g., *United States v. Jones*, 565 U.S. 400, 406 (2012). Wilson cites no authority saying that. And his view is odd. It judges private conduct by a Fourth Amendment standard though the Amendment does not apply to private action. *Jacobsen*, 466 U.S. at 113.

It also produces strange results. The police may look at evidence found by a FedEx employee who roots through a previously sealed package. *Jacobsen*, 466 U.S. at 111. Same when a "thief" steals papers from an office. *Burdeau v. McDowell*, 256 U.S. 465, 473 (1921); *id.* at 476 (Brandeis, J., dissenting). Yet looking at files found by a computer repairman who stumbled over them during a repair, *Tosti*, 733 F.3d at 818-19, becomes an overstep. The repairman was authorized and expected to look through the computer for the repair so he did not surpass the owner's privacy expectations or tread where he was not licensed and did not "search" the computer within

the meaning of the Amendment. So too in other cases when a third party discovers something without exceeding the owner's privacy expectations or going where he was not allowed. *United States v. Paige*, 136 F.3d 1012, 1015 (5th Cir. 1998) (worker authorized by homeowner to enter garage inadvertently sees drugs while looking for materials); *United States v. Clutter*, 914 F.2d 775, 776 (6th Cir. 1990) (homeowner's children find marijuana while left alone at home). Wilson would have the Fourth Amendment allow police to use information found through more intrusive private conduct and bar them from using information obtained through less intrusive private action.

Wilson's top premise is also questionable. He says a hash match is a "technological dog-sniff" and not a Fourth Amendment search. AOB 32. *United States v. Place*, 462 U.S. 696 (1983), does say an exterior dog sniff of luggage is not a search in Fourth Amendment terms. The sniff "does not require opening the luggage," "does not expose noncontraband items that otherwise would remain hidden from public view," and "despite the fact that the sniff tells the authorities something about the contents of the luggage, the information is limited." *Id.* at 707. Even assuming for argument the first two are like hashing, the third is the opposite. A hash match identifies the file's exact content and in that way is a high-definition,

full-color view of the inside. *Place* said it was "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* Even if the first could be said of hashing, the second cannot. *Place* is not the answer that Wilson suggests.

b. Wilson's back-up argument is the exception does not apply because it "requires an initial, private frustration of an individual's privacy" which a machine cannot do. AOB 34 ("Only a human can violate another human's privacy . . . . [I]f no human knows what the computer found, privacy remains intact."). Wilson does not offer authority for this view which is not universal. Recent increases in machine-based monitoring have sparked significant privacy discussions, probably because automated computers can monitor, gather, and store information on a scale and at a frequency far greater than humans unaided by technology. See, e.g., Geoffrey A. Fowler, *Alexa Has Been Eavesdropping On You This Whole Time*, WASH. POST, May 6, 2019, https://www.washingtonpost.com/technology/2019/05/06/alexa-has-been-eavesdropping-you-this-whole-time/?utm_term=.0e54c48d5718 ("Would you let a stranger eavesdrop in your home and keep the recordings? For most people, the answer is, 'Are you crazy?' Yet that's essentially what Amazon has

been doing to millions of us with its assistant Alexa in microphone-equipped Echo speakers.").

4. *The Lawfulness of the Agent's Review Is Not Altered By the Property Rights Doctrine From* Jones

Wilson alternatively says the private search exception is not enough. The argument is, separate from expectations of privacy, the Fourth Amendment protects effects (personal property) and papers against physical intrusion by the government; the reviewed files were Wilson's effects or papers; and the rationale for the private search exception does not excuse property intrusions. His inspiration is *Jones* which said the Fourth Amendment protects both a person's reasonable expectation of privacy and against "physical intrusion[s] of a constitutionally protected area in order to obtain information," i.e., "property rights." 565 U.S. at 407 (internal quotation marks omitted); see also *id.* at 406 ("for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates"). See AOB 22-27, 30-31.

Wilson's claim is flawed in at least one and maybe two ways. It might be flawed, because it is unclear if the files reviewed by the agent were *Wilson's* "effects" (they were not literally his "papers").

