IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	
vs.	Criminal No. GLR-23-0026
RYAN DALES	
Defendant.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE CHIEF JUDGE GEORGE LEVI RUSSELL, III
MAY 3, 2024 AT 9:35 A.M.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:
PAUL A. RILEY, ESQUIRE
EREK BARRON, ESQUIRE

ON BEHALF OF THE DEFENDANT:
RICHARD B. BARDOS, ESQUIRE

ALSO PRESENT:
SPECIAL AGENT SUMMER BALL
SPECIAL AGENT BRIAN GORMAN

(Computer-aided transcription of stenotype notes)

Reported by:
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9:38 a.m.

THE COURT: Good morning, Counsel. You can have a seat everyone. Why don't you call the case.

MR. RILEY: Yes, Your Honor. Calling the case of United States of America v. Ryan E. Dales. That's Criminal No. GLR-23-cr-0026. U.S. Attorney Erek Barron, Assistant U.S. Attorney Paul Riley on behalf of the Government. With us is Special Agent Summer Ball of the FBI as well as Special Agent Brian Gorman of DOL-IOG.

We're here today this morning for a motions hearing.

THE COURT: Good morning. All right, Mr. Bardos, always a pleasure, sir.

MR. BARDOS: Yes, Your Honor. Congratulations on the new salutation for your name. Rich Bardos on behalf of Ryan Dales who is present to my left.

THE COURT: All right. Mr. Dales, good morning to you, sir.

THE DEFENDANT: Good morning, sir.

THE COURT: As indicated, we are here for the purpose of a motions hearing. I indicated, I sent out to counsel earlier, prior to the motions hearing, a notice that the underlying trial that was set will end up having to be rescheduled in the event that we get to a point that we have a trial or need a trial.

But, we are here for the purposes of a motions hearing.

It's my understanding that the Defendant, through counsel, has filed two motions. One, a Motion to Sever counts as well as a Motion to Suppress Evidence.

What is typically my practice, I've had the opportunity to read both motions as well as the oppositions and the replies. They are noted at ECF Number 49, which is the Motion to Suppress, and ECF Number 50.

I'm, of course, going to hear from Mr. Bardos, and I'll hear from the Government as well, but I wanted to give you my understanding of what the arguments are from my standpoint. And then I'll hear from you to let me know where I'm wrong or where I'm right, and we can proceed from there.

First, as to the Motion to Suppress. There is a Motion to Suppress Evidence seized at 900 East Fort Avenue, Apartment 537 in Baltimore, Maryland, which is an address associated with the Defendant. A warrant was executed on January 20, 2023.

The warrant actually was applied for and issued two days earlier. Inside the warranted affidavit it alleges through the agent that there was reason to believe that evidence of a criminal fraud would be present at the individual location.

There were two investigations of fraud. One related to a -- an identity sort of fraud, an insurance fraud, and a pandemic fraud scheme.

In one of the fraud schemes the Defendant identified himself through identification -- don't worry about -- I'm not

worried about the furrowed brows, if I make a mistake you guys are going to tell me.

And then in the second -- one of the other frauds there were other individuals' identities that were assumed for the purposes of obtaining Government monies.

In addition, there was a second fraud that was related to actually defrauding other institutions that were not Government controlled.

The primary argument by the defense is that the information that was provided to -- within the affidavit and provided to the United States magistrate was old, was stale, was over a year and a half or so old, that the schemes that were alleged in the fraud had concluded and that -- one fraud had concluded and then a period of time had passed before investigations led to allegations of a second fraud.

Sought to be recovered at the location where evidence of the fraud obviously, but this would include documents and other items that once the warrants were executed -- and there was no mention of any guns or narcotics or any other criminal act, but once the warrants were executed, located allegedly in plain view were firearms, narcotics, narcotic packaging material and but also evidence of fraud -- of a fraud scheme as well.

The Defendant was arrested on a separate warrant and when he was Mirandized and taken into custody by the FBI, he admitted to possession of the firearms and/or ownership of the

narcotics.

He had been on -- during the course of the alleged fraud scheme, the Defendant was on supervised release out of Volunteers of America at the time that the purported fraud scheme was taking place.

One of the numbers and identifying materials that was -- that he used or allegedly used to commit the fraud was, A, his name, but also his cell phone. His cell phone number is associated with the Defendant and that cell phone is associated with the location.

The case agent or the affiant used -- affirmed that based upon his training and experience that cell phones are typically kept in private locations and this would include in an individual's residence.

This, among other things, is what gave rise to what the Government asserts as probable cause to search the apartment of the Defendant. Judge Coulson found that there was probable cause.

Of course the defense is arguing staleness. Also arguing there was no alleged ongoing scheme or crime that was being committed, and that there was no reason to believe that the Defendant who didn't live at the apartment at the time the fraud was committed would have in his possession at the residence any proceeds or evidence of the criminal activity.

As to the Motion to Sever, it's fairly straightforward

that these -- all three of these crimes or alleged criminal acts are not related. They're dissimilar. The fraud crimes are dissimilar in methodology. They're dissimilar in temporal proximity. They're different from the guns in that they're completely separate offenses from the firearms. The Government points out that he's charged with the exact same statute in both of the fraud schemes as well.

Also, alternatively, in the event for some reason the Court finds that there is no probable cause, that the *Leon*, in the good faith exception to the warrant requirement will be applicable in this case, and there's no exception to that exception to the warrant requirement.

In a nutshell, Mr. Bardos, I know you're going to tell me where I didn't get it and where I did get it, but that's my understanding of what the issues are here and why we're here.

So with that, Mr. Bardos, I'll hear from you, sir.

MR. BARDOS: Thank you, Your Honor. May I go to the podium?

THE COURT: Of course.

MR. BARDOS: So, apparently, my primary argument did not come across as clearly as I was hoping in my pleadings.

THE COURT: Or maybe I didn't read it as clearly as I should have. Either way.

MR. BARDOS: Yes. So the primary argument is this: The place that was searched, the Fort Avenue place, no crimes

were committed from there. There's no evidence in the affidavit that anything happened there. And, more importantly, the affidavit actually shows that the crimes that are alleged in 2021 for the search of January of 2023, all occurred somewhere else, and they know where that was.

For example, they know that Mr. Dales was living at the Volunteers of America from December to June, December '20 to June of 2021. They know that the affidavit states that the first fraud was committed with an IP address connected to the Volunteers of America.

The way I read that, as defense counsel, is that the crime was committed at the Volunteers of America. There is nothing that connects an IP address, an electronic transmission from the Fort Avenue address. Nothing.

So what happens is, they have an offense that occurs in December of 2020 at 5000 East Monument Street. They have two more that don't identify any IP address. The last thing that happens at all is that, assuming it's Mr. Dales, that he's paid in September of '21 and then nothing. So there's nothing that connects this address to any of those offenses, other than the presence of Mr. Dales.

So the Fourth Circuit has said clearly --

THE COURT: Or they have his cell phone.

MR. BARDOS: Yes. Let's assume that he had a cell phone. Number one, there's nothing that indicates that a cell

phone was used in this offense, in any of these offenses, in the affidavit. Doesn't even allege that.

THE COURT: Was there a mention of the cell phone number being associated with him in the affidavit?

MR. BARDOS: Yes, sir. And here's how: When the applications were filed -- and, Your Honor, for the general purpose, Mr. Dales maintains his not guilty plea.

THE COURT: Of course.

MR. BARDOS: For the purposes of this argument, let's assume it was Mr. Dales'. What happens is the application is filed and in the application they ask for a contact number and his phone number is used -- is listed there. It's never used. It's never called anybody on these offenses. It's never -- nobody from the Government calls him. He doesn't use it other than to list the specific phone number. So the cell phone itself is not used in any of these frauds.

The cell phone was used for legitimate reasons. I'm not contesting that it's not his phone. He did use it to talk to his landlord. He did use it for other purposes. But it was never used for anything illegal and it was not used in these offenses.

THE COURT: Except it was put on an application --

MR. BARDOS: Yes.

THE COURT: -- to fraudulently get monies?

MR. BARDOS: Yes. So in December 2020 and the spring

of '21, this number is placed on applications. Cell phones are probably the pretty typical example of things that are exchanged and traded and bought on a regular, if not yearly, basis. There's nothing in this affidavit that suggests that Mr. Dales had the phone. The phone number, yes. But the phone number means nothing without some data on the phone, right.

So there's nothing that indicates that he still had in January of '23 the phone that he had in December of 2020, and that's the critical difference.

I could tell Your Honor, I think I have my fifth cell phone but I've kept my phone number. It's not the same phone.

So, there's nothing in the affidavit that even suggests that this phone from December of 2020 is still the same phone two years later and that's important because, as Your Honor pointed out, the only thing that connects this phone to these crimes is the listing of the phone number, not the use of the phone.

THE COURT: Well, but the association -- the listing of the phone number, that's fine, but then Mr. Dales allegedly is associated with the phone. Phones are -- by phone, I mean that cell phone number --

MR. BARDOS: Right.

THE COURT: -- the cell phone number is, at least according to the affiant, cell phones are typically kept in secure locations and on the person of individuals using it.

MR. BARDOS: Yes. And had this affidavit in anywhere said that they had -- they had searched his iCloud account, they had searched his other accounts, and they found things that were on his phone from those accounts at the time or right before they did the search, yes, because then you need the phone and not just the phone number but the phone.

What is interesting about this affidavit, they got his Google information, they got his iCloud information, and they said they found stuff on there with regard to identity fraud. And none of it says the dates of those things. None of it says this picture of this ID is dated at any time. It just says it was on there.

The affidavit also says, as you pointed out, Your Honor, Mr. Dales has a prior conviction for identity theft. So, the fact that they found these on his phone doesn't mean it was in '22, '21 '20, could be from his 2017 conviction. But they never put the dates on there.

So, part of what's important here is not just what's in the affidavit but what they had the opportunity to put in and did not. Because I could tell you my experience with agents of this quality, if they had a picture of Mr. Dales on someone else's ID and that picture was dated November 2022, that date would have been in the affidavit and it's not.

THE COURT: Well, despite that, the magistrate judge found that that wasn't necessary for the purposes of probable

cause.

MR. BARDOS: Yes, Your Honor. And I have -- I have great respect for Judge Coulson. I've been in front of him many times. I don't know if it's mutual, but I certainly have respect for the judge. And, like anyone else, he can make a mistake.

Look, the first -- when I get these cases, the very first thing I look at is who signed it. If it's a state court judge that's a little different. When it's a magistrate judge like in this court of the quality of Judge Coulson, that's a little bit more difficult.

But here, the crime itself was completed in the spring of '21, almost two full years before the search. The only thing that happens after that is that money gets sent to him in September of 2021.

THE COURT: When you say "completed," how do you know it was completed?

MR. BARDOS: Because that's what the affidavit says. The affidavit says, this is what happened and lists no activity whatsoever after September of 2021.

THE COURT: Right. But then you're assuming that it just stopped as opposed to there's no evidence that it continued, but . . .

MR. BARDOS: Well, I'm not necessarily assuming it, Your Honor, but because we're limited to the four corners of

the affidavit --

THE COURT: Right.

MR. BARDOS: -- that's all we have. And I don't think there's an inference that fraud crimes, particularly PPP fraud crimes, go on indefinitely. This is not a wire fraud case of multiple years. This is three separate events, December, March and May of 2021, and that's it. There's no ongoing scheme.

In fact, the three things are very different in what they did. Your Honor, I think you said that you thought that there was identity theft as one of the offenses. I don't --

THE COURT: Right.

MR. BARDOS: -- that's not my reading of it.

THE COURT: I was thinking -- I remember when I read in the affidavit there were discovered identification cards with other people's personal identifying information on them that were in the iCloud account but the Defendant's picture. So that's where I think I picked up the evidence of identity theft.

MR. BARDOS: Yes, I agree with that.

THE COURT: Right.

MR. BARDOS: But the offenses that are alleged are not identity theft. And I think it's different because the types of offenses that are alleged were all electronic, they were all filed electronically. Any evidence of the offenses would be in the computers at VOA. There's no suggestion that Mr. Dales at

any point could have taken them from VOA and printed them out and then carried them with him wherever he lived up until January of 2023 when he ended up at the Fort Avenue address.

THE COURT: No, well, fraud schemes are much more sophisticated than that now. I mean, you could take your -- you don't need to take the physical hardware with you. You can log on from your own smart device that you just bought associated with that number and do the same thing as you could with a mainframe computer.

MR. BARDOS: Yes. So, part -- I agree with that, Your Honor. Part of -- so my primary argument is that there's nothing that connects any illegal activity to the Fort Avenue address. The only thing that connects anything is that his number was used in one of these events and he probably still had his phone.

THE COURT: And he's registered to live there.

MR. BARDOS: Yes.

THE COURT: It's his apartment. His phone is associated with that address, the phone is associated with that number.

MR. BARDOS: Yes. So, Your Honor, you do have the opportunity to rule that any time the Government has a probable -- has reason to believe that a cell phone may contain incriminating information, that that alone provides probable cause to search the person's house, I've never seen that. I

mean, obviously you can rule that way, Your Honor, but that seems to be what the Government is saying. That there's a cell phone and the cell phone was associated with the fraud, he still has the cell phone, he's in this address, therefore we can search it. I don't think that's what the Fourth Amendment permits, particularly with a residence.

THE COURT: But I don't think -- they're going to tell me themselves but I'm not certain whether or not they're saying the actual cell phone that he possessed at the time that the numbers were put on the application was in his possession or contained incriminating information.

They're saying that he lives at the residence, the cell phone's associated with the residence, that that cell phone number is associated with the residence and that cell phone number was used on a document that was attempting to perpetrate a fraud.

MR. BARDOS: Yes.

THE COURT: Okay.

MR. BARDOS: But my point is that if that's what they're saying, and what they're really saying is any time we think there's information on a cell phone that is incriminating, and we know where that cell phone is in somebody's house, we can search the house. And I don't believe that's what the Fourth Amendment permits. I don't even think that's what -- I've never seen a case that says that.

The fact that -- and the mobility and the transiency of cell phones I think belies that but, importantly, if that were the case I don't think we would have any more issues with Fourth Amendment --

THE COURT: Weren't they searching for other things, too? Weren't they searching for hard records as well, documents, as opposed to just the physical cell phone?

MR. BARDOS: Yeah, they were searching for those things, Your Honor, but there's nothing in the affidavit that suggests any of those things would be there from a crime that was committed over two years before that at a different address. That's what the issue is, that if Mr. Dales had lived at the Fort Avenue address in December of 2020, and then they came in January of 2023, maybe there's probable cause on the connection between the crime and the offense. There's still the staleness, which I haven't gotten to. But there's no nexus. There's no connection, other than the presence of the cell phone.

And I would hope that we are not in a situation in our society with everybody having a cell phone -- and as the Court indicated, you can commit a crime with just your cell phone -- if that's sufficient for a search warrant then everybody is subject to that. And that is directly contrary to all of the cases that I cited in my reply.

With regard to -- and so the other thing is the Government

tries to suggest on the staleness issue that people keep records forever but all of the cases they cited, as I pointed out in my Reply, are not these kinds of cases. It's not a case where there's an individual fraud, an individual fraud, an individual fraud, and then 16 months go by before they even approach the person's residence at a different place than where the crime was committed. They talk about child pornography cases which are obviously very different. They talk about drug cases which are obviously very different.

I mean, the Fourth Circuit has held that if you have probable cause to believe that a person is selling drugs, that gives you probable cause to search their house. I mean, so the drug cases are irrelevant. And the other cases they cite are multiyear, multipeople, multicrime, long-term, continuous activity. This is not.

There is zero, in this affidavit, nothing after September of 2021 that alleges any illegal activity by Mr. Dales whatsoever. Nothing.

Now, the Government, interestingly, they cited *U.S. v. Njokem* case from Judge Bennett, that happened to be a motion I lost, so I'm somewhat familiar with it.

But the difference there was the loan applications in that case came from the IP address of Mr. Njokem's apartment and it was a seven-month period not a 16-month period. But there, there was no issue on the connection.

In other words, the evidence -- it was reasonable to believe that evidence would still be there seven months later because it started there when the crime was committed and that's the big distinction here. This crime was committed somewhere else. There's nothing to suggest -- now, if they searched VOA maybe they could have an argument that the records would still be there. But there's nothing to suggest that the records would be at the Fort Avenue address other than the presence of Mr. Dales himself.

I have one more comment on that. If the Court has no further questions on that I'll move to the severance.

THE COURT: Okay.

MR. BARDOS: So, one of the things that is sort of troubling me on this is that if the Court were to grant the Motion to Suppress, the suppression would include the identification fraud but also would include all of the guns and drugs that were found.

I'm thinking, do we really want to be in a situation where we're suppressing guns and drugs and not be able to prosecute that? And my answer is, no, we don't want to be in that situation at all.

That's why the Court needs to rule in favor of the Defendant because in a situation that is as difficult and problematic as guns and drugs, the Government has to get it right. They have to do the right thing.