The agent technically looked at copies of Wilson's uploads as is always the case when files are sent through the Internet or transferred from one digital media to another. The "original" bits or ones and zeroes making up the files stayed in Wilson's email account. The buyer or recipient of a bag cannot say every copy of the bag is also his property even if the copies are exact matches and were created based on the first. The original creator of the files (or bag) might still hold intellectual property rights which complicates matters. But Wilson has never claimed he holds copyrights or other intellectual property rights for the images.

Wilson relies on *United States v. Ackerman*, 831 F.3d 1292, 1304 (10th Cir. 2016), to say "'an email is a 'paper' or 'effect' for Fourth Amendment purposes.'" AOB 23. That is true in other cases but irrelevant here. The agent did not review Wilson's email. Google did not send it. The agent only reviewed copies of the uploaded files with matching hashes. *Ackerman* recognized that may be different. 831 F.3d at 1306 ("What if NCMEC *hadn't* opened Mr. Ackerman's email but had somehow directly accessed (only) the (one) attached image with the matching hash value? … Interesting questions, to be sure, but ones we don't have to resolve in this case.").

In any case, one clear problem with the argument is even if the agent's review was a "search" of Wilson's effects or papers, the reason for the private search exception still applies. For one, the exception started with *Burdeau*, 256 U.S. at 475-76, when the Fourth Amendment focus *was* trespass on property. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 457 (1928) (Amendment inapplicable to wiretap because "[t]he taps from house lines were made in the streets near the houses"). That was 46 years before the concurrence in *Katz v. United States*, 389 U.S. 347 (1967), led Fourth Amendment doctrine down the privacy path. *Burdeau* never mentions privacy. Its thinking instead amounted to "we see no reason why" the government should be barred from using papers acquired and provided by a private party. 256 U.S. at 476.

Jacobsen later spoke in privacy terms, 466 U.S. at 117, probably because by 1984 even the Justices appeared to think *Katz* alone determined if a "search" occurred for Fourth Amendment purposes. *Jacobsen*, 466 U.S. at 113 ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."); see *Jones*, 565 U.S. at 421-23 (Alito, J., concurring) (noting old "trespass-base rule was repeatedly criticized" until *Katz* "did away with" it and by the time of *Oliver v. United States*, 466 U.S. 170, 183 (1984), the Court admonished "[t]he premise that property

interests control the right of the Government to search and seize has been discredited" (internal quotation marks omitted)).

At any rate, the premise underlying *Jacobsen*'s explanation for the private search exception is assumption of risk: "when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information." 466 U.S. at 117. That is also true when a property owner gives another complete or partial control over his papers, effects, or home. The owner assumes the risk the third party might frustrate the owner's ordinary ability to physically exclude others from his property—the right protected by the property rights side of the Fourth Amendment. And even more in Wilson's case: in setting up his email account, he gave "Google (and those we work with) a worldwide license to use, host, store, … communicate, … and distribute" all content he uploaded, for the "purpose of operating … and improving [Google's] services." ER 83. Wilson did not just assume the risk Google might "communicate" or "distribute" his uploaded files to the authorities. He authorized Google to do it. So *Jacobsen*'s assumption of risk basis for the private search exception applies to all Fourth Amendment "searches,"

property- or privacy-based. It also applies to Wilson with more force than usual.

5. *NCMEC Referrals Should Not Be Excluded From the Private Search Exception*

Wilson's final contest is to say the "private search doctrine should not be extended to email." AOB 36. One problem is that misidentifies what happened. The agent did not look at an email without a warrant. He reviewed copies of files uploaded as attachments. A fraction of emails have attachments. It overstates to emphasize the prevalence of and effects on email generally. See *id.*

That aside, Wilson's call for an exception to the exception is unwarranted. "Absent more precise guidance from the founding era, [the Supreme Court] generally determine[s] whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Riley v. California*, 573 U.S. 373, 385 (2014).