And the right thing here would have been to watch Mr. Dales and see what he does and see if he's connected to drugs or gun dealers or anything else.

They did nothing. Absolutely nothing. There is not a word in that first affidavit that connects this man to any illegal activity involving guns or drugs.

So, if they're going to investigate something like that, if they want to look into something like that, they have to do it right.

THE COURT: Well, they got the second warrant. I mean, you know, I guess the criminality of firearms and narcotics is probably pretty clear.

MR. BARDOS: Yes.

THE COURT: But, nevertheless, despite that, they went ahead and got a second warrant.

MR. BARDOS: Yes, and there's issues with that, too, but not for today.

So, with regard to the *Leon* issue, so our position is that, with all do respect to Judge Coulson, he just missed it. I don't know what he was thinking, but he has an affidavit where the last criminal activity, at all, was 16 months before this search. And why he didn't say, why don't you have something more recent, why don't you have something up-to-date, why don't you have something in the last 16 months that suggests this location should be searched, I don't know, but he

didn't.

And, so in our view because it is so lacking in a connection to the address and 16 months later from an offense that occurred somewhere else, that *Leon* doesn't apply because the affidavit is simply devoid of probable cause. Unless the Court rules that a cell phone is enough, and I'm certainly hoping you don't do that.

So, on the issue of severance, Your Honor, I understand the Government's argument with regard to the two fraud cases. I think that identity theft is materially different than the PPP loan theft. I think it involves other people, it's serious. But I understand that it's a fraud and they're related.

I don't understand the Government's argument with regard to the guns and the drugs. Not that I have to, only you have to. But the guns and the drugs are different statute, different time. Right? The PPP fraud was in the spring of 2021. These guns and drugs were found in January of '23.

You pointed out they needed a second warrant, right, because when they went in the first time they didn't even suspect guns and drugs. There's nothing that connects the fraud stuff in this affidavit, in this case, to what was found in the guns and drugs in January of 2023. And the Fourth Circuit has held there has to be a logical and close connection and there simply is not.

The *Hawkins* case that I cited, that case is where the man was charged with an armed carjacking and then several weeks later possession of a handgun. And the Fourth Circuit said you can't even try those together. They're different statutes, different times. And there's no evidence that the gun in the possession was the gun in the carjacking.

Well, if you can't try possession of a weapon with an armed carjacking case, you certainly can't try possession of guns and drugs with a fraud case. They're completely different.

And the prejudice to the jury -- I mean, Your Honor has tried drug cases as well -- they're going to see the drugs -- the impact on the jury is outstanding in those things. And they're going to go, well, he must have done them all if he did this.

So there's an obvious prejudice from trying these cases together and the rules simply do not permit it.

THE COURT: What about the fact that evidence of fraud was also found in the same apartment as the firearms and the narcotics? Doesn't that sort of place them interwoven together?

MR. BARDOS: No, Your Honor, because there's no evidence that the fraud was used in any relationship to the guns and the drugs. Actually, the fraud offense occurs well before the search in 2022. The search was in January '23.

THE COURT: No, but the evidence of --

MR. BARDOS: Of being together --

THE COURT: Of things supporting the fraud, a fraud scheme inside the apartment with the guns, couldn't the argument be made that the guns were there to protect the items related to the fraud scheme? I mean, certainly, guns and drugs are tools of the trade.

MR. BARDOS: Yes.

THE COURT: You can make a clear argument that the guns were there --

MR. BARDOS: Yes.

THE COURT: -- as part of the tools of the trade to protect --

MR. BARDOS: Yes.

THE COURT: -- the criminality of the narcotics, but couldn't that extend arguably to protection of the fraud scheme as well?

MR. BARDOS: I really would hope not, Your Honor. You noticed I did not move to sever the guns and the drugs case counts because I agree they are interconnected. I don't think there's anything that suggest people who commit money fraud cases have guns to protect them. I've never seen that. So they don't naturally go together. They were found at the same time but that doesn't mean they have to be tried at the same time.

If the Court denies the motion to suppress, and we have a trial on fraud counts, the Government will say here's what we found on the fraud counts. They don't have to say anything about the rest of it.

So the idea that we have to tell the whole story is simply incorrect. And the prejudice potential to Mr. Dales is, I think, through the roof on those things.

So for all of the reasons I put in my Reply, the lack of a -- and I think -- I'll close with this. I think the lack of connection to this address from any illegal activity and the staleness argument are somewhat related because if something had happened in this address then maybe you could say -- one could say 16 months maybe he still has the records.

But given that we didn't even start the offense at this address and it started somewhere else more than two years prior to this, there's a nexus problem, and there's a staleness problem.

And for those reasons, I would ask the Court to grant the Motion to Suppress and sever the cases from the guns and drugs.

THE COURT: Thank you very much, Mr. Bardos.

MR. BARDOS: Thank you, Judge.

THE COURT: All right. Mr. Riley or Mr. Barron?

MR. RILEY: Yes, Your Honor. I'm going to start by talking about the Motion to Suppress, talking about probable cause. We'll address the staleness argument, and then I'm

going to move to some of the specific arguments that the defense made.

THE COURT: Okay.

MR. RILEY: Your Honor, the affidavit in this case, which is over 20 pages long, the warrant package authorized by Judge Coulson, that Judge Coulson considered and signed off on, this affidavit was overflowing with probable cause to believe that evidence of a crime, namely wire fraud, would be found in this Defendant's residence at Fort Avenue.

THE COURT: Walk me through it.

MR. RILEY: Yes, Your Honor. So, broadly, there are two broad categories of items, records information sought by the warrant, right.

So we have, broadly, electronic devices and electronic records contained therein. So electronic devices includes the Defendant's cell phone. It also includes other electronic devices.

Then we have, broadly, the category of financial records, IRS documents, credit card bills -- credit card statements, bank account statements, bills, and potentially documents pertaining to unemployment insurance benefits, Economic Injury Disaster loans, EIDLs, Paycheck Protection Program loans. Two broad categories.

I'm going to start, Your Honor, by talking about step by step, like Your Honor said, what the affidavit laid out. And

I'm going to focus on electronic evidence first.

The affidavit prepared by Agent Gorman laid out in detail first that the Defendant submitted a fraudulent unemployment insurance benefit application in December of 2020. It laid out that in July 30, 2021, that unemployment insurance application, which had been denied, was reopened. So that's July 30, 2021. And, thereafter, that benefits were paid by the Maryland Department of Labor between August 2021 and September '21, 2021.

The affidavit laid out that an Economic Injury Disaster Loan application was applied for in December of 2020, that there was an application for a Paycheck Protection Program loan in March 2021.

Now, importantly, Your Honor, I think Your Honor was attuned to this, all of these applications were submitted electronically and the affidavit noted that. And Your Honor has picked up on the phone, that the phone number of the Defendant's phone was included in each of the applications. Not just that the Defendant's email address, his Gmail address theycallmedales@gmail.com, was used in connection with each of the applications, too.

And the affidavit further noted that fraudulent documents were uploaded electronically in support of the applications. There was a bogus IRS document that said -- Paragraphs 34 and 31 of the affidavit. And there was a bogus -- another bogus

IRS document and that's noted at Paragraph 53 of the Gorman affidavit.

Importantly, Your Honor, with respect to the emails, the Government -- contrary to counsel's assertion with respect to the investigation of this matter, every step of the way the Government was doing its job, doing it thoroughly, doing it right.

The Government got a search warrant for Mr. Dales' Gmail account, that theycallmedales@gmail.com, a review. That warrant was authorized by Judge Maddox. A review of that search warrant -- and this is noted in the affidavit -- revealed multiple emails with the Maryland Department of Labor regarding unemployment insurance.

So emails with MDDOL concerning unemployment insurance coupled with the Defendant's submission of a fraudulent UI application.

The affidavit further notes that there were emails with respect to Mr. Dales being warned that he had insufficient funds balance, that he was declined for lines of credit with Wells Fargo and Navy federal.

So, Your Honor, all of these electronic records, the electronically-submitted applications, emails concerning unemployment insurance benefits, electronic documents that were uploaded and submitted with the applications and other data from these devices, all of those records -- not even including

attribution information for the email account, the phone number, et cetera, all of that would constitute evidence of the charged crime of wire fraud.

THE COURT: That it's him. That the person who is perpetrating these acts are the Defendant?

MR. RILEY: Correct, Your Honor.

THE COURT: Now, how do we jump to -- and I know you're going to get there.

MR. RILEY: Yep.

THE COURT: -- the jump to the residence.

MR. RILEY: Yes, Your Honor. So I was just going to get there. No question that law enforcement had probable cause to believe the Defendant's luxury apartment, the $3,000 a month rent at the Anthem House, contained electronics.

The affidavit noted that the Defendant's cell phone was used by the Defendant to communicate with his probation officer, that's Paragraph 45. According to T-Mobile, it was active as of December 4, 2022. So about a little under a month and a half before the execution of the search warrant on January 20, 2023, it was used to communicate with the Anthem House, which is the building where the Defendant's apartment was located.

And, importantly, it was associated -- that phone number was associated with various Google and Apple iCloud accounts linked to this Defendant, Paragraphs 56, 64, 69.

Your Honor noted, you talked about Agent Gorman's experience, knowledge, training and experience, well, the agent noted that based on his training and experience folks carry their cellular telephone with them virtually everywhere they go. And Agent Gorman noted, moreover, about -- he talked about the prevalence of the use of mobile phones, electronic devices in connection with fraud schemes such as the schemes laid out in the affidavit.

Now, I referenced the phones linked to iCloud and Google a moment ago. Your Honor, iCloud is a cloud storage account. So with a cloud storage account, even if you have a new phone -- counsel spent a lot of time talking about the potential for a new phone in the Defendant's hand. Even if you have a new phone, it backs up to the cloud. It backs up to the iCloud and the contents are able to be put on that phone; and the same goes for Google, which is an internet-based cloud account.

The affidavit talks about cloud-based accounts and apps on phones, including iCloud and including Google.

And Your Honor picked up on or noted the bogus, fraudulent identification cards, driver's licenses that were found during the review of the Defendant's iCloud account.

And in addition to those bogus identification cards, there was also apparently fake paystubs or paystub or earnings statement for the Defendant.

THE COURT: What was the date on the -- was it noted

the date of that earnings statement? Because that would at least give a backdate of when --

MR. RILEY: Yes, Your Honor. It was not noted but there's the suggestion -- I'm going to jump ahead a little bit -- there's a suggestion by the defense, we heard it just now, we saw it on reply, that these identification cards could have been remnants of this Defendant's past conviction from 2017.

THE COURT: Right.

MR. RILEY: Not so, Your Honor. The affidavit notes that this Defendant's phone, his phone number, was activated on December of 2020. Okay. So that phone that is linked to these iCloud accounts where this inculpatory information is contained was activated in December of 2020.

THE COURT: Was that noted in the affidavit?

MR. RILEY: It is, Your Honor, that's Paragraph 68, talks about --

THE COURT: So that would at least put a back date on when those things were at least uploaded or existed?

MR. RILEY: Exactly, Your Honor.

THE COURT: Gotcha.

MR. RILEY: I will say, Your Honor, this isn't in the affidavit, but of course we know now that those IDs were not used in connection with the Defendant's past fraud schemes because some of them were used in connection with the

newly-charged fraud and identify theft conduct that's charged in Counts 5 through 8 of the superseding indictment.

With respect to the other broad category of information that I noted at the outset, the financial records generally. Your Honor noted this, I think, that Agent Gorman noted based on his knowledge, training, and experience that it was common for folks to keep fraud documents and particularly financial records in their homes, in other secure locations.

And there's no question that the Defendant was living at the Anthem House in this apartment at the time of the execution of the warrant as established by lease records, as established by records from PayPal, as established by records from Amazon, all of which is laid out in the affidavit.

Now, I want to address in more detail the contentions with respect to staleness. There's been a focus from the defense on the number of days, the amount of time that's passed. But the Fourth Circuit has said we're not -- courts are not just supposed to count the number of days between the authorization of the warrant and the alleged criminal activity. Courts are supposed to look at -- take into account the totality of the circumstances and in particular the nature of the evidence or items sought. Whether the -- and the nature of the crime, including whether it was continuous and ongoing.

And so regarding the first item that I mentioned, the nature of the property to be seized, the evidence sought. I

talked about the two broad categories: Electronic devices including phones and then financial records.

Now, with respect to electronic devices, courts have repeatedly held that when the evidence to be seized is an electronic device, such as a phone, staleness is not an issue and that's given the nature of electronic evidence and storage generally.

Indeed, the Fourth Circuit said in the *Boysk* case, which I believe is a 2019 case, that staleness is, quote, "rarely relevant," in the context of electronic evidence and computer records.

I will acknowledge -- and I'll talk about this a bit more in a minute -- I will acknowledge that the *Boysk* case is a case relating to child pornography but that's because child pornography -- that principle -- let me back up.

It cannot be said that the principle as to staleness and electronic evidence only applies to child pornography. The Fourth Circuit has not said that, that's not the law. The issue comes up in child pornography cases routinely because they almost always involve digital evidence, particularly now. So it does come up routinely in those cases.

But the Government cites a number of cases that do not involve child pornography in its response brief.

And this principle with respect to staleness and electronic evidence, I mean, it makes sense. A cell phone, a

computer, just not the type of evidence that rapidly dissipates or degrades or would be expected to be moved outside of the house or residence rapidly. And the same goes for the data on these electronic devices. Even if data is or a record is depleted from that device, it's still there, and law enforcement can get it back and that's talked about in the affidavit by Agent Gorman as well.

So given that electronic evidence was sought to be seized in this case, given the importance of electronics in connection with the submission of these applications electronically, the uploading of documents electronically, the links between the Gmail account, the use of the Gmail account in connection with the unemployment insurance fraud, there are fake documents as well.

There was a fair -- a fair basis for the -- Judge Coulson to sign off on that warrant and to not find that the information -- to find there was probable cause and to not reject that affidavit, that warrant package on the basis of staleness.

And I talked about the child pornography cases earlier. The Government cites at Page 11, the *Gerace* case, that was not a child pornography case. The Court there noted, quote, "The cell phone seized from Gerace had the ability to retain large amounts of personal data, photographs, communications, and other records for long periods of time. Moreover, a cell phone

is not the type of evidence that rapidly dissipates or degrades."

And the court noted that the conspiracy allegations ended between 15 and 27 months before the seizure and says, quote, "Probable cause still would have existed for issuance of the warrant to search the cell phone."

The *Feng Ling Liu* case, said by the Government at Page 12, that was an asylum fraud case, and the same principle with respect to staleness and electronic evidence was applied there.

So it's simply not the case that this rule only applies to child pornography cases.

The second broad category of information, I talked about this earlier, financial records. So, again, I'm looking at the nature of the evidence to be seized and the staleness analysis. Financial records, such as those sought here, are also of the type not to be ordinarily destroyed or moved.

Agent Gorman noted in his affidavit that one who commits fraud is likely to keep those documents in a secure location, like his house.

And counsel brought up the *Njokem* case, the Government discusses it in our brief. That matter did involve unemployment insurance fraud, fraudulent claims submitted by the Defendant. It was essentially -- the motion was substantially identical to the motion in this case. And the judge, Judge Bennett, rejected the staleness argument.

Now, counsel talked about the IP address linking the fraudulent applications to the residence. Your Honor, the decision doesn't reference IP addresses at all. What Judge Bennett is focused on in his decision is that it's the nature of the property sought, including financial records and debit and credit cards. And he says, quote, "not the type that is ordinarily destroyed or moved." So that principle is applicable here.

Certainly appreciate that the Defendant was for a time at the Volunteers of America halfway house but it's reasonable to -- and we can use common sense, the magistrate judge can use common sense inferences -- it's reasonable to assume that he brought his financial records with him to his new home at the Anthem House.

Now, the second factor --

THE COURT: In fact, it's more reasonable that he took the financial records with him than he would have left them at the VOA.

MR. RILEY: You're absolutely right, Your Honor. You're absolutely right.

Now, with respect to the other important factor that the Fourth Circuit has said is important to consider, it's the nature of the unlawful activity in assessing the staleness issue. The courts routinely conclude that information is not stale where we have an ongoing pattern of criminal activity and

not, quote, "near isolated violations of the law."

THE COURT: Yeah, where's the ongoing pattern?

MR. RILEY: Yes, Your Honor. From the Government's perspective, the ongoing pattern is plain. If we look at this Defendant's past conviction before Your Honor, which is referenced in the affidavit, the fact that he got out -- was actually still in the custody of the BOP and began -- got right back to it submitting -- allegedly submitting fraudulent unemployment insurance applications while in the halfway house. And then we have a period of time from December to September 2021 when he's still receiving funds. That's a pattern if you look at the past, the past conviction.

And then, and Your Honor was attuned to this earlier, there are the bogus identification cards found in his iCloud account. So we have -- and those are referenced, again, in the affidavit submitted by Agent Gorman.

I will acknowledge that we did not include and, frankly, I don't know if we had, metadata in terms of when those photographs were taken. But we know, we know that it was at least in December of 2020 because the phone number linked to that iCloud account was the activated -- that phone was activated in December 2020.

From the Government's perspective, that establishes a lengthy pattern of activity spanning back to this Defendant's past conviction for -- convictions for bank fraud and

aggravated identity theft. So all of this is to say, Your Honor, there was a substantial basis for Judge Coulson to sign off on that warrant and conclude that probable cause existed.

And I would note, Your Honor, you know, referring to the *Njokem* case, Judge Bennett found the crime, that UI fraud crime to be ongoing and continuous.

And so what we have here is we have a December 2020 fraudulent, allegedly fraudulent UI application. We have a Defendant receiving fraud proceeds up until September 2021, that's a period of 10 months of criminal activity. Not even taking into account the bogus ID cards, driver's license found on the Defendant's iCloud again.

And the *Njokem* case, as Judge Bennett pointed out, the length of the alleged crimes was six months and the court found that the crimes were ongoing and continuous.

So I would submit that when Your Honor takes into account everything in the affidavit, this Defendant's criminal history, the fact that he was at a halfway house when he submitted that first application. The fact that -- the 10-month period from the submission of the application to receipt of fraud funds, September '21, plus the ID cards which bespeak potential at least fraud and aggravated identity theft or identify theft, that bespeaks a pattern, ongoing pattern of activity by this Defendant which weighs in favor of rejecting the staleness argument.

Briefly, Your Honor, with respect to a couple of the specific arguments counsel has raised. There's a suggestion in the Reply that the affidavit, quote, "suggests that Dales not only ceased illegal activity but ran out of money," and the Defendant points to his failure to pay rent at the Anthem House. Some money was owed.

Your Honor, the affidavit -- simply put, the affidavit does not suggest that Dales ceased criminal activity. The ID cards, the multiple ID cards, the fake earnings stub on the iCloud suggests otherwise. And the pattern of activity I just talked about, the pattern of criminal activity I just talked about, that suggests otherwise.

Now, with respect to the running-out-of-money argument that we heard on Reply, I would just say that the affidavit notes that the rent for the Anthem House was -- for the Defendant's apartment -- was $3,000 a month. The affidavit notes that in January 2020 the Defendant signed a one-year lease, and as of December 2022 that he was four months in arrears.

So that means the Defendant had the ability, had the funds to pay for seven months' worth of rent, $21,000 of rent money for someone who has just got out of jail, applied for unemployment benefits. Someone whose emails -- and this is in the affidavit Your Honor -- someone whose emails reflect emails from banks regarding insufficient funds and getting declined

from lines of credit. That's Paragraph 58 of the affidavit. He was able to pay rent for a time, and he was able to pay rent because his fraud activity was ongoing. The funds were flowing.

Now, we've heard --

THE COURT: And he had no other source of legitimate income.

MR. RILEY: Exactly, Your Honor. Exactly right. We heard the argument just now or a moment ago, and we saw it on Reply --

THE COURT: I mean, if he had a job that would seem to suggest that he did -- that the scheme might not be ongoing, but if you got no employment after you just got out of prison, then you got a very expensive apartment where the rent has been paid and all of a sudden it's not being paid.

MR. RILEY: Exactly. At a minimum, there would at least be an argument. I'm not saying that the Defendant couldn't have a job and still be doing well, but he would at least have an argument. But he submitted a claim for unemployment insurance benefits. And we're aware of no -- the Government is aware of no legitimate means of employment, no legitimate sourcing of income.

We've heard this argument about the Volunteers of America. I talked a little bit about IP addresses earlier. The Defendant claimed explicitly in his Reply Brief that each of

the fraudulent loans was applied for with a computer.

So to the extent there are devices that contain relevant evidence, that those devices are at the VOA, this argument is based on nothing but the defense's conjecture.

Your Honor hit the nail on the head, when we're thinking about electronic devices, and we do it every day, if you have a phone you can log onto a Wi-Fi and you're going to be using that entity's IP address but it doesn't mean you're using a computer at that place.

THE COURT: Right.

MR. RILEY: That's common sense.

THE COURT: There's no dial-up anymore.

MR. RILEY: I will note that the affidavit is clear that these applications for the UI benefits, for the Economic Injury Disaster loan, for the PPP loan, it doesn't say by computer. It says they were submitted electronically by internet-capable computers or other electronic devices.

So the suggestion that the VOA would have records of the Defendant's phone and other electronic devices in his possession would not -- is simply wrong and not supported by Agent Gorman's exhaustive affidavit. Particularly, when we think about the links between that phone and -- which is on the applications -- the links between that phone and the Defendant's email address which is on the applications; the email correspondence, the same email address with the Maryland

Department of Labor. And, particularly, when we think about the link between that phone and the Defendant's iCloud account where we found the bogus identity cards and driver's license as noted in the affidavit.

Next, Your Honor, we heard this possession of a cell phone alone and the Government going into somebody's house based on the possession of a cell phone, that's a strawman argument. That's not the Government's position in this case.

The defense claims that the Government's position that simply because the Defendant might have a cell phone that the Government can search the Defendant's residence. That's not even close to the Government's position or what's taken place in this case.

The Government's position is that there was probable cause to believe that an electronic device or devices, including the Defendant's cell phone, contained evidence which -- and that -- those devices -- there's probable cause to believe that those devices contained that evidence and would be found in the Defendant's residence, which it ultimately was, Your Honor.

Now, I'm nearly done with addressing the defense arguments, Your Honor, and then I'll move on to severance.

We saw on the first time on Reply actually a nexus argument, and then we heard about it again today and counsel says it's his primary argument.

He says there's no nexus between the Defendant's residence

and the suspected criminal activity. This is an argument that the Court can easily reject. The nexus, and the Fourth Circuit law is clear on this, the nexus between the place to be searched and the items to be seized, such as electronic devices, such as financial records, and so on, may be established by the nature of the item and the normal inferences where one would be likely to keep such evidence.

It's a very well-established principle of law.

So here, applying that standard, it's reasonable to infer that this Defendant's cell phone, other electronic devices, would be kept with the Defendant at his residence for all of the reasons I've talked about earlier: The links to the iCloud account, the links to the Gmail account, the link to the phone linked to those other two accounts, Dales' PayPal account listed the phone and that Fort Avenue address, his Amazon account -- this is all in the affidavit -- his Amazon account did so too, Your Honor.

And, you know, as I said earlier, Agent Gorman noted the use of mobile phones in connection with criminal activity, including fraud crimes. It noted that mobile devices include messaging applications and other applications including iCloud and Google accounts, that's Paragraph 7. And it noted that people carry the phones with them virtually everywhere they go. That's Paragraph 71.

All of this information taken together with the totality

of the facts in this case is more than sufficient for a magistrate judge, Judge Coulson, to conclude that there was a fair probability that an electronic device containing evidence of criminal activity was in this Defendant's home.

Counsel referenced the *Lawler* case, that's a Fourth Circuit decision from 1993. It's a nexus -- it's a nexus case. That case bears no resemblance to the facts and circumstances here. The Court there said, quote, "There was devoid of any basis," end quote, by which the magistrate judge could infer that evidence of a drug crime would be found in the defendant's residence. Not even close to the facts and circumstances here.

I would note with respect to that case, Your Honor, that the Fourth Circuit found that evidence should not be suppressed because the good faith exception applied.

So even if Your Honor -- and that's a nice dovetail to the good faith argument -- even if Your Honor were to find that the information that supported probable cause was stale, the good faith exception would still apply in this case and would provide an independent basis for the Court to deny the Motion to Suppress.

I would note that a couple of cases were attached as exhibits to counsel's Reply. Neither one of these cases is on all fours with the facts and circumstances in this case.

There's been no basis asserted by the defense for the Court to find that the law enforcement officers did not have an

objective basis to rely on the search warrant as they did.

The Government would ask the Court deny the Motion to Suppress in its entirety.

If Your Honor has specific questions, I'm happy to address them.

THE COURT: No, I'm ready to move on to the severance.

MR. RILEY: Yes, Your Honor.

THE COURT: What's the relationship between the firearms and the fraud?

MR. RILEY: Yes, Your Honor. The fraud provides the vehicle, the funds, for this Defendant to finance his nascent drug-trafficking business. Your Honor, that's with respect to the drugs. I'm going to talk a bit more about that in detail in a moment.

The firearms, part and parcel of the drugs, part and parcel with the drugs, firearms are the tool that trade with the drugs. But the point is that but for Defendant's fraud activities he would not be able to get -- he would not have been able to get in the drug business.

Now --

THE COURT: How do you make that leap?

MR. RILEY: Yes, Your Honor. I'm going to get there right now. So Counts 5 through 8 in the superseding indictment relate to a wire fraud, an aggravated identity theft scheme, whereby this Defendant using -- allegedly -- using identities

of real people, victims, would open up lines of credit and use those lines of credit in the victims' names to acquire very high-end riding lawnmowers valued at $14,000, $15,000 a piece. And as the Government understands it, he would go on to sell those lawnmowers for cash.

The events underlying -- the timing of those events underlying the wire fraud and aggravated identity theft, it's essentially the summer of 2022, and so with respect to -- and he was successful in this venture. Successful in acquiring these riding lawnmowers and also selling them and getting cash.

Contemporaneous with the execution of this fraud and aggravated identity theft scheme, based on the Government's review of the electronic devices seized from the Defendant's apartment, contemporaneous with this there are discussions between the Defendant about buying fetty, F-E-T-T-Y -- fentanyl, that's what he's referring. Buying coke, we understand he's referring to buying cocaine. Buying quinine, cut. And so these are contemporaneous in the summer of 2022.

And so for someone who's not employed, who has no legitimate source of income, the Government understands that he's using the significant monies he's receiving to finance his illegal drug business. And is some of the money going towards his rent? Sure, it is. He has to pay $3,000 a month in rent. But guess what? That apartment was used to package the drugs, to cut up the drugs and so on. And we can see that from all of

the evidence in the search warrant.

So, but for the significant monies flowing in, in connection with the fraud scheme, the Government will argue at trial, if we need to try this case, but the Government contends that he would not be able to get into the drug business the way he did.

And I will note, Your Honor, that, you know, we have just a couple of wire fraud counts in the superseding indictment. The Government is aware of multiple other instances where the Defendant engaged in his wire fraud scheme.

And I will say the Government doesn't have venue over every single instances but the Government is aware of at least seven instances where the Defendant engaged in the wire fraud and aggravated identity theft scheme involving these high-end riding lawnmowers.

And so the Government, to be clear, the Government is not relying on, with respect to joinder of the guns and the drugs with the wire fraud counts, the Government is not relying on the same or similar character language. The Government is relying on based on the same act or transaction, or are connected with or constituted parts of a common scheme or plan.

And I think if Your Honor looks at some of the cases cited by the Government, they're somewhat instructive. There's the *Cooper* case, which is an unpublished Fourth Circuit decision. There, the circuit affirmed the district court's decision to

deny severance of bank robbery and bankruptcy fraud charges, concluding that they were part of a common scheme or plan. Namely, the Defendant's theft of money from bank ATMs, his use of that money to refurbish his home and his concealment of that to the bankruptcy trustee.

So the Court said it was not error for those charges to be tried together and the circuit noted, too, that the district court gave a limiting instruction, a cautionary instruction to the jury. And I think that's an important factor for consideration as well.

To mitigate any risk of potential prejudice, Your Honor will instruct the jury that they are to consider each of the counts individually. And we haven't heard a sufficient basis from the defense as to why cautionary instruction, a limiting instruction, wouldn't be sufficient in this case.

I'll note finally, broadly, Your Honor, conservation of resources is important. Of course the Defendant's rights are paramount in any criminal trial, but there will be much of the same evidence at any trial involving the firearms and drugs and any trial involving the fraud and identity theft.

THE COURT: Really? Couldn't you -- I mean, it seems like the guns and the drugs could be tried in two days and but the fraud scheme is a little bit more expansive than that. And I say that because if the post-arrest statement confession is fairly strong evidence of his culpability, I mean, there's a

search executed, guns were found, he was arrested, he admitted to the guns, he admitted to the drugs.

You go through lab testing, firearms examination. Cross examination --

MR. RILEY: Yes, Your Honor.

THE COURT: That's the gun and drug case. With an expert witness throwing in guns and drugs -- guns are tools of the trades of drugs, and there was packaging material, and this is a possession of firearm in furtherance of a drug-trafficking offense.

MR. RILEY: Yes, Your Honor. I certainly understand what Your Honor is saying. Absolutely. Even accepting that that's the way the Government would put on the case.

THE COURT: Yeah, that's what I'm thinking. As opposed to days of fraud -- fraud allegations --

MR. RILEY: Right, Your Honor.

THE COURT: -- and Google searches.

MR. RILEY: But I would say, Your Honor, there's -- even with the case as Your Honor envisioned it, there would be overlap in terms of the witnesses, right. Evidence regarding the search of the Defendant's house, that would need to come in at both trials. Evidence regarding the Defendant's statement, as Your Honor said.

There would be evidence regarding the Defendant's electronic devices and the content of those devices, such as

the chats I just mentioned, that would be important evidence, notwithstanding the confession, notwithstanding the guns and drugs were found at the Defendant's house.

And, you know, the Government would -- Your Honor referenced the email accounts, we would probably in both trials put on that evidence as well. And same goes for evidence with respect to financial activity as well as evidence as to the location of his cell phone. So cell site evidence, that would be something we would likely use in both trials as well.

But I certainly appreciate Your Honor's point that the guns and the drugs could be approached in a more streamlined fashion.

The Government thinks that that -- although the guns and the drugs are not part of -- are not of the same character under Rule (a), they are part of or constitute parts of a common scheme or plan, as I said.

The funds financing this Defendant's nascent drug business, the Government would ask that the Court deny the Motion to Sever, and of course instruct the jury appropriately with respect to their assessment of the evidence as to each count.

I did not address in detail severance of the wire fraud counts from one another. I'm happy to address that if the Court wishes.

THE COURT: No, I do -- so, you are asking me to

accept a proffer of the link between the guns, drugs to fund -- are funded by the sale of the riding lawnmowers?

MR. RILEY: Yes, Your Honor.

THE COURT: Because I didn't see that kind of specificity in the Response.

MR. RILEY: You're right, Your Honor. I'm proffering that today. And one of the reasons the Government is proffering that information now is what we heard -- what the Government saw in this Defendant's Reply.

THE COURT: Reply.

MR. RILEY: In terms of absolutely no connection whatsoever. No evidence with respect to money and the start at the beginning of the Defendant's drug business and so on. I guess I would just encourage -- just encourage a careful review of all of the electronic devices in this case for the defense.

THE COURT: All right. Thank you.

MR. RILEY: Thank you, Your Honor.

THE COURT: Mr. Bardos.

MR. BARDOS: Thank you, Judge. So the Government stated there's no question that the Defendant had electronic devices in his apartment. I will agree that there is likely probable cause that he had his cell phone. There is zero evidence that he had a laptop, a computer, Or anything else. So for them to say there's no question that it had electronic devices, that only applies to the phone, that doesn't apply to

anything else.

They talked about the iCloud but, on the one hand, they said the iCloud account was started in December of 2020, but there's no dates for anything past that. There's no dates for anything past September of 2021, with regard to any illegal activity for the original search warrant.

There's nothing that suggests -- now, I get the idea that there are records. There's nothing in this affidavit that says any of these records are printed, portable, that Mr. Dales would have taken them with him, that he still had them over two years later.

So, the Government's position is that once a person commits wire fraud there's an electronic record, and they can search a person's house to find a cell phone at any time. There is no longer a staleness argument with regard to records because, as the Government suggests, they're electronic and they live forever. That is not what the cases say. And I really don't think that's what the Fourth Amendment says. That's why the Supreme Court has said that there has to be facts so closely related to the time of the issue of the warrant as to justify probable cause.

If everybody who commits a wire fraud has electronic record and basically that's how it's committed, and the Government's position is that records live forever, and people take them with them wherever they go then there's no longer any

protection under the Fourth Amendment.

THE COURT: The temporal proximity argument, I get it. It's just a question of whether or not the temporal distance in this case is such that would make the records stale or the possibility of the place of residence containing such records less practical or improbable. We're talking about two or three years as opposed to 10 years or -- so, I think that that's something I need to take into consideration as well.

MR. BARDOS: Your Honor, with regard to the *Njokem* case, I was there when Judge Bennett ruled from the bench and he did -- he did put in his Memorandum records live and they're likely to be found.

But it's critical to bear in mind that the *Njokem* case involved applications for loans from the Defendant's apartment. So it is -- although I filed a motion otherwise -- it was reasonable for Judge Bennett to say it started in this apartment seven months ago, it's reason to believe they're still there seven months later. In addition, the cards from the PPP loans were mailed to that apartment. So there was a lot of evidence that, as of seven months before, there was a lot of stuff in that apartment related to this. Hard, actual evidence in that apartment. And the judge said, well, seven months later that's not that much time.

We have nothing --

THE COURT: Other than the link between the cell

phone -- that cell phone number and this Defendant.