Some email attachments doubtless reveal matters that the sender or recipient prefer stay private. But that is not unique to email attachments. It applies to traditional mail, physical packages, and any number of other everyday things. The question is the

extent of government intrusion on privacy in context. For NCMEC referrals that is at most slight. *Jacobsen* already explained that the nature of the private search exception means any hope for privacy in the reviewed material is "frustrated" before the government looks at it. 466 U.S. at 117. The type of reviewed material does not change that. It could be a letter, an email, or an email attachment. The circumstance is the same. The party or parties expecting privacy trusted and revealed information to a third party who disclosed it.

And any hope of privacy in this context, even if initially reasonable in Fourth Amendment terms, already was at the weak end of the spectrum before it was frustrated. Wilson did not save the images to a drive that he locked in his house safe. He uploaded them to the servers of a corporation that famously scans and mines all its users' content and always has told everyone that is what it does. ER 83 ("Our automated systems analyze your content (including emails) to provide you personally relevant product features, such as customized search results, tailored advertising, and spam and malware detection. This analysis occurs as the content is sent, received, and when it is stored."); Katie Hafner, *In Google We Trust? When the Subject is E-Mail, Maybe Not*, N.Y. TIMES, Apr. 8, 2004, at G1 (noting Google's "new" email service, Gmail, would "us[e] software

to peruse e-mail" and "analyze content" so some were inclined not to use it). Wilson, in other words, sent his files to strangers who warn they look at everything.

Finally no one contends it was a problem for Fourth Amendment purposes that Google found the images. Or that Google employees could not tell the police what they saw and knew like any percipient witness to a crime. In terms of Wilson's privacy and what he hoped to keep secret, that was the essence of the intrusion: outsiders learning he had child pornography. The only government action potentially cognizable under the Fourth Amendment was the agent viewing copies of Wilson's uploaded files. That confirmed Google's report but did not add much to the privacy breach. The secret was already out and, through witnesses, could (would) have been disclosed regardless. The intrusion on privacy attributable to the government in this context is slight.

On the other side, warrantless reviews of referred images like Wilson's serve a number of government interests. The overarching concern, stopping child exploitation through the distribution of child pornography, is obvious and undeniable. The Internet is the lead battleground. Congress made that point by requiring that Internet service providers, and not others, report knowledge of crimes involving child pornography. See 18 U.S.C. § 2258A.

The usual requirement of a warrant is a problem in this scenario because of the breadth of the issue. The Supreme Court was concerned that requiring search warrants for breathalyzer tests after every drunk driving arrest would put a "considerable" burden on courts; it cited the 1.1 million drunk driving arrests in 2014. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2180 (2016). NCMEC referrals were comparable then. The Center averaged 15,000 reports of child abuse imagery per week in 2014 or roughly 800,000 reports for the year. Staff, CyberTipline Sees Surge in Reports of Child Abuse Imagery, Thorn (July 24, 2014), https://www.thorn.org/blog/cybertipline-reports-child-abuse-imagery/. There are more now. CyberTipline reports—which include reports of child pornography images, online enticement, child sex trafficking, and child molestation—have shot from about 1.1 million in 2014 to 4.4 million in 2015 ("[n]inety-nine percent" of which were "incidents of apparent pornography involving children") to 18.4 million in 2018. See 2015 National Center for Missing & Exploited Children Annual Report at 5, https://api.missingkids.org/en_US/publications/NCMEC_2015.pdf (2014 and 2015 statistics); NCMEC, Media Key Facts, http://www.missingkids.com/footer/media/keyfacts (last visited April 30, 2019) (2018 statistics).

Birchfield also said it is "appropriate to consider the benefits that" requiring a search warrant "would provide" under the circumstances. 136 S. Ct. at 2181. One way a warrant "protect[s] privacy" is by ensuring a "neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found." *Id.* The other is "it limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought." *Id.* The Court saw little gain for either if a breathalyzer required a warrant: the first because "the facts that establish probable cause are largely the same from one drunk-driving stop to the next and consist largely of the officer's own characterizations of his or her observations" which a judge "would be in a poor position to challenge"; the second because "[i]n every case the scope of the warrant would simply be a BAC test of the arrestee" so a warrant "would not serve [the specification] function at all." *Id.*