MR. BARDOS: Yes, sir -- I'm sorry, I didn't mean to be informal -- but, yes, Your Honor.

But I think it's a substantial difference from the *Njokem* case and other cases like that. In other words, the Government cites a case in which a search, I think it was several years later, was permitted, but -- the same case. But Mrs. Sing operated the offense in the house. And that's really -- so the staleness issue is related to the nexus issue, right.

Because if it started -- if all of this IP address stuff had started at Fort Avenue in December of 2020, I would still make the staleness argument but I couldn't make the nexus.

The reason it matters is if it starts in the apartment then it might be there later. If it never started in the apartment then the only connection is the cell phone.

And I still think the Government is arguing that if we think there's records on the cell phone we can search the person's house.

Some of the cases argued by the Government are being able to search a phone. I don't contest the search of a cell phone. But the strongest protection of the Fourth Amendment is a person's home. And to say that we believe we have no evidence that you have a computer, no evidence that you have a laptop, we think you have a phone and on that phone might be evidence of a crime, therefore, we can search your entire house. That's

what the motion is all about, Your Honor.

With regard to the severance, Mr. Riley said that fraud funds were flowing. I think that's what the indictment suggests. But he also says that that money was used to buy the guns and drugs. That connection isn't there. He had money, he ultimately had guns and drugs, but there's nothing that says he used one for the other. That's why those things have to be tried separately.

THE COURT: Well, how do I deal with the proffer of the Government regarding the evidence that they have in their possession which would link up the fraud to the drugs?

MR. BARDOS: Your Honor, I don't think it links the fraud to the drugs. I think it links -- I think that they overlap. I think that they might have been committed at the same time but that doesn't mean there they're related and that doesn't mean they're one common scheme.

The loan -- the individuals involved in the ID theft and the individuals involved possibly in the guns and drugs aren't the same individuals. This isn't one gang doing a bunch of different illegal activity. This is one series of ID thefts in September of 2022.

THE COURT: I was going to say, the sale of the lawnmowers --

MR. BARDOS: Yes.

THE COURT: -- and the proceeds of the sale from the

riding lawnmowers being used to fund the narcotics.

MR. BARDOS: And that may have been, Your Honor, but it is not -- so Your Honor talked about --

THE COURT: Then the guns are related to the narcotics because they're tools of the trade.

MR. BARDOS: Yes, but financial fraud, financial fraud is not a tool of the trade for drug cases.

THE COURT: Hang on one second.

MR. BARDOS: Certainly.

THE COURT: Excuse me.

MR. BARDOS: Guns and drugs go together and guns unfortunately are tools of the trade. But there's nothing to suggest that financial fraud is a tool of the trade of guns or of drugs.

I mean, Your Honor has seen multiple cases where no one is -- they don't have to get a nest egg in order to finance a drug conspiracy. I understand the Government's proffer that there may be context at the same time. But there's nothing -- there's no financial information, there's no wires, there's no transfers of money at all that suggest that any of this fraud money was used to purchase the guns and the drugs. And, therefore, given the vastly different types of offenses, and the potential prejudice that I don't think an instruction could possibly cover -- you're going to tell the jury, look, if you find he had guns and drugs and packing material you need to put

that aside in deciding whether he applied for a PPP loan two and a half years ago. I don't think a jury can do that.

I agree with Your Honor, my sense of it is -- and obviously it's up to the Government if the Court grants severance -- is that the guns and the drugs case would go first, and there would be no case in the fraud case after that because what would be the point. But that's up to the Government. They rarely call me for my views of what they should try and when they should try them.

If the Court has any other questions, I'm happy to answer them.

THE COURT: No, thank you.

MR. BARDOS: Thank you, Judge.

THE COURT: Pending before the Court is a Motion to Suppress Evidence and a Motion to Sever counts, ECF Number 49 and 50.

The Motion to Suppress Evidence arises out of the execution of the search warrant on a residence located at 900 East Fort Avenue, Apartment 537, in Baltimore, Maryland.

Within the confines of that warrant sought to search a cell phone associated based upon the affidavit that the Defendant used. This cell phone number used was associated with applications to obtain fraudulent information in which the Defendant was identified not only through the cell phone but also through his email addresses.

The affiant asserts that proceeds or evidence of the cell phone would be found or the cell phone itself would be found at the residence based upon his training and experience, that not only is information contained on the cell phone manifesting criminal activity but that the cell phone itself is possessed or would be possessed by the individual Defendant.

There's sufficient evidence within the affidavit itself that the cell phone was used by this Defendant at the location, although there is some time that did pass between the two alleged fraudulent acts. It's noteworthy that the Defendant was indeed on supervised release for a fraud-related crime and committed this act while -- at least one of these acts while he was on supervised release.

Certainly temporal proximity, and temporal proximity, alone, is not sufficient for the purposes of establishing probable cause. But, nevertheless, the Defendant's use of the cell phone as part of the fraudulent scheme does support the finding of probable cause.

Certainly the Court affords great deference given to the probable cause determination of the judge, and law enforcement may draw inferences based upon their experiences.

As indicated in this case, the Defendant allegedly used electronic device to commit and in connection with a criminal activity. Those devices or that device, including financial records, would be sought. The affiant indicated that financial

records are typically kept in residences. There was specific details of the fraud scheme and the Defendant's involvement in the use of his own identifying information. As indicated, the residence was linked through the phone. And as a result, there was a link between the phone and the Defendant's residence.

There was an assertion within the affidavit that the crime, if not direct and express, was ongoing. The Defendant was on supervised release for a fraud. He committed one fraud while in VOA and then within a relatively -- what this Court considers a relatively short period of time, connected in another fraud. Evidence on his iCloud account manifested of purported fraudulent documents. And although the precise dates of those documents, which were not known, the time where they arrived on the iCloud account through the phone service of December of 2020 was known.

So it's not that far or that long a period of time between the existence of those incriminating items on the iCloud and the time of active service in the ongoing fraud which fails to support an ongoing scheme.

As indicated, the length of time is not the only factor in determining proper cause. You will need to look to all of the facts and circumstances. Certainly electronic devices, unlike maybe some other evidence such as narcotics, is not likely to be stale given the nature of the electronic storage. And it's not -- there's no evidence that this degrades quickly. This

also includes the iCloud account.

The warrant also sought records and other data on applications and IRS records.

So it was just -- it was broader than just simply searching of an electronic device.

Looking at the nature of the unlawful activity, as indicated, the alleged activity -- there's a suggestion that it was potentially ongoing because although there were periods of time where they're not manifested within the affidavit themselves, there are multiple periods of fraudulent activity that are ongoing.

When you look at the -- all of this in the totality of the circumstance, I believe that there is a demonstration that there was probable cause. Even if it wasn't, I do believe that the good faith exception would end up being applicable here.

Certainly, this exception applies only in -- unless there is the most egregious conduct: A judge abandoned his judicial role, or where the warrant is so facially deficient the executing officer cannot reasonably presume it to be valid. That's not the case here. This is a little bit closer call than what would normally be the case. But certainly I believe that the good faith exception to the warrant requirement would apply.

As far as the severance is concerned, I'm not prepared at this point in time to accept the proffer of the Government

related to the connection between the narcotics, guns, and the fraud scheme. I also note that it would be extremely prejudicial to the Defendant to present them both if they weren't inextricably tied together.

As a result, I do believe it's appropriate when I weigh the prejudice against the consumption of judicial and Government resources and defense resources that it is appropriate to sever out the guns as well as the narcotics from the fraud scheme. However, the fraud schemes will not be separated.

Fraud can be accomplished in multiple ways. And just because there are two different methodologies of committing fraud doesn't necessarily mean that they're so dissimilar as to not be joined together under one umbrella and under one statute.

So I am going to grant the Motion to Sever the narcotics and the firearms that were seized as a result of the search from the fraud scheme. But I will include and allow the two fraud counts or the fraud counts to be tried together.

Mr. Bardos, have you made an adequate record on your motion?

MR. BARDOS: I made an adequate record, I'm not sure I made an adequate argument. But, yes, thank you.

THE COURT: Very well.

Mr. Riley.

MR. RILEY: Nothing further to add. When Your Honor has referred to the fraud counts being tried together, Your Honor is also including the aggravated identity theft count; is that right?

THE COURT: Correct.

MR. RILEY: Thank you, Your Honor.

THE COURT: Anything else?

MR. RILEY: No thank you, Your Honor.

THE COURT: All right. Thank you very much.

THE CLERK: All rise. This Honorable Court stands in recess.

(Hearing concluded at 11:13 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Ronda J. Thomas, Registered Merit Reporter, Certified Realtime Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 10th day of July 2024.

Ronda J. Thomas

Ronda J. Thomas, RMR, CRR
Federal Official Reporter

MR. BARDOS: [45] 2/13 6/17 6/20 6/24 7/24 8/5 8/9 8/23 8/25 9/22 10/1 11/2 11/18 11/24 12/3 12/12 12/19 12/21 13/10 13/17 13/21 14/17 14/19 15/8 17/13 18/13 18/16 20/22 21/2 21/8 21/11 21/14 21/18 22/21 48/19 50/9 51/2 52/12 52/24 53/2 53/6 53/9 53/11 54/13 58/22
MR. RILEY: [32] 2/4 22/23 23/4 23/11 26/6 26/9 26/11 28/3 28/10 28/16 28/20 28/22 33/19 34/3 37/8 37/16 38/11 38/13 42/7 42/10 42/22 46/5 46/11 46/16 46/18 48/3 48/6 48/11 48/17 59/1 59/6 59/8
THE CLERK: [1] 59/10
THE COURT: [79]
THE DEFENDANT: [1] 2/18

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$14,000 [1] 43/3
$15,000 [1] 43/3
$21,000 [1] 36/21
$3,000 [3] 26/13 36/16 43/23

'

'20 [2] 7/7 10/16
'21 [6] 7/19 9/1 10/16 11/13 24/8 35/21
'22, [1] 10/16
'23 [3] 9/8 19/18 20/25

0

0026 [2] 1/5 2/6

1

10 [2] 35/10 50/7
10-month [1] 35/19
101 [1] 1/24
10th [1] 60/12
11 [1] 31/21
11:13 [1] 59/12
12 [1] 32/7
15 [1] 32/4
16 [5] 16/5 18/21 18/24 19/3 22/13
16-month [1] 16/24
1993 [1] 41/6

2

20 [3] 3/16 23/5 26/20
2017 [2] 10/16 28/8
2019 [1] 30/9
2020 [16] 7/16 8/25 9/8 9/13 15/13 24/4 24/11 28/12 28/14 34/20 34/22 35/7 36/17 49/3 51/11 56/15
2021 [15] 7/4 7/8 11/15 11/20 12/7 16/17 19/18 24/5 24/6 24/8 24/9 24/13 34/11 35/9 49/5
2022 [7] 10/22 20/25 26/18 36/18 43/8 43/18 52/21
2023 [6] 3/16 7/4 13/3 15/14 19/23 26/20
2024 [2] 1/12 60/12
21201 [1] 1/25
27 [1] 32/4
28 [1] 60/6

3

30 [2] 24/5 24/6
31 [1] 24/25
34 [1] 24/24

4

45 [1] 26/17
49 [2] 3/6 54/15
4th [1] 1/24

5

50 [2] 3/7 54/16
5000 [1] 7/16
53 [1] 25/1
537 [2] 3/14 54/19
56 [1] 26/25
58 [1] 37/1

6

64 [1] 26/25
68 [1] 28/16
69 [1] 26/25

7

71 [1] 40/24
753 [1] 60/7

9

900 [2] 3/14 54/18
9:35 [1] 1/12
9:38 [1] 1/25

A

a.m [3] 1/12 2/1 59/12
abandoned [1] 57/17
ability [2] 31/23 36/20
able [8] 17/19 27/15 37/2 37/2 42/18 42/19 44/5 51/19
about [38] 3/25 4/1 10/7 16/7 16/8 20/18 22/4 22/24 22/24 23/24 26/18 27/1 27/5 27/5 27/12 27/17 28/17 30/1 30/12 31/6 31/20 32/12 33/1 36/11 36/12 37/23 37/24 38/6 38/22 39/1 39/23 40/12 42/13 43/15 49/2 50/6 52/1 53/3
above [1] 60/9
above-entitled [1] 60/9
absolutely [5] 18/4 33/19 33/20 46/12 48/11
accept [2] 48/1 57/25
accepting [1] 46/12
accomplished [1] 58/11
according [2] 9/24 26/17
account [26] 10/2 12/16 23/20 25/9 26/1 27/10 27/11 27/16 27/21 29/20 31/12 31/12 34/15 34/21 35/11 35/16 39/2 40/13 40/13 40/14 40/16 40/16 49/3 56/11 56/14 57/1
accounts [8] 10/3 10/4 26/24 27/17 28/13 40/14 40/22 47/5
acknowledge [3] 30/12 30/13 34/17
acquire [1] 43/2
acquiring [1] 43/9
across [1] 6/21
act [3] 4/19 44/20 55/12
activated [4] 28/11 28/14 34/21 34/22
active [2] 26/18 56/18
activities [1] 42/18
activity [30] 5/24 11/19 13/12 16/15 16/17 18/6 18/21 22/10 29/19 33/23 33/25 34/24 35/10 35/23 36/4 36/8 36/10 36/11 37/3 40/1 40/19 41/4 47/7 49/6 52/20 55/5 55/24 57/6 57/7 57/10
acts [4] 6/2 26/5 55/10 55/12
actual [2] 14/9 50/21
actually [6] 3/17 4/7 7/3 20/24 34/7 39/22
add [1] 59/1
addition [3] 4/6 27/22 50/18
address [31] 3/15 7/9 7/13 7/14 7/17 7/20 13/3 13/13 13/19 14/4 15/12 15/13 16/23 17/8 19/3 22/10 22/12 22/15 22/25 24/19 24/19 29/14 33/1 38/8 38/24 38/25 40/15 42/4 47/22 47/23 51/10
addresses [3] 33/3 37/24 54/25
addressing [1] 39/20
adequate [3] 58/20 58/22 58/23
admitted [3] 4/25 46/1 46/2
affiant [4] 5/11 9/24 55/1 55/25
affidavit [64]
affirmed [2] 5/11 44/25
affords [1] 55/19
after [5] 11/14 11/20 16/16 37/13 54/6
again [4] 32/13 34/15 35/12 39/23
against [1] 58/6
agent [16] 1/19 1/19 2/8 2/8 3/19 5/11 24/2 27/1 27/2 27/5 29/5 31/7 32/17 34/16 38/21 40/18
agents [1] 10/20
aggravated [7] 35/1 35/22 42/24 43/7 43/12 44/14 59/3
ago [4] 27/10 37/9 50/17 54/2
agree [5] 12/19 13/10 21/20 48/21 54/3
ahead [2] 18/15 28/4
aided [1] 1/22
all [39] 2/11 2/16 6/1 7/4 7/18 12/3 12/23 12/23 15/23 16/2 17/16 17/21 18/19 18/21 20/14 22/8 22/22 24/15 25/21 25/25 26/2 29/13 33/3 35/1 37/15 40/11 40/16 40/25 41/23 43/25 48/15 48/16 51/10 52/1 53/20 56/21 57/12 59/9 59/10
allegations [3] 4/15 32/3 46/15
allege [1] 8/2
alleged [11] 4/13 5/2 5/20 6/1 7/3 12/21 12/23 29/19 35/14 55/10 57/7
allegedly [7] 4/20 5/7 9/19 34/8 35/8 42/25 55/22
alleges [2] 3/18 16/17
allow [1] 58/18
almost [2] 11/13 30/20
alone [3] 13/24 39/6 55/15
also [18] 1/18 4/22 5/8 5/19 6/8 10/13 17/16 20/19 23/16 27/23 32/15 43/10 52/4 54/25 57/1 57/2 58/2 59/3
alternatively [1] 6/8
although [5] 47/13 50/15 55/9 56/12 57/8
always [2] 2/12 30/20
am [1] 58/16
Amazon [3] 29/12 40/15 40/16
Amendment [6] 14/5 14/24 15/4 49/18 50/1 51/21
AMERICA [8] 1/4 2/5 5/4 7/7 7/10 7/12 33/10 37/23
among [1] 5/15
amount [1] 29/16
amounts [1] 31/24
analysis [1] 32/14
another [3] 24/25 47/23 56/11
answer [2] 17/20 54/10
Anthem [6] 26/14 26/20 29/10 33/14 36/5 36/15
any [30] 4/19 4/19 5/24 7/17 7/20 8/1 8/16 10/11 12/24 13/1 13/12 13/22 14/20 15/3 15/10 16/17 18/5 20/23 22/10 41/8 45/11 45/18 45/19 45/20 49/5 49/9 49/14 49/25 53/20 54/10
anybody [1] 8/13
anymore [1] 38/12
anyone [1] 11/5
anything [11] 7/2 8/20 13/13 18/3 21/21 22/3 48/23 49/1 49/4 49/5 59/7
anywhere [1] 10/1
apartment [23] 3/14 5/16 5/22 13/18 16/23 20/19 21/4 26/13 26/21 29/10 36/16 37/14 43/14 43/24 48/21 50/14 50/17 50/19 50/21 50/22 51/13 51/15 54/19
apparently [2] 6/20 27/23
APPEARANCES [1] 1/14
Apple [1] 26/24
applicable [3] 6/11 33/8 57/15
application [12] 8/10 8/11 8/22 14/10 24/4 24/5 24/11 24/12 25/16 35/8 35/19 35/20
applications [20] 8/6 9/1 16/22 24/15 24/18 24/21 24/23 25/22 25/24 31/10 33/2 34/9 38/14 38/23 38/24 40/21 40/21 50/14 54/23 57/3
applied [7] 3/17 24/11 32/9 36/22 38/1 41/14 54/1
applies [4] 30/17 32/10 48/25 57/16
apply [4] 19/4 41/18 48/25 57/23
applying [1] 40/9
appreciate [2] 33/9 47/10
approach [1] 16/6
approached [1] 47/11
appropriate [2] 58/5 58/8
appropriately [1] 47/19
apps [1] 27/17
are [61]
aren't [1] 52/18
arguably [1] 21/16
argue [1] 44/3
argued [1] 51/19
arguing [3] 5/19 5/19 51/16
argument [29] 4/9 6/20 6/24 8/9 13/11 17/6 19/9 19/14 21/5 21/9 22/11 22/25 32/25 35/25 36/13 37/9 37/17 37/19 37/23 38/3 39/7 39/23 39/24 40/1 41/16 49/15 50/2 51/12 58/23
arguments [4] 3/10 23/1 36/2 39/21
arises [1] 54/17
armed [2] 20/2 20/8
arrears [1] 36/19
arrest [1] 45/24
arrested [2] 4/23 46/1
arrived [1] 56/14
as [84]
aside [1] 54/1
ask [4] 8/11 22/18 42/2 47/18
asking [1] 47/25
asserted [1] 41/24
assertion [2] 25/4 56/6
asserts [2] 5/16 55/1
assessing [1] 33/23
assessment [1] 47/20
Assistant [1] 2/6
associated [15] 3/15 5/9 5/9 8/4 9/20 13/8 13/19 13/19 14/3 14/13 14/14 26/23 26/24 54/21 54/22
association [1] 9/18
assume [3] 7/24 8/10 33/12
assumed [1] 4/4
assuming [3] 7/18 11/21 11/24
asylum [1] 32/8
ATMs [1] 45/3
attached [1] 41/21
attempting [1] 14/15
Attorney [2] 2/6 2/7
attribution [1] 26/1
attuned [2] 24/15 34/13
August [1] 24/8
August 2021 [1] 24/8
authorization [1] 29/18
authorized [2] 23/5 25/10
Avenue [11] 3/14 6/25 7/14 13/3 13/12 15/13 17/8 23/9 40/15 51/11 54/19
aware [4] 37/20 37/21 44/9 44/12