The same is true for NCMEC referrals. The facts establishing probable cause for most referrals largely would look like the facts here and in *Reddick*: the visual identification of a digital file as child pornography by a private employee and some description of the image. Referrals predicated on hashing might also explain the assign-

ment of a hash value, discuss hash matching including the provider's belief in its reliability, and reveal the discovery of a later hash match. A court would be in no position to challenge the description of the image (it cannot look at it) or the provider's belief in hashing's reliability. But the allegation and the disinterested nature of the reporting party would compel issuance of the warrant. And the warrant does nothing for the second purpose. In every case it would just say the officer may look at the image(s) from NCMEC. The judge has nothing to cabin. The imposition of "a substantial burden but no commensurate benefit" by requiring a warrant, *Birchfield*, 136 S. Ct. at 2181-82, cuts against carving out NCMEC referrals from the private search exception.

Wilson contends that *Riley* and *Carpenter v. United States*, 138 S. Ct. 2206 (2018), show "[t]he Supreme Court has repeatedly declined to extend other established warrant exceptions to technologies, like cell phones, that provide increased access to personal data." AOB 35. The Court, however, has not yet said a separate Fourth Amendment always applies to new technology. And the intrusions do not compare. What used to be a search of the few physical items on arrestees' persons threatened to become a warrantless look at "a digital record of nearly every aspect of their lives—from the mundane to the intimate" if today's cell phones fell within the

search incident to arrest rule. *Riley*, 573 U.S. at 395. Warrantless access to past cell-site records, if permitted under the third-party doctrine, could "provide[] an intimate window into a person's life" over an extended period, "revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Carpenter*, 138 S. Ct. at 2217. The private search exception applied to NCMEC referrals only allows agents to review the specific material reviewed and sent by the provider. That little information is not a full cell phone or many days of past around-the-clock location records. It cannot be used to reconstruct much of a person's life over an extended period. The potential for that type of reconstruction might only start to arise through a further search of the person's email or online account. But that additional search still requires a warrant as the agent obtained here. This is not *Riley* or *Carpenter*. The intersection with technology is not reason alone to drill holes in a long-standing Fourth Amendment rule. The denial of the motion should be affirmed.

B. Wilson Orally Waived His Right to a Jury Trial

Wilson is a college graduate with a business degree. Until his arrest he had a six-figure salary as a marketing director for a popular drink company. PSR 21. At a status hearing before trial, the

prosecutor said if the defense would stipulate to certain facts as it had indicated, she would consent to a bench trial instead of a jury trial. ER 213. Wilson's attorney said they would stipulate. *Id.*

The prosecutor later said she "thought as part of this hearing [the defense attorney] was going to have his client execute the waiver of jury trial." ER 216. The court took the waiver orally. It confirmed Wilson "underst[ood] that you have a right to have the government present this case to a jury and then for the jury to consider whether or not they have met their burden of proof on each of the elements of each of the three offenses that have been charged." ER 218. Wilson said, "Yes. We're not dealing with a jury, though. Correct?" The court said, "No. Do you understand that you have that right?" Wilson said he understood. *Id.* Wilson understood that "in terms of finding guilt, it's required, it would be required that all 12 jurors find you guilty." ER 219. He understood his stipulation to certain facts meant the prosecution would not call witnesses to prove those facts, and he would be unable to question them. ER 219-20. After confirming Wilson understood others of his trial rights (to subpoena witnesses, to present a defense, to remain silent, and the burden of proof) and knew the potential penalties, ER 220-22, and after verifying Wilson had no questions "about anything that I have gone over," ER 223, the court found that "Mr. Wilson has waived

his right to a jury trial, and so we can proceed with a bench trial." ER 224. Wilson now contends the court "structurally erred in failing to obtain a written jury waiver." AOB 54.

1. *Standard of Review*: Wilson did not argue below that his jury waiver was defective. Review is for plain error. Fed. R. Crim. P. 52(b) (plain error review applies to errors "not brought to the court's attention"); *United States v. Williams*, 559 F.3d 607, 613 (7th Cir. 2009) (unpreserved challenge to Rule 23(a) colloquy is reviewed "for plain error"). Plain error requires "'error' that is 'plain' and that 'affects substantial rights.'" *United States v. Olano*, 507 U.S. 725, 732 (1993). While such error is necessary, it is not sufficient: correction remains discretionary, and the Supreme Court warns that "court[s] should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (citation omitted). The plain error rule "authorizes [appellate courts] to correct only 'particularly egregious errors'" and "is to be 'used sparingly.'" *United States v. Young*, 470 U.S. 1, 15 (1985). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009).