B

back [5] 28/18 30/15 31/6 34/8 34/24
backdate [1] 28/2
backs [2] 27/14 27/14
balance [1] 25/19
BALL [2] 1/19 2/8
BALTIMORE [4] 1/2 1/25 3/15 54/19
bank [4] 23/20 34/25 45/1

B

bank... [1] 45/3
bankruptcy [2] 45/1 45/5
banks [1] 36/25
BARDOS [9] 1/17 2/11 2/14 3/8 6/13 6/16 22/20 48/18 58/20
BARRON [3] 1/16 2/6 22/22
based [12] 5/11 27/3 27/16 27/17 29/5 38/4 39/6 43/12 44/20 54/21 55/3 55/21
basically [1] 49/23
basis [9] 9/4 31/15 31/18 35/2 41/9 41/19 41/24 42/1 45/13
be [75]
bear [1] 50/13
bears [1] 41/7
because [30] 9/14 10/5 10/20 11/18 11/25 12/22 17/3 17/23 19/2 19/4 19/20 20/22 21/20 22/11 28/1 28/25 30/14 30/19 34/20 37/3 39/10 41/14 45/24 48/4 49/16 51/10 53/5 54/7 57/8 58/12
been [12] 5/2 10/23 11/3 18/1 24/6 28/7 29/15 37/14 41/24 42/19 52/14 53/2
before [13] 1/11 4/14 10/5 11/13 15/11 16/5 18/21 20/25 26/19 32/4 34/5 50/20 54/14
began [1] 34/7
beginning [1] 48/13
behalf [4] 1/15 1/17 2/7 2/14
being [9] 5/20 8/4 21/2 25/18 37/15 51/19 53/1 57/15 59/2
belies [1] 15/2
believe [17] 3/19 5/21 13/23 14/23 16/11 17/2 23/7 26/13 30/9 39/15 39/17 50/17 51/22 57/13 57/14 57/21 58/5
bench [1] 50/10
benefit [1] 24/4
benefits [6] 23/21 24/7 25/23 36/23 37/20 38/14
Bennett [7] 16/20 32/25 33/4 35/5 35/13 50/10 50/16
bespeak [1] 35/21
bespeaks [1] 35/23
between [18] 15/15 24/8 29/18 31/11 32/4 38/22 38/23 39/2 39/25 40/3 42/8 43/15 48/1 50/25 55/9 56/5 56/16 58/1
big [1] 17/4
bills [2] 23/19 23/20
bit [7] 11/11 28/5 30/12 37/24 42/13 45/23 57/20
bogus [8] 24/24 24/25 24/25 27/19 27/22 34/14 35/11 39/3
BOP [1] 34/7
both [6] 3/5 6/7 46/22 47/5 47/9 58/3
bought [2] 9/3 13/7
Boysk [2] 30/8 30/13
BRIAN [2] 1/19 2/9
brief [3] 30/23 32/21 37/25
Briefly [1] 36/1
broad [5] 23/12 23/23 29/3 30/1 32/12
broader [1] 57/4
broadly [4] 23/11 23/14 23/18 45/16
brought [2] 32/20 33/13
brows [1] 4/1
building [1] 26/21
bunch [1] 52/19
business [6] 42/12 42/19 43/22 44/5 47/18 48/13
buy [1] 52/4
buying [4] 43/15 43/16 43/17 43/17

C

call [3] 2/3 54/8 57/20
called [1] 8/13
Calling [1] 2/4
calls [1] 8/14
came [2] 15/14 16/23
can [21] 2/2 3/12 11/5 13/6 14/1 14/5 14/23 15/21 21/9 31/6 33/11 33/11 38/7 39/11 40/2 43/25 49/13 51/17 51/25 54/2 58/11
can't [3] 20/4 20/7 20/8
cannot [2] 30/16 57/19
capable [1] 38/17
card [2] 23/19 23/19
cards [12] 12/14 27/20 27/22 28/6 33/6 34/14 35/11 35/21 36/9 36/9 39/3 50/18
careful [1] 48/14
carjacking [3] 20/2 20/6 20/8
carried [1] 13/2
carry [2] 27/3 40/23
case [59] 2/3 2/4 5/11 6/11 12/5 14/25 15/3 16/3 16/20 16/23 19/22 20/1 20/1 20/8 20/9 21/19 23/4 30/8 30/9 30/13 30/13 31/9 31/21 31/22 32/7 32/8 32/10 32/20 32/24 35/5 35/13 39/8 39/13 41/1 41/5 41/6 41/7 41/12 41/18 41/23 44/4 44/24 45/15 46/6 46/13 46/19 48/15 50/4 50/10 50/13 51/5 51/6 51/7 54/5 54/6 54/6 55/22 57/20 57/21
cases [26] 11/7 15/24 16/2 16/3 16/8 16/9 16/13 16/13 19/9 20/12 20/16 21/22 22/19 30/19 30/21 30/22 31/20 32/11 41/21 41/22 44/22 49/17 51/5 51/19 53/7 53/15
cash [2] 43/5 43/10
categories [3] 23/12 23/23 30/1
category [3] 23/18 29/3 32/12
cause [25] 5/16 5/18 6/9 11/1 13/25 15/14 16/11 16/12 19/5 22/25 23/7 26/12 31/17 32/5 35/3 39/14 39/17 41/17 48/22 49/21 55/16 55/18 55/20 56/21 57/14
cautionary [2] 45/8 45/14
ceased [2] 36/4 36/8
cell [60] 5/8 5/8 5/9 5/12 7/23 7/24 7/25 8/3 8/15 8/17 9/1 9/10 9/21 9/23 9/24 13/23 14/2 14/3 14/4 14/9 14/12 14/13 14/14 14/21 14/22 15/2 15/7 15/18 15/20 15/21 19/6 23/16 26/15 30/25 31/23 31/25 32/6 39/5 39/7 39/10 39/16 40/10 47/8 47/8 48/22 49/14 50/25 51/1 51/15 51/17 51/20 54/21 54/22 54/24 55/1 55/2 55/4 55/5 55/8 55/17
cellular [1] 27/4
certain [1] 14/8
certainly [13] 11/4 19/6 20/8 21/6 33/9 46/11 47/10 53/9 55/14 55/19 56/22 57/16 57/21
CERTIFICATE [1] 59/13
Certified [1] 60/4
certify [1] 60/6
cetera [1] 26/2
character [2] 44/19 47/14
charged [5] 6/6 20/2 26/3 29/1 29/1
charges [2] 45/1 45/6
chats [1] 47/1
CHIEF [1] 1/11
child [9] 16/7 30/14 30/14 30/17 30/19 30/23 31/20 31/22 32/11
circuit [14] 7/22 16/10 19/24 20/3 29/17 30/8 30/18 33/22 40/2 41/6 41/13 44/24 44/25 45/7
circumstance [1] 57/13
circumstances [5] 29/21 41/7 41/11 41/23 56/22
cite [1] 16/13
cited [5] 15/24 16/2 16/19 20/1 44/22
cites [3] 30/22 31/21 51/6
claim [1] 37/19
claimed [1] 37/25
claims [2] 32/22 39/9
clear [5] 18/12 21/9 38/13 40/3 44/16
clearly [3] 6/21 6/22 7/22
close [4] 19/24 22/9 39/12 41/11
closely [1] 49/20
closer [1] 57/20
cloud [5] 27/10 27/11 27/14 27/16 27/17
cloud-based [1] 27/17
cocaine [1] 43/17
coke [1] 43/16
come [3] 6/21 30/21 46/21
comes [1] 30/19
comment [1] 17/10
commit [4] 5/7 15/21 21/21 55/23
commits [3] 32/17 49/13 49/22
committed [13] 5/21 5/23 7/1 7/9 7/12 15/11 16/7 17/3 17/4 49/23 52/14 55/12 56/8
committing [1] 58/12
common [8] 29/6 33/11 33/12 38/11 44/21 45/2 47/16 52/16
communicate [2] 26/16 26/20
communications [1] 31/24
completed [3] 11/12 11/16 11/17
completely [2] 6/5 20/9
computer [9] 1/22 13/9 30/10 31/1 38/1 38/9 38/16 48/23 51/23
Computer-aided [1] 1/22
computers [2] 12/25 38/17
concealment [1] 45/4
concerned [1] 57/24
concerning [2] 25/14 25/22
conclude [3] 33/24 35/3 41/2
concluded [3] 4/13 4/14 59/12
concluding [1] 45/2
conduct [2] 29/1 57/17
Conference [1] 60/10
confession [2] 45/24 47/2
confines [1] 54/20
conformance [1] 60/10
Congratulations [1] 2/13
conjecture [1] 38/4
connected [4] 7/9 18/2 44/21 56/10
connection [19] 15/15 15/17 16/25 19/3 19/24 22/10 24/20 27/7 28/24 28/25 31/9 31/12 40/19 44/3 48/11 51/15 52/5 55/23 58/1
connects [7] 7/13 7/20 9/15 13/12 13/13 18/5 19/21
conservation [1] 45/16
consider [2] 33/22 45/12
consideration [2] 45/10 50/8
considered [1] 23/6
considers [1] 56/10
conspiracy [2] 32/3 53/17
constitute [2] 26/2 47/15
constituted [1] 44/21
consumption [1] 58/6
contact [1] 8/11
contain [2] 13/23 38/2
contained [7] 14/11 23/15 26/14 28/13 39/16 39/18 55/4
containing [2] 41/3 50/5
contemporaneous [3] 43/11 43/14 43/18
contends [1] 44/4
content [1] 46/25
contentions [1] 29/14
contents [1] 27/15
contest [1] 51/20
contesting [1] 8/18
context [2] 30/10 53/18
continued [1] 11/23
continuous [4] 16/14 29/23 35/6 35/15
contrary [2] 15/23 25/4
controlled [1] 4/8
conviction [6] 10/14 10/16 28/7 34/5 34/12 34/25
convictions [1] 34/25
Cooper [1] 44/24
corners [1] 11/25
correct [3] 26/6 59/5 60/7
correspondence [1] 38/25
could [14] 9/10 10/16 10/20 13/1 13/5 13/8 17/6 22/12 22/13 28/6 41/9 45/22 47/11 53/23
couldn't [5] 21/4 21/16 37/18 45/21 51/12
Coulson [9] 5/17 11/3 11/10 18/19 23/6 23/6 31/15 35/2 41/2
counsel [10] 2/2 2/20 3/1 7/11 27/12 32/20 33/1 36/2 39/23 41/5
counsel's [2] 25/4 41/22
count [3] 29/18 47/21 59/3
counts [14] 3/2 21/20 22/2 22/3 29/2 42/23 44/8 44/18 45/13 47/23 54/15 58/19 58/19 59/2
couple [3] 36/1 41/21 44/8
coupled [1] 25/15
course [8] 3/8 5/2 5/19 6/19 8/8 28/23 45/17 47/19
court [31] 1/1 6/9 11/8 11/10 15/20 17/10 17/14 17/22 19/6 22/1 22/18 31/22 32/3 35/14 40/2 41/8 41/19 41/25 42/2 45/6 45/8 47/18 47/24 49/19 54/4 54/10 54/14 55/19 56/9 59/10 60/5
court's [1] 44/25
courts [4] 29/17 29/19 30/3 33/24
cover [1] 53/24
cr [1] 2/6
credit [7] 23/19 23/19 25/19 33/6 37/1 43/1 43/2
crime [18] 5/20 7/11 11/12 15/10 15/15 15/21 16/7 17/3 17/4 23/8 26/3 29/22 35/5 35/5 41/10 51/25 55/11 56/7
crimes [10] 6/1 6/2 6/25 7/3 9/16 12/4 12/5 35/14 35/15 40/20
criminal [19] 1/5 2/5 3/20 4/19 5/24 6/1 18/21 29/19 33/25 35/10 35/17 36/8 36/11 40/1 40/19 41/4 45/18 55/5 55/23
criminality [2] 18/11 21/15
critical [2] 9/9 50/13
Cross [1] 46/3
CRR [2] 1/23 60/16
culpability [1] 45/25
custody [2] 4/24 34/7
cut [2] 43/18 43/25

D

DALES [22] 1/7 2/5 2/15 2/16 7/6 7/18 7/21 8/7 9/5 9/19 10/14 10/21 12/25 15/12 16/17 17/9 18/2 22/6 25/18 36/3 36/8 49/9
Dales' [3] 8/10 25/8 40/14
data [6] 9/6 25/24 31/3 31/4 31/24 57/2
date [5] 10/22 18/23 27/25 28/1 28/18
date on [1] 27/25
dated [3] 10/11 10/22 60/12
dates [5] 10/10 10/17 49/4 49/4 56/12
day [2] 38/6 60/12
days [5] 3/17 29/16 29/18 45/22 46/15

D

deal [1] 52/9
dealers [1] 18/3
debit [1] 33/5
December [21] 7/7 7/7 7/16 8/25 9/8 9/13 12/6 15/13 24/4 24/11 26/18 28/12 28/14 34/10 34/20 34/22 35/7 36/18 49/3 51/11 56/15
December 2020 [3] 8/25 34/22 35/7
December 2022 [1] 36/18
December 4 [1] 26/18
deciding [1] 54/1
decision [5] 33/3 33/4 41/6 44/24 44/25
declined [2] 25/19 36/25
Defendant [43] 1/8 1/17 3/1 3/16 3/24 4/23 5/3 5/9 5/17 5/22 17/23 24/3 26/5 26/16 26/25 27/24 29/9 32/23 33/9 35/9 35/24 36/5 36/17 36/20 37/17 37/25 39/10 40/11 42/11 42/25 43/15 44/10 44/13 48/20 51/1 54/22 54/24 55/6 55/8 55/10 55/22 56/7 58/3
defendant's [44] 12/16 23/9 23/16 24/18 24/19 25/15 26/13 26/15 26/21 27/13 27/21 28/7 28/11 28/24 34/5 34/24 35/12 35/17 36/16 38/19 38/24 39/2 39/11 39/16 39/19 39/25 40/10 41/4 41/10 42/17 43/13 45/3 45/17 46/21 46/22 46/24 47/3 47/17 48/9 48/13 50/14 55/16 56/2 56/5
defense [12] 4/9 5/19 7/11 23/2 28/5 29/15 39/9 39/20 41/24 45/14 48/15 58/7
defense's [1] 38/4
deference [1] 55/19
deficient [1] 57/18
defrauding [1] 4/7
degrades [3] 31/2 32/2 56/25
demonstration [1] 57/13
denied [1] 24/6
denies [1] 22/1
deny [4] 41/19 42/2 45/1 47/18
Department [3] 24/8 25/12 39/1
depleted [1] 31/5
despite [2] 10/24 18/14
destroyed [2] 32/16 33/7
detail [4] 24/2 29/14 42/13 47/22
details [1] 56/2
determination [1] 55/20
determining [1] 56/21
device [8] 13/7 30/5 31/5 39/15 41/3 55/23 55/24 57/5
devices [27] 23/14 23/15 23/17 25/25 27/6 30/1 30/3 31/4 38/2 38/3 38/6 38/17 38/19 39/15 39/17 39/18 40/5 40/10 40/20 43/13 46/25 46/25 48/15 48/21 48/25 55/24 56/22
devoid [2] 19/5 41/8
dial [1] 38/12
dial-up [1] 38/12
did [21] 6/14 6/20 8/18 8/19 10/5 10/20 12/9 18/4 20/14 21/19 32/21 34/17 37/12 40/17 41/25 42/1 44/6 47/22 50/11 50/11 55/9
didn't [9] 5/22 6/14 6/22 18/22 19/1 19/20 22/14 48/4 51/2
difference [3] 9/9 16/22 51/4
different [17] 6/4 11/9 12/8 12/22 15/11 16/6 16/8 16/9 19/10 19/16 19/17 20/4 20/5 20/10 52/20 53/22 58/12
difficult [2] 11/11 17/23
digital [1] 30/20
direct [1] 56/7
directly [1] 15/23
Disaster [3] 23/22 24/10 38/15
discovered [1] 12/14
discusses [1] 32/21
discussions [1] 43/14
dissimilar [4] 6/2 6/3 6/3 58/13
dissipates [2] 31/1 32/1
distance [1] 50/3
distinction [1] 17/4
district [6] 1/1 1/1 44/25 45/7 60/5 60/6
DIVISION [1] 1/2
do [19] 11/16 13/8 13/21 17/18 17/25 18/8 18/19 19/7 20/17 26/7 30/22 38/6 42/21 47/25 52/9 54/2 57/14 58/5 60/6
document [3] 14/15 24/24 25/1
documents [12] 4/17 15/7 23/19 23/20 24/22 25/23 29/7 31/11 31/13 32/18 56/12 56/13
does [4] 18/2 30/21 36/8 55/17
doesn't [14] 8/2 8/14 10/15 19/4 20/20 21/24 33/3 38/8 38/15 44/11 48/25 52/15 52/16 58/13
doing [5] 25/6 25/6 25/6 37/18 52/19
DOL [1] 2/9
DOL-IOG [1] 2/9
don't [30] 2/3 3/25 7/17 11/4 12/3 12/10 13/6 14/5 14/7 14/23 14/24 15/3 17/20 18/20 18/22 18/23 18/24 18/25 19/7 19/14 21/20 21/23 22/3 34/18 49/18 51/20 52/12 53/16 53/23 54/2
done [2] 20/14 39/20
dovetail [1] 41/15
draw [1] 55/21
driver's [3] 27/20 35/11 39/3
drug [14] 16/8 16/13 20/12 41/10 42/12 42/19 43/22 44/5 46/6 46/9 47/17 48/13 53/7 53/17
drug-trafficking [2] 42/12 46/9
drugs [43] 16/11 17/17 17/19 17/24 18/3 18/6 19/15 19/16 19/18 19/21 19/23 20/9 20/12 20/24 21/6 21/19 22/19 42/13 42/15 42/16 42/17 43/24 43/25 44/17 45/19 45/22 46/2 46/7 46/8 47/3 47/11 47/14 48/1 52/5 52/6 52/11 52/13 52/18 53/11 53/14 53/21 53/25 54/5
during [2] 5/2 27/20

E

each [5] 24/18 24/20 37/25 45/12 47/20
earlier [8] 2/21 3/18 31/20 32/13 34/13 37/24 40/12 40/18
earnings [3] 27/23 28/1 36/9
easily [1] 40/2
East [3] 3/14 7/16 54/19
ECF [3] 3/6 3/7 54/15
ECF Number [3] 3/6 3/7 54/15
Economic [3] 23/21 24/10 38/14
egg [1] 53/16
egregious [1] 57/17
EIDLs [1] 23/22
Either [1] 6/23
electronic [39] 7/13 12/23 23/14 23/14 23/15 23/16 24/1 25/21 25/23 27/6 30/1 30/3 30/5 30/6 30/10 30/17 30/25 31/4 31/8 32/9 38/6 38/17 38/19 39/15 40/4 40/10 41/3 43/13 46/25 48/15 48/20 48/24 49/13 49/16 49/22 55/23 56/22 56/24 57/5
electronically [7] 12/24 24/16 24/23 25/22 31/10 31/11 38/16
electronically-submitted [1] 25/22
electronics [2] 26/14 31/9
else [9] 7/5 11/5 17/5 18/3 19/4 22/15 48/23 49/1 59/7
else's [1] 10/22
email [7] 24/19 26/1 38/24 38/25 38/25 47/5 54/25
emails [8] 25/3 25/12 25/14 25/17 25/22 36/23 36/24 36/24
employed [1] 43/19
employment [2] 37/13 37/21
encourage [2] 48/14 48/14
end [5] 2/22 41/9 43/3 44/14 57/15
ended [2] 13/3 32/3
enforcement [4] 26/12 31/6 41/25 55/20
engaged [2] 44/10 44/13
enough [1] 19/6
entire [1] 51/25
entirety [1] 42/3
entitled [1] 60/9
entity's [1] 38/8
envisioned [1] 46/19
EREK [2] 1/16 2/6
error [1] 45/6
ESQUIRE [3] 1/15 1/16 1/17
essentially [2] 32/23 43/8
established [5] 29/11 29/11 29/12 40/6 40/8
establishes [1] 34/23
establishing [1] 55/15
et [1] 26/2
even [19] 8/2 9/12 14/24 16/5 19/20 20/4 22/14 25/25 27/11 27/13 31/4 35/10 39/12 41/11 41/15 41/16 46/12 46/19 57/14
event [2] 2/23 6/8
events [4] 12/6 13/14 43/6 43/6
every [3] 25/5 38/6 44/12
everybody [3] 15/20 15/22 49/22
everyone [1] 2/3
everything [1] 35/17
everywhere [2] 27/4 40/23
evidence [66]
exact [1] 6/6
Exactly [4] 28/20 37/8 37/8 37/16
examination [2] 46/3 46/4
example [2] 7/6 9/2
Except [1] 8/22
exception [8] 6/10 6/11 6/12 41/14 41/18 57/15 57/16 57/22
exchanged [1] 9/3
Excuse [1] 53/10
executed [4] 3/16 4/18 4/20 46/1
executing [1] 57/19
execution [4] 26/19 29/10 43/11 54/18
exhaustive [1] 38/21
exhibits [1] 41/22
existed [3] 28/19 32/5 35/3
existence [1] 56/17
expansive [1] 45/23
expected [1] 31/2
expensive [1] 37/14
experience [7] 5/12 10/20 27/2 27/2 27/3 29/6 55/3
experiences [1] 55/21
expert [1] 46/7
explicitly [1] 37/25
express [1] 56/7
extend [1] 21/16
extent [1] 38/2
extremely [1] 58/2

F

F-E-T-T-Y [1] 43/15
facially [1] 57/18
fact [8] 10/15 12/8 15/1 20/18 33/16 34/6 35/18 35/19
factor [4] 33/15 33/21 45/9 56/20
facts [6] 41/1 41/7 41/11 41/23 49/20 56/22
fails [1] 56/18
failure [1] 36/5
fair [3] 31/15 31/15 41/3
fairly [2] 5/25 45/25
faith [6] 6/10 41/14 41/16 41/18 57/15 57/22
fake [3] 27/23 31/13 36/9
familiar [1] 16/21
far [2] 56/16 57/24
Fargo [1] 25/20
fashion [1] 47/12
favor [2] 17/22 35/24
FBI [2] 2/8 4/24
federal [3] 1/24 25/20 60/16
Feng [1] 32/7
fentanyl [1] 43/16
fetty [1] 43/15
Fi [1] 38/7
fifth [1] 9/10
filed [5] 3/2 8/6 8/11 12/24 50/15
finally [1] 45/16
finance [3] 42/11 43/21 53/16
financial [17] 23/18 29/4 29/7 30/2 32/13 32/15 33/5 33/13 33/17 40/5 47/7 53/6 53/6 53/13 53/19 55/24 55/25
financing [1] 47/17
find [6] 31/16 31/17 41/16 41/25 49/14 53/25
finding [1] 55/18
finds [1] 6/9
fine [1] 9/19
firearm [1] 46/9
firearms [11] 4/21 4/25 6/5 18/11 20/19 42/9 42/15 42/16 45/19 46/3 58/17
first [12] 3/13 7/9 11/7 11/7 18/5 19/20 24/1 24/3 29/24 35/19 39/22 54/6
Floor [1] 1/24
flowing [3] 37/4 44/2 52/3
focus [2] 24/1 29/15
focused [1] 33/4
folks [2] 27/3 29/7
foregoing [1] 60/7
forever [3] 16/2 49/17 49/24
format [1] 60/9
Fort [11] 3/14 6/25 7/14 13/3 13/12 15/13 17/8 23/9 40/15 51/11 54/19
found [26] 5/17 10/3 10/9 10/15 10/25 17/17 19/18 19/22 20/19 21/23 22/3 23/8 27/20 34/14 35/5 35/11 35/14 39/3 39/18 41/10 41/13 46/1 47/3 50/12 55/2 55/2
four [2] 11/25 36/18
fours [1] 41/23
Fourth [18] 7/22 14/5 14/24 15/4 16/10 19/23 20/3 29/17 30/8 30/18 33/22 40/2 41/5 41/13 44/24 49/18 50/1 51/21
frankly [1] 34/17
fraud [105]
fraud-related [1] 55/11
frauds [2] 4/3 8/16
fraudulent [15] 24/3 24/22 25/15 27/19 32/22 33/2 34/8 35/8 35/8 38/1 54/23 55/10 55/17 56/12 57/10
fraudulently [1] 8/24
front [1] 11/3
full [1] 11/13
fund [2] 48/1 53/1
funded [1] 48/2
funds [9] 25/19 34/11 35/20 36/20 36/25 37/3 42/11 47/17 52/3
furrowed [1] 4/1
further [4] 17/11 24/22 25/17 59/1

F

furtherance [1] 45/9

G

gang [1] 52/19
gave [2] 5/15 45/8
general [1] 8/6
generally [2] 29/4 30/7
GEORGE [1] 1/11
Gerace [2] 31/21 31/23
get [16] 2/23 6/14 6/14 8/24 11/7 17/24 26/8 26/12 31/6 42/18 42/19 42/22 44/5 49/7 50/2 53/16
gets [1] 11/14
getting [2] 36/25 43/10
give [2] 3/9 28/2
given [7] 22/14 30/6 31/8 31/9 53/22 55/19 56/24
gives [1] 16/12
GLR [2] 1/5 2/6
GLR-23-0026 [1] 1/5
GLR-23-cr-0026 [1] 2/6
Gmail [5] 24/19 25/8 31/12 31/12 40/13
gmail.com [2] 24/20 25/9
go [12] 6/17 12/5 16/5 20/14 21/23 27/5 40/23 43/4 46/3 49/25 53/11 54/5
goes [3] 27/16 31/3 47/6
going [22] 3/8 4/2 6/13 14/7 18/7 20/12 20/14 22/23 23/1 23/24 24/1 26/8 26/11 28/4 38/7 39/6 42/13 42/22 43/22 52/22 53/24 58/16
good [10] 2/2 2/11 2/16 2/18 6/10 41/14 41/16 41/17 57/15 57/22
Google [7] 10/8 26/24 27/9 27/16 27/18 40/22 46/17
GORMAN [10] 1/19 2/9 24/2 25/1 27/5 29/5 31/7 32/17 34/16 40/18
Gorman's [2] 27/1 38/21
got [11] 10/7 10/8 18/10 18/15 25/8 34/6 34/7 36/22 37/13 37/13 37/14
Gotcha [1] 28/21
gotten [1] 15/16
Government [52] 2/7 3/9 4/5 4/7 5/16 6/5 8/14 13/22 14/2 15/25 16/19 17/24 22/2 25/4 25/6 25/8 30/22 31/21 32/7 32/20 37/21 39/6 39/11 42/2 43/4 43/20 44/3 44/4 44/9 44/11 44/12 44/16 44/16 44/18 44/19 44/23 46/13 47/4 47/13 47/18 48/7 48/9 48/19 49/16 51/5 51/16 51/19 52/10 54/4 54/8 57/25 58/7
Government's [12] 19/9 19/14 34/3 34/23 39/8 39/9 39/12 39/14 43/12 49/12 49/24 53/17
grant [3] 17/14 22/18 58/16
grants [1] 54/4
great [2] 11/3 55/19
guess [3] 18/11 43/24 48/14
guilty [1] 8/7
gun [4] 18/3 20/5 20/6 46/6
guns [42] 4/19 6/4 17/16 17/19 17/24 18/6 19/15 19/16 19/18 19/21 19/23 20/9 20/24 21/4 21/5 21/6 21/10 21/19 21/22 22/19 44/17 45/22 46/1 46/2 46/7 46/7 47/2 47/11 47/13 48/1 52/5 52/6 52/18 53/4 53/11 53/11 53/13 53/21 53/25 54/5 58/1 58/8
guys [1] 4/1

H

had [36] 3/4 4/13 4/14 4/14 5/2 7/24 9/5 9/7 9/8 10/1 10/2 10/2 10/3 10/19 10/21 13/15 15/12 22/12 24/6 25/18 26/12 31/23 34/18 36/20 36/20 37/6 37/11 48/20 48/22 48/23 48/24 49/10 51/11 52/5 52/6 53/25
half [3] 4/12 26/19 54/2
halfway [3] 33/10 34/9 35/18
hand [2] 27/13 49/2
handgun [1] 20/3
Hang [1] 53/8
happened [4] 7/2 11/19 16/20 22/12
happens [4] 7/15 7/18 8/10 11/14
happy [3] 42/4 47/23 54/10
hard [2] 15/6 50/21
hardware [1] 13/6
has [30] 3/1 7/22 10/14 13/22 13/23 14/4 16/10 17/10 17/24 18/20 19/24 19/24 20/11 22/13 24/17 29/17 30/18 33/22 36/2 36/22 37/14 42/4 43/19 43/23 49/19 49/19 49/22 53/15 54/10 59/2
have [68]
haven't [2] 15/16 45/13
having [2] 2/22 15/20
Hawkins [1] 20/1
he [68]
he's [10] 6/6 7/18 13/16 14/4 18/2 34/11 43/16 43/17 43/21 43/21
head [1] 38/5
hear [4] 3/8 3/9 3/11 6/16
heard [9] 28/5 36/14 37/5 37/9 37/23 39/5 39/23 45/13 48/8
hearing [6] 1/11 2/10 2/20 2/21 2/25 59/12
held [4] 16/10 19/24 30/4 60/8
here [17] 2/10 2/19 2/25 6/15 6/15 10/18 11/12 17/4 18/1 32/15 33/8 35/7 40/9 41/8 41/11 57/15 57/20
here's [2] 8/5 22/2
hereby [1] 60/6
high [2] 43/3 44/14
high-end [2] 43/3 44/14
him [9] 8/4 8/14 11/3 11/14 13/2 26/4 33/13 33/17 49/10
himself [2] 3/25 17/9
his [58] 5/7 5/8 5/8 5/12 5/23 7/23 8/7 8/12 8/18 8/19 10/2 10/3 10/4 10/7 10/8 10/15 10/16 13/13 13/15 13/18 13/18 14/10 24/19 26/16 27/3 28/11 29/6 32/17 32/19 33/4 33/13 33/13 34/14 36/5 37/3 37/25 38/19 39/24 40/11 40/15 40/16 42/11 43/21 43/23 44/10 45/3 45/4 45/4 45/25 47/8 48/21 48/22 50/11 54/25 55/3 56/3 56/11 57/17
history [1] 35/17
hit [1] 38/5
home [4] 33/13 41/4 45/4 51/22
homes [1] 29/8
Honor [91]
Honor's [1] 47/10
HONORABLE [2] 1/11 59/10
hope [2] 15/19 21/18
hoping [2] 6/21 19/7
house [22] 13/25 14/23 14/23 16/12 26/14 26/21 29/10 31/3 32/19 33/10 33/14 34/9 35/18 36/6 36/15 39/6 46/21 47/3 49/14 51/8 51/18 51/25
how [6] 8/5 11/16 26/7 42/21 49/23 52/9
However [1] 58/9