Wilson says review is *de novo*. AOB 54. He cites *United States v. Shorty*, 741 F.3d 961, 965 (9th Cir. 2013), AOB 54, which cites *United States v. Christensen*, 18 F.3d 822, 824 (9th Cir. 1994),

which cites *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1252 (9th Cir. 1986). (He also cites *United States v. Laney*, 881 F.3d 1100, 1106 (9th Cir. 2018), AOB 54, which cites *Shorty*.) All the cites are silent on whether those defendants objected to allow the district judge to fix any mistake before appeal. See *Puckett*, 556 U.S. at 134 (objection requirement and plain error standard "serve[] to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them"; "'anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal'"). None addresses how *de novo* applies over Rule 52 if there was no objection; none mentions Rule 52(b). And *Ferreira-Alameda*, the wellspring for all, cites the standard for reviewing "the voluntariness of [a] guilty plea," not the standard for an unpreserved claim of deficient jury waiver. 815 F.2d at 1252. Review should be for plain error.

2. There was no error. *United States v. McCurdy*, 450 F.2d 282, 283 (9th Cir. 1971) (per curiam), held long ago that despite Rule 23's mention of a written waiver a jury trial may be waived by "an intelligent, knowing, and express [oral] waiver by the defendant in open court, with the consent of both counsel, and with the approval

of the trial judge given after appropriate questioning of the defendant." McCurdy was told he had a "right to have this case tried by a jury composed of twelve people" and affirmed he "was willing to waive that right … and have the Court, sitting alone, determine whether you are guilty." 450 F.2d at 282. That is largely what Wilson was told; the differences are Wilson was not told explicitly that the court would decide his guilt (that was implied), and unlike McCurdy, Wilson was told the jurors must be unanimous. This Court said McCurdy's waiver sufficed, *id.*; Wilson's should too.

And the bar is lower for an "'intellectually sophisticated and highly educated'" defendant like Wilson. See *United States v. Tamman*, 782 F.3d 543, 551-52 (9th Cir. 2015) ("the sufficiency of the colloquy is highly dependent on the education and legal sophistication of the defendant, and shorter colloquies can be sufficient to ascertain whether the waiver is knowing and voluntary"). Tamman's waiver sufficed "even without an in-depth colloquy or a recitation of" four factors mentioned in *Shorty*, 741 F.3d at 966, and *United States v. Cochran*, 770 F.2d 850, 853 (9th Cir. 1985), because Tamman was "a practicing attorney and a partner at a major law firm." 782 F.3d at 552. Leja was a college graduate and licensed insurance and securities broker who watched as the court and his attorney discussed and confirmed a jury waiver. Leja "demonstrated his

agreement … through facial expressions." *United States v. Leja*, 448 F.3d 86, 90, 94-95 (1st Cir. 2006). Page was a former professor with a doctorate who said nothing as his attorney told the court the defense would waive. *United States v. Page*, 661 F.2d 1080, 1080-81, 1083 (5th Cir. 1981). Leja and Page were not asked anything about their waivers. Wilson, a college graduate with a well-paying job that inherently requires some business acumen and sophistication, at least personally made clear he did not want a jury ("We're not dealing with a jury, though. Correct?") and was warned he had a right to one, it would be a jury of 12, and all must convict. See also *Shorty*, 741 F.3d at 968 ("Were Shorty as intellectually sophisticated and highly educated [as the defendants in *Leja* and *Page*], his colloquy might indeed have been sufficient.").