I

I'll [8] 3/8 3/11 6/16 17/11 22/9 30/12 39/21 45/16
I'm [29] 3/8 3/11 3/12 3/25 8/17 11/24 14/8 16/21 17/18 19/6 22/23 22/25 23/24 24/1 28/4 32/13 37/17 39/20 42/4 42/6 42/13 42/22 46/14 47/23 48/6 51/2 54/10 57/24 58/22
I've [7] 3/4 9/11 11/3 13/25 14/25 21/22 40/12
iCloud [23] 10/2 10/8 12/16 26/24 27/9 27/10 27/14 27/18 27/21 28/13 34/14 34/21 35/12 36/10 39/2 40/12 40/21 49/2 49/3 56/11 56/14 56/17 57/1
ID [8] 10/11 10/22 35/11 35/21 36/8 36/9 52/17 52/20
idea [2] 22/5 49/7
identical [1] 32/24
identification [7] 3/25 12/14 17/16 27/20 27/22 28/6 34/14
identified [2] 3/24 54/24
identify [3] 7/17 29/1 35/22
identifying [3] 5/6 12/15 56/3
identities [2] 4/4 42/25
identity [16] 3/22 10/9 10/14 12/10 12/17 12/22 19/10 35/1 35/22 39/3 42/24 43/7 43/12 44/14 45/20 59/3
IDs [1] 28/23
Ill [1] 1/11
illegal [9] 8/20 13/12 16/17 18/6 22/10 36/4 43/22 49/5 52/20
impact [1] 20/13
importance [1] 31/9
important [7] 9/14 10/18 33/21 33/22 45/9 45/17 47/1
importantly [5] 7/2 15/2 24/14 25/3 26/23
improbable [1] 50/6
include [7] 4/17 5/13 17/15 17/16 34/17 40/20 58/18
included [1] 24/18
includes [3] 23/15 23/16 57/1
including [11] 25/25 27/18 27/18 29/23 30/2 33/5 39/15 40/20 40/21 55/24 59/3
income [3] 37/7 37/22 43/20
incorrect [1] 22/6
incriminating [4] 13/24 14/11 14/22 56/17
inculpatory [1] 28/13
indeed [2] 30/8 55/11
indefinitely [1] 12/5
independent [1] 41/19
indicated [8] 2/19 2/20 15/21 55/22 55/25 56/3 56/20 57/7
indicates [2] 7/25 9/7
indictment [4] 29/2 42/23 44/8 52/3
individual [5] 3/20 16/4 16/4 16/5 55/6
individual's [1] 5/14
individually [1] 45/13
individuals [4] 9/25 52/17 52/18 52/19
individuals' [1] 4/4
inextricably [1] 58/4
infer [2] 40/9 41/9
inference [1] 12/4
inferences [3] 33/12 40/6 55/21
informal [1] 51/3
information [21] 4/10 10/8 10/8 12/15 13/24 14/11 14/21 23/12 26/1 28/13 29/3 31/17 32/12 33/24 40/25 41/17 48/8 53/19 54/23 55/4 56/3
injury [3] 23/21 24/10 38/15
inside [2] 3/18 21/4
instances [3] 44/9 44/12 44/13
institutions [1] 4/7
instruct [2] 45/12 47/19
instruction [5] 45/8 45/8 45/14 45/15 53/23
instructive [1] 44/23
insufficient [2] 25/18 36/25
insurance [11] 3/22 23/21 24/4 24/5 25/13 25/14 25/23 31/13 32/22 34/9 37/20
interconnected [1] 21/20
interesting [1] 10/7
interestingly [1] 16/19
internet [2] 27/16 38/17
internet-based [1] 27/16
internet-capable [1] 38/17
interwoven [1] 20/20
investigate [1] 18/7
investigation [1] 25/5
investigations [2] 3/21 4/15
involve [3] 30/20 30/23 32/21
involved [3] 50/14 52/17 52/18
involvement [1] 56/2
involves [1] 19/11
involving [4] 18/6 44/14 45/19 45/20
IOG [1] 2/9
IP [9] 7/9 7/13 7/17 16/23 33/1 33/3 37/24 38/8 51/10
irrelevant [1] 16/13
IRS [4] 23/19 24/24 25/1 57/3
is [164]
isn't [3] 28/22 52/5 52/19
isolated [1] 34/1
issuance [1] 32/5
issue [11] 15/12 16/1 16/25 18/18 19/8 30/5 30/19 33/24 49/20 51/9 51/9
issued [1] 3/17
issues [3] 6/15 15/3 18/16
it [98]
it's [42] 3/1 5/25 7/18 8/12 8/13 8/13 8/18 9/11 10/23 11/4 11/8 11/9 12/22 13/18 16/3 19/11 19/12 26/4 31/5 32/10 33/4 33/10 33/12 33/16 33/22 37/15 39/24 40/8 40/9 41/6 41/6 43/7 49/23 50/3 50/13 50/17 51/4 54/4 55/10 56/16 56/24 58/5
item [2] 29/24 40/6
items [6] 4/18 21/5 23/12 29/22 40/4 56/17
its [3] 25/6 30/23 42/3
itself [5] 8/16 11/12 55/2 55/5 55/7

J

jail [1] 36/22
January [10] 3/16 7/4 9/8 13/3 15/14 19/18 19/23 20/25 26/20 36/17
January '23 [1] 20/25
January 20 [2] 3/16 26/20
January 2020 [1] 36/17
job [3] 25/6 37/11 37/18
joinder [1] 44/17
joined [1] 58/14
judge [32] 1/11 5/17 10/24 11/3 11/5 11/8 11/9 11/10 16/20 18/19 22/21 23/6 23/6 25/10 31/15 32/25 32/25 33/3 33/11 35/2 35/5 35/13 41/2 41/2 41/9 48/19 50/10 50/16 50/22 54/13 55/20 57/17
judicial [3] 57/17 58/6 60/10
July [3] 24/5 24/6 60/12
July 30 [2] 24/5 24/6
jump [3] 26/7 26/10 28/4
June [2] 7/7 7/8
jury [7] 20/11 20/13 45/9 45/12 47/19 53/24 54/2
just [27] 10/6 10/11 10/18 11/22 13/7 15/7 15/21 18/19 24/19 26/11 28/5 29/17 31/1 36/10 36/11

J

just... [12] 36/1 36/22 37/9 37/13 44/7 47/1 48/14 48/14 50/3 57/4 57/4 58/11
justify [1] 49/21

K

keep [4] 16/1 29/7 32/18 40/7
kept [5] 5/13 9/11 9/24 40/11 56/1
kind [1] 48/4
kinds [1] 16/3
know [20] 3/11 6/13 7/5 7/6 7/8 11/4 11/16 14/22 18/11 18/20 18/25 26/7 28/23 34/18 34/19 34/19 35/4 40/18 44/7 47/4
knowledge [2] 27/2 29/6
known [2] 56/13 56/15

L

lab [1] 46/3
Labor [3] 24/8 25/12 39/1
lack [2] 22/8 22/9
lacking [1] 19/2
laid [6] 23/25 24/2 24/4 24/10 27/7 29/13
landlord [1] 8/19
language [1] 44/19
laptop [2] 48/23 51/23
large [1] 31/23
last [3] 7/17 18/21 18/24
later [9] 9/14 17/2 19/3 20/3 49/11 50/18 50/23 51/7 51/14
law [8] 26/12 30/18 31/5 34/1 40/3 40/8 41/25 55/20
Lawler [1] 41/5
lawnmowers [7] 43/3 43/5 43/10 44/15 48/2 52/23 53/1
leap [1] 42/21
lease [2] 29/11 36/18
least [10] 9/23 28/2 28/18 28/19 34/20 35/22 37/17 37/19 44/12 55/12
led [1] 4/15
left [2] 2/15 33/17
legitimate [5] 8/17 37/6 37/21 37/22 43/20
length [2] 35/14 56/20
lengthy [1] 34/24
Leon [3] 6/9 18/18 19/4
less [1] 50/6
let [2] 3/11 30/15
let's [2] 7/24 8/9
LEVI [1] 1/11
license [2] 35/11 39/3
licenses [1] 27/20
like [8] 11/5 11/9 18/7 18/8 23/25 32/19 45/22 51/5
likely [6] 32/18 40/7 47/9 48/21 50/12 56/23
limited [1] 11/25
limiting [2] 45/8 45/14
lines [4] 25/19 37/1 43/1 43/2
Ling [1] 32/7
link [6] 39/2 40/13 48/1 50/25 52/11 56/5
linked [6] 26/25 27/9 28/12 34/20 40/14 56/4
linking [1] 33/1
links [7] 31/11 38/22 38/23 40/12 40/13 52/12 52/13
list [1] 8/15
listed [2] 8/12 40/15
listing [2] 9/16 9/18
lists [1] 11/19
little [7] 11/9 11/10 26/18 28/4 37/24 45/23 57/20
Liu [1] 32/7
live [5] 5/22 13/16 49/17 49/24 50/11
lived [2] 13/2 15/12
lives [1] 14/12
living [2] 7/6 29/9
loan [8] 16/22 19/11 24/11 24/12 38/15 38/15 52/17 54/1
loans [5] 23/22 23/22 38/1 50/14 50/19
located [3] 4/20 26/22 54/18
location [7] 3/20 4/16 5/10 18/25 32/18 47/8 55/8
locations [3] 5/13 9/25 29/8
log [2] 13/7 38/7
logical [1] 19/24
Lombard [1] 1/24
long [4] 16/14 23/5 31/25 56/16
long-term [1] 16/14
longer [2] 49/15 49/25
look [9] 11/7 11/8 18/8 29/20 34/4 34/12 53/24 56/21 57/12
looking [2] 32/13 57/6
looks [1] 44/22
lost [1] 16/21
lot [3] 27/12 50/20 50/21
luxury [1] 26/13

M

Maddox [1] 25/10
made [5] 21/5 23/2 58/20 58/22 58/23
magistrate [6] 4/11 10/24 11/9 33/11 41/2 41/9
mailed [1] 50/19
mainframe [1] 13/9
maintains [1] 8/7
make [7] 4/1 11/5 21/9 42/21 50/4 51/12 51/12
makes [1] 30/25
man [2] 18/5 20/1
manifested [2] 56/11 57/9
manifesting [1] 55/4
many [1] 11/4
March [2] 12/6 24/13
March 2021 [1] 24/13
MARYLAND [8] 1/1 1/25 3/15 24/7 25/12 38/25 54/19 60/6
material [3] 4/21 46/8 53/25
materially [1] 19/10
materials [1] 5/6
matter [3] 25/5 32/21 60/9
matters [1] 51/13
may [8] 1/12 6/17 12/7 13/23 40/5 53/2 53/18 55/21
maybe [6] 6/22 15/14 17/6 22/12 22/13 56/23
MDDOL [1] 25/14
me [10] 3/11 4/2 6/13 14/8 17/14 23/10 30/15 47/25 53/10 54/8
mean [20] 9/20 10/15 13/5 14/1 16/10 16/12 18/11 20/11 21/6 21/24 30/25 37/11 38/8 45/21 45/25 51/2 52/15 52/16 53/15 58/13
means [3] 9/6 36/20 37/21
Memorandum [1] 50/11
mention [2] 4/19 8/3
mentioned [2] 29/24 47/1
Merit [1] 60/4
messaging [1] 40/21
metadata [1] 34/18
methodologies [1] 58/12
methodology [1] 6/3
might [5] 37/12 39/10 51/14 51/24 52/14
mind [1] 50/13
minimum [1] 37/16
minute [1] 30/13
Mirandized [1] 4/24
missed [1] 18/19
mistake [2] 4/1 11/6
mitigate [1] 45/11
mobile [4] 26/17 27/6 40/19 40/20
mobility [1] 15/1
moment [3] 27/10 37/9 42/14
money [14] 11/14 21/21 36/4 36/6 36/13 36/21 43/22 45/3 45/4 48/12 52/4 52/5 53/20 53/21
monies [4] 4/5 8/24 43/21 44/2
month [7] 16/24 16/24 26/13 26/18 35/19 36/16 43/23
months [14] 16/5 17/2 18/21 18/24 19/3 22/13 32/4 35/10 35/14 36/18 50/17 50/18 50/20 50/23
months' [1] 36/21
Monument [1] 7/16
more [15] 7/2 7/17 11/11 13/4 15/3 17/10 18/23 22/15 29/14 30/12 33/16 41/1 42/13 45/23 47/11
moreover [2] 27/5 31/25
morning [5] 2/2 2/10 2/11 2/16 2/18
most [1] 57/17
motion [23] 3/2 3/3 3/6 3/13 3/13 5/25 16/20 17/15 22/1 22/19 22/24 32/23 32/24 41/19 42/2 47/19 50/15 52/1 54/14 54/15 54/17 58/16 58/21
motions [7] 1/11 2/10 2/20 2/21 2/25 3/2 3/5
move [5] 17/11 21/19 23/1 39/21 42/6
moved [3] 31/2 32/16 33/7
Mr [1] 2/11
Mr. [30] 2/16 3/8 6/13 6/16 7/6 7/18 7/21 8/7 8/10 9/5 9/19 10/14 10/21 12/25 15/12 16/17 16/23 17/9 18/2 22/6 22/20 22/22 22/22 25/8 25/18 48/18 49/9 52/2 58/20 58/25
Mr. Bardos [6] 3/8 6/13 6/16 22/20 48/18 58/20
Mr. Barron [1] 22/22
Mr. Dales [17] 2/16 7/6 7/18 7/21 8/7 9/5 9/19 10/14 10/21 12/25 15/12 16/17 17/9 18/2 22/6 25/18 49/9
Mr. Dales' [2] 8/10 25/8
Mr. Njokem's [1] 16/23
Mr. Riley [3] 22/22 52/2 58/25
Mrs. [1] 51/7
Mrs. Sing [1] 51/7
much [5] 13/4 22/20 45/18 50/23 59/9
multicrime [1] 16/14
multipeople [1] 16/14
multiple [7] 12/6 25/12 36/9 44/9 53/15 57/10 58/11
multiyear [1] 16/14
must [1] 20/14
mutual [1] 11/4
my [20] 2/15 3/1 3/4 3/9 3/10 6/14 6/20 6/21 9/10 9/11 10/20 12/12 13/11 14/19 15/24 16/3 17/20 22/8 54/3 54/8

N

nail [1] 38/5
name [2] 2/14 5/8
namely [2] 23/8 45/3
names [1] 43/2
narcotic [1] 4/21
narcotics [12] 4/19 4/21 5/1 18/12 20/20 21/15 53/1 53/4 56/23 58/1 58/8 58/16
nascent [2] 42/11 47/17
naturally [1] 21/23
nature [10] 29/21 29/22 29/25 30/6 32/14 33/4 33/23 40/6 56/24 57/6
Navy [1] 25/20
near [1] 34/1
nearly [1] 39/20
necessarily [2] 11/24 58/13
necessary [1] 10/25
need [8] 2/24 10/5 13/6 44/4 46/21 50/8 53/25 56/21
needed [1] 19/19
needs [1] 17/22
Neither [1] 41/22
nest [1] 53/16
never [9] 8/12 8/13 8/13 8/20 10/17 13/25 14/25 21/22 51/14
nevertheless [2] 18/14 55/16
new [5] 2/14 27/11 27/13 27/13 33/13
newly [1] 29/1
newly-charged [1] 29/1
Next [1] 39/5
nexus [10] 15/17 22/16 39/22 39/25 40/2 40/3 41/6 41/6 51/9 51/12
nice [1] 41/15
Njokem [7] 16/20 32/20 35/5 35/13 50/9 50/13 51/4
Njokem's [1] 16/23
no [55] 1/5 2/6 4/18 5/20 5/21 6/9 6/11 6/25 7/1 11/19 11/22 12/7 12/25 13/4 15/16 15/17 16/25 17/10 17/20 20/5 20/22 20/22 21/1 26/12 29/9 37/6 37/13 37/20 37/21 37/21 38/12 39/25 41/7 41/24 42/6 43/19 47/25 48/11 48/12 48/20 48/24 49/4 49/4 49/15 49/25 51/22 51/23 53/15 53/19 53/19 53/19 54/6 54/12 56/25 59/8
nobody [1] 8/14
none [2] 10/10 10/10
normal [1] 40/6
normally [1] 57/21
not [100]
note [7] 35/4 38/13 41/12 41/21 44/7 45/16 58/2
noted [24] 3/6 24/16 24/22 25/1 25/11 26/15 27/1 27/3 27/5 27/19 27/25 28/3 28/15 29/4 29/5 29/5 31/22 32/3 32/17 39/4 40/18 40/20 40/22 45/7
notes [5] 1/22 25/17 28/10 36/15 36/17
noteworthy [1] 55/10
nothing [26] 7/12 7/14 7/19 7/19 7/25 9/4 9/6 9/7 9/12 13/12 15/9 16/16 16/18 17/5 17/7 18/4 18/4 19/21 38/4 49/7 49/8 50/24 52/6 53/12 53/18 59/1
notice [1] 2/21
noticed [1] 21/19
notwithstanding [2] 47/2 47/2
November [1] 10/22
November 2022 [1] 10/22
now [22] 13/5 16/19 17/5 24/14 26/7 27/9 28/6 28/23 29/14 30/3 30/20 33/1 33/15 33/21 36/13 37/5 37/9 39/20 42/20 42/23 48/8 49/7
number [33] 3/6 3/7 5/8 7/25 8/4 8/11 8/12 8/15 9/1 9/5 9/6 9/11 9/16 9/19 9/21 9/23 10/6 13/8 13/14 13/20 14/14 14/15 24/17 26/2 26/23 28/11 29/16 29/18 30/22 34/20 51/1 54/15 54/22
numbers [2] 5/6 14/10
nutshell [1] 6/13