McCurdy and other cases are fatal to Wilson's claim that not obtaining a written waiver is structural error. Written waivers are preferred and presumptively valid, *Cochran*, 770 F.2d at 851, but this circuit has accepted oral waivers for nearly half a century. *McCurdy*, 450 F.2d at 283; see also *Shorty*, 741 F.3d at 966 ("Although Rule 23 states that the waiver must be in writing, we have held that under certain circumstances an oral waiver may be sufficient."); cf. *United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971) (oral stipulation to jury of less than 12 satisfies Rule

23(b) despite requirement of written stipulation if "appear[s] from the record that the defendant personally gave express consent in open court, intelligently, and knowingly"). Wilson's complaint that allowing oral waivers strays from Rule 23 and should be overruled, AOB 56 n.12, overlooks that the law always has considered whether deviations from procedural rules "'much matter.'" *Puckett*, 556 U.S. at 134. The Rules require that. See Fed. R. Crim. P. 52.

Wilson also misunderstands *Shorty* to mean courts must always inform defendants of four facts before accepting an oral waiver. AOB 55. The four facts originated in "dicta" in *Cochran*. *Christensen*, 18 F.3d at 825. *Cochran* "implore[d]" lower courts to tell defendants a jury is made up of 12 community members, defendants help pick the jury, jury verdicts must be unanimous, and a waiver means the court decides guilt. 770 F.2d at 853. *Cochran* did not say that always must be done—it affirmed a waiver without the advice—because it could not. This Court already had found waivers sufficient when the advice was not given. See, e.g., *McCurdy*, 450 F.2d at 283; see also *Duarte-Higareda*, 113 F.3d at 1003 ("We have declined … to impose an absolute requirement of [the *Cochran*] colloquy in every case."); *Williams*, 559 F.3d at 610 ("As we have said, the sole constitutional requirement is that the waiver be voluntary, knowing, and intelligent. The colloquy and the written waiver serve

to document these qualities, but a jury waiver may be valid despite their absence."). *Christensen* elevated *Cochran*'s dicta to a requirement for that case; the defendant had manic-depressive disorder supposedly "so severe as to make it impossible for a person to tell right from wrong." *Christensen*, 18 F.3d at 824-25. *Christensen* explained that, "In cases where the defendant's mental or emotional state is a substantial issue, 'imploring' district courts to conduct fuller colloquies is not enough. We must require them to do so." *Id.* (citation omitted). *Duarte-Higareda* did the same because it was unclear the defendant understood what he had done. He spoke Spanish yet signed a waiver in English. No one asked if he understood the form or what it meant. He was never questioned orally. 113 F.3d at 1003. *Shorty* was the same. He had a low I.Q. and a learning disability, so like *Christensen*, the district court "was aware of an additional, 'salient fact' that should have put it on notice that Shorty's oral waiver 'might be less than knowing and intelligent.'" 741 F.3d at 967. Wilson is not in this class and has never claimed to be.

Wilson says his waiver two weeks before trial "should have" been re-confirmed at trial. AOB 57. No authority holds that once a jury trial or any right is waived it is error not to obtain the same waiver again later. Courts routinely take jury waivers well before trial,

e.g., *Tamman*, 782 F.3d at 548 (26 days); *Leja*, 448 F.3d at 90 (38 days), so they do not needlessly summon scores of potential jurors to the courthouse just to send them home. Wilson also picks at two things the court said. AOB 56-57. While true that jurors do not "determine actual innocence," AOB 56, they do decide a defendant is not guilty. Wilson does not claim or explain how the court's use of "innocent" over "not guilty" caused him not to understand that he was giving up a jury trial. The same gap infects Wilson's complaint that the court spoke about the jury waiver at the same time as stipulations. AOB 57. At any rate, Wilson showed he would ask questions if he needed clarification. ER 218. He asked none about this. He was not confused. There was no error.

3. Wilson's argument stalls out for another reason. Errors must be "plain" for plain error. Plain means "clear or obvious under current law. An error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results." *United States v. Gonzalez-Becerra*, 784 F.3d 514, 518 (9th Cir. 2015); see also *United States v. Hayat*, 710 F.3d 875, 896 (9th Cir. 2013) ("plain" means "'so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection'"). No circuit authority matches this case perfectly. No binding authority squarely establishes Wilson's waiver

was insufficient. *McCurdy* is closest, and it indicates the waiver was fine.

CONCLUSION

Wilson's conviction should be affirmed.

Respectfully submitted,

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JUNE 21, 2019.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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