O

objective [1] 42/1
obtain [1] 54/23
obtaining [1] 4/5
obvious [1] 20/16
obviously [5] 4/17 14/1 16/8 16/9 54/4
occurred [2] 7/4 19/4
occurs [2] 7/15 20/24
off [3] 23/6 31/16 35/3
offense [8] 7/15 8/1 15/15 19/3 20/24 22/14 46/10 51/8
offenses [10] 6/5 7/20 8/1 8/13 8/21 12/10 12/21 12/23 12/24 53/22
officer [2] 26/17 57/19
officers [1] 41/25
Official [3] 1/24 60/1 60/16
Okay [4] 14/18 17/12 23/3 28/12
old [2] 4/11 4/12
once [3] 4/18 4/20 49/12
one [29] 3/2 3/21 3/24 4/3

O

one... [25] 4/13 5/6 7/5 12/10 13/14 17/10 17/13 22/12 32/17 36/17 40/7 41/22 47/23 48/7 49/2 52/7 52/16 52/19 52/20 53/8 53/15 55/12 56/8 58/14 58/14
one-year [1] 36/17
ongoing [16] 5/20 12/7 29/23 33/25 34/2 34/4 35/6 35/15 35/23 37/3 37/12 56/7 56/18 56/19 57/8 57/11
only [13] 9/15 11/13 13/13 19/15 30/17 32/10 36/4 48/25 51/15 54/24 55/4 56/20 57/16
open [1] 43/1
operated [1] 51/8
opportunity [3] 3/4 10/19 13/22
opposed [4] 11/22 15/7 46/15 50/7
oppositions [1] 3/5
order [1] 53/16
ordinarily [2] 32/16 33/7
original [1] 49/6
other [38] 4/3 4/4 4/7 4/17 4/19 5/15 7/20 8/14 8/19 10/3 12/15 15/5 15/17 15/25 16/13 17/1 17/8 19/11 23/16 25/24 29/3 29/8 31/25 33/21 37/6 38/17 38/19 40/10 40/14 40/21 44/9 50/25 51/5 51/5 52/7 54/10 56/23 57/2
otherwise [3] 36/10 36/12 50/15
our [4] 15/19 18/18 19/2 32/21
out [22] 2/20 5/3 6/6 9/15 10/13 13/1 16/3 19/19 23/25 24/2 24/4 24/10 27/7 29/13 34/6 35/13 36/4 36/13 36/22 37/13 54/17 58/8
outset [1] 29/4
outside [1] 31/2
outstanding [1] 20/13
over [5] 4/12 15/11 23/5 44/11 49/10
overflowing [1] 23/7
overlap [2] 46/20 52/14
owed [1] 36/6
own [2] 13/7 56/3
ownership [1] 4/25

P

package [3] 23/5 31/18 43/24
packaging [2] 4/21 46/8
packing [1] 53/25
page [3] 31/21 32/7 60/9
Page 11 [1] 31/21
Page 12 [1] 32/7
pages [1] 23/5
paid [4] 7/18 24/7 37/15 37/15
pandemic [1] 3/23
Paragraph [6] 25/1 26/17 28/16 37/1 40/22 40/24
Paragraph 53 [1] 25/1
Paragraph 58 [1] 37/1
Paragraph 68 [1] 28/16
Paragraph 7 [1] 40/22
Paragraph 71 [1] 40/24
Paragraphs [2] 24/24 26/25
paramount [1] 45/18
parcel [2] 42/15 42/16
part [10] 10/18 13/10 13/11 21/12 42/15 42/15 45/2 47/14 47/15 55/17
particular [1] 29/21
particularly [6] 12/4 14/6 29/7 30/20 38/21 39/1
parts [2] 44/21 47/15
pass [1] 55/9
passed [2] 4/14 29/16
past [8] 28/7 28/24 34/5 34/12 34/12 34/25 49/4 49/5
pattern [9] 33/25 34/2 34/4 34/12 34/24 35/23 35/23 36/10 36/11
PAUL [2] 1/15 2/7
pay [5] 36/5 36/21 37/2 37/2 43/23
Paycheck [2] 23/22 24/12
PayPal [2] 29/12 40/14
paystub [1] 27/23
paystubs [1] 27/23
Pending [1] 54/14
people [6] 16/1 19/11 21/21 40/23 43/1 49/24
people's [1] 12/15
period [8] 4/14 16/24 16/24 34/10 35/10 35/19 56/10 56/16
periods [3] 31/25 57/8 57/10
permit [1] 20/17
permits [2] 14/6 14/24
permitted [1] 51/7
perpetrate [1] 14/15
perpetrating [1] 26/5
person [4] 9/25 16/11 26/4 49/12
person's [5] 13/25 16/6 49/14 51/18 51/22
personal [2] 12/15 31/24
perspective [2] 34/4 34/23
pertaining [1] 23/21
phone [109]
phone's [1] 14/13
phones [11] 5/12 9/1 9/20 9/24 15/2 27/6 27/9 27/18 30/2 40/19 40/23
photographs [2] 31/24 34/19
physical [2] 13/6 15/7
picked [3] 12/17 24/17 27/19
picture [4] 10/11 10/21 10/22 12/16
piece [1] 43/3
place [9] 5/5 6/25 6/25 16/6 20/20 38/9 39/12 40/3 50/5
placed [1] 9/1
plain [2] 4/20 34/4
Plaintiff [2] 1/5 1/15
plan [3] 44/21 45/2 47/16
plea [1] 8/7
pleadings [1] 6/21
pleasure [1] 2/12
plus [1] 35/21
podium [1] 6/18
point [7] 2/23 13/1 14/19 42/17 47/10 54/7 57/25
pointed [5] 9/15 10/13 16/2 19/19 35/13
points [2] 6/6 36/5
pornography [9] 16/7 30/14 30/15 30/17 30/19 30/23 31/20 31/22 32/11
portable [1] 49/9
position [7] 18/18 39/8 39/9 39/12 39/14 49/12 49/24
possessed [3] 14/9 55/5 55/6
possession [12] 4/25 5/23 14/10 20/3 20/6 20/7 20/8 38/20 39/5 39/7 46/9 52/11
possibility [1] 50/5
possibly [2] 52/18 53/24
post [1] 45/24
post-arrest [1] 45/24
potential [5] 22/6 27/12 35/21 45/11 53/23
potentially [2] 23/20 57/8
PPP [6] 12/4 19/11 19/17 38/15 50/19 54/1
practical [1] 50/6
practice [1] 3/4
precise [1] 56/12
prejudice [6] 20/11 20/16 22/6 45/11 53/23 58/6
prejudicial [1] 58/3
prepared [2] 24/2 57/24
presence [3] 7/21 15/17 17/9
present [4] 1/18 2/15 3/20 58/3
presume [1] 57/19
pretty [2] 9/2 18/12
prevalence [1] 27/6
primary [5] 4/9 6/20 6/24 13/11 39/24
principle [6] 30/15 30/16 30/24 32/8 33/7 40/8
printed [2] 13/1 49/9
prior [3] 2/21 10/14 22/15
prison [1] 37/13
private [1] 5/13
probability [1] 41/3
probable [25] 5/16 5/17 6/9 10/25 13/23 13/24 15/14 16/11 16/12 19/5 22/24 23/7 26/12 31/17 32/5 35/3 39/14 39/17 41/17 48/22 49/21 55/16 55/18 55/20 57/14
probably [4] 9/2 13/14 18/12 47/5
probation [1] 26/16
problem [2] 22/16 22/17
problematic [1] 17/24
proceed [1] 3/12
proceedings [1] 60/8
proceeds [4] 5/24 35/9 52/25 55/1
proffer [4] 48/1 52/9 53/17 57/25
proffering [2] 48/6 48/8
Program [2] 23/22 24/12
proper [1] 56/21
property [2] 29/25 33/5
prosecute [1] 17/19
protect [3] 21/5 21/13 21/22
protection [5] 21/16 23/22 24/12 50/1 51/21
provide [1] 41/19
provided [2] 4/10 4/11
provides [2] 13/24 42/10
proximity [4] 6/4 50/2 55/14 55/14
purchase [1] 53/21
purported [2] 5/4 56/12
purpose [2] 2/19 8/7
purposes [6] 2/25 4/5 8/9 8/19 10/25 55/15
pursuant [1] 60/6
put [12] 8/22 10/17 10/19 14/10 22/8 27/15 28/18 36/7 46/13 47/6 50/11 53/25

Q

quality [2] 10/21 11/10
question [5] 26/12 29/9 48/20 48/24 50/3
questions [3] 17/11 42/4 54/10
quickly [1] 56/25
quinine [1] 43/17
quote [8] 30/9 31/22 32/4 33/6 34/1 36/3 41/8 41/9

R

raised [1] 36/2
ran [1] 36/4
rapidly [3] 31/1 31/3 32/1
rarely [2] 30/9 54/8
read [4] 3/5 6/22 7/11 12/13
reading [1] 12/12
ready [1] 42/6
real [1] 43/1
really [6] 14/20 17/18 21/18 45/21 49/18 51/8
Realtime [1] 60/5
reason [6] 3/19 5/21 6/8 13/23 50/17 51/13
reasonable [6] 17/1 33/10 33/12 33/16 40/9 50/16
reasonably [1] 57/19
reasons [5] 8/17 22/8 22/18 40/12 48/7
receipt [1] 35/20
receiving [3] 34/11 35/9 43/21
recent [1] 18/23
recess [1] 59/11
record [5] 31/4 49/13 49/23 58/20 58/22
records [37] 15/6 16/2 17/6 17/8 22/13 23/12 23/15 23/18 25/21 25/25 29/4 29/8 29/11 29/12 29/12 30/2 30/11 31/25 32/13 32/15 33/5 33/13 33/17 38/18 40/5 49/8 49/9 49/15 49/24 50/4 50/5 50/11 51/17 55/25 56/1 57/2 57/3
recovered [1] 4/16
reference [1] 33/3
referenced [5] 27/9 34/6 34/15 41/5 47/5
referred [1] 59/2
referring [3] 35/4 43/16 43/17
reflect [1] 36/24
refurbish [1] 45/4
regard [9] 10/9 15/25 18/18 19/9 19/14 49/5 49/15 50/9 52/2
regarding [7] 25/13 29/24 36/25 46/20 46/22 46/24 52/10
registered [2] 13/16 60/4
regular [1] 9/3
regulations [1] 60/10
reject [2] 31/18 40/2
rejected [1] 32/25
rejecting [1] 35/24
relate [1] 42/24
related [13] 3/21 4/6 6/2 19/13 21/6 22/11 49/20 50/21 51/9 52/15 53/4 55/11 58/1
relating [1] 30/14
relationship [2] 20/23 42/8
relatively [2] 56/9 56/10
release [4] 5/3 55/11 55/13 56/8
relevant [2] 30/10 38/2
rely [1] 42/1
relying [3] 44/17 44/18 44/20
remember [1] 12/13
remnants [1] 28/7
rent [10] 26/14 36/5 36/15 36/21 36/21 37/2 37/2 37/14 43/23 43/23
reopened [1] 24/6
repeatedly [1] 30/4
replies [1] 3/5
reply [12] 15/24 16/3 22/8 28/6 36/3 36/14 37/10 37/25 39/22 41/22 48/9 48/10
reported [2] 1/23 60/8
Reporter [5] 1/24 60/1 60/4 60/5 60/16
requirement [3] 6/10 6/12 57/22
rescheduled [1] 2/23
resemblance [1] 41/7
residence [21] 5/14 5/24 14/6 14/12 14/13 14/14 16/6 23/9 26/10 31/3 33/2 39/11 39/19 39/25 40/11 41/11 50/5 54/18 55/3 56/4 56/5
residences [1] 56/1
resources [3] 45/17 58/7 58/7
respect [21] 11/3 11/5 18/19 25/3 25/4 25/18 29/3 29/15 30/3 30/24 32/9 33/21 36/1 36/13 41/12 42/12 43/8 44/17 47/7 47/20 48/12
response [2] 30/23 48/5
rest [1] 22/4
result [3] 56/4 58/5 58/17
retain [1] 31/23
revealed [1] 25/12
review [5] 25/9 25/10 27/21 43/13 48/14
Rich [1] 2/14
RICHARD [1] 1/17
riding [5] 43/3 43/10 44/15 48/2 53/1
right [33] 2/11 2/16 3/12 9/6 9/22 10/4 11/21 12/2 12/11 12/20 17/25 17/25 18/1 18/9 19/17 19/19 22/22 23/13 25/7 28/9 33/19 33/20 34/7 37/8 38/10 42/23 46/16 46/20 48/6 48/16 51/9 59/4 59/9
rights [1] 45/17

R

RILEY [5] 1/16 2/5 2/12 52/2 58/25
rise [2] 5/15 59/10
risk [1] 45/11
RMR [2] 1/23 60/16
robbery [1] 45/1
role [1] 57/18
Ronda [3] 1/23 60/4 60/16
roof [1] 22/7
routinely [3] 30/19 30/21 33/24
rule [5] 13/22 14/1 17/22 32/10 47/15
ruled [1] 50/10
rules [2] 19/6 20/17
running [1] 36/13
RUSSELL [1] 1/11
RYAN [3] 1/7 2/5 2/14

S

said [22] 7/22 10/2 10/9 12/9 20/3 23/25 24/24 29/17 30/8 30/16 30/18 32/7 33/22 40/18 41/8 45/6 46/23 47/16 49/3 49/19 50/22 52/2
sale [3] 48/2 52/22 52/25
salutation [1] 2/14
same [20] 6/6 9/11 9/13 13/8 20/19 21/23 21/24 27/15 31/3 32/8 38/25 44/19 44/20 45/19 47/6 47/14 51/7 52/15 52/19 53/18
saw [4] 28/6 37/9 39/22 48/9
say [18] 11/16 18/22 22/2 22/3 22/12 22/13 28/22 35/1 36/14 38/15 44/11 45/24 46/18 48/24 49/17 50/16 51/22 52/22
saying [7] 14/2 14/8 14/12 14/20 14/20 37/17 46/12
says [16] 10/10 10/10 10/11 10/13 11/18 11/19 14/25 32/4 33/6 38/16 39/24 39/25 49/8 49/18 52/4 52/6
scheme [26] 3/23 4/22 5/3 5/5 5/20 12/7 21/4 21/6 21/16 37/12 42/24 43/12 44/3 44/10 44/14 44/21 45/2 45/23 47/16 52/16 55/17 56/2 56/19 58/2 58/9 58/18
schemes [8] 3/24 4/12 6/7 13/4 27/7 27/7 28/24 58/9
search [31] 5/16 7/4 10/5 11/13 13/25 14/5 14/23 15/22 16/12 18/22 20/25 20/25 25/8 25/11 26/19 32/6 39/11 42/1 44/1 46/1 46/21 49/6 49/14 51/6 51/17 51/20 51/20 51/25 54/18 54/20 58/17
searched [6] 6/25 10/2 10/3 17/6 18/25 40/4
searches [1] 46/17
searching [4] 15/5 15/6 15/8 57/5
seat [1] 2/3
second [9] 4/3 4/6 4/15 18/10 18/15 19/19 32/12 33/15 53/8
secure [3] 9/25 29/8 32/18
see [5] 18/2 18/2 20/12 43/25 48/4
seem [1] 37/11
seems [2] 14/2 45/21
seen [4] 13/25 14/25 21/22 53/15
seized [9] 3/14 29/25 30/4 31/8 31/23 32/14 40/4 43/13 58/17
seizure [1] 32/4
sell [1] 43/4
selling [2] 16/11 43/10
sense [5] 30/25 33/11 33/12 38/11 54/3
sent [2] 2/20 11/14
separate [3] 4/23 6/5 12/6
separated [1] 58/10
separately [1] 52/8
September [10] 7/19 11/15 11/20 16/16 24/8 34/11 35/9 35/21 49/5 52/21
September '21 [2] 24/8 35/21
September 2021 [2] 34/11 35/9
series [1] 52/20
serious [1] 19/12
service [2] 56/14 56/18
set [1] 2/22
seven [8] 16/24 17/2 36/21 44/13 50/17 50/18 50/20 50/22
seven-month [1] 16/24
sever [8] 3/2 5/25 21/19 22/19 47/19 54/15 58/8 58/16
several [2] 20/2 51/6
severance [9] 17/11 19/8 39/21 42/6 45/1 47/22 52/2 54/5 57/24
short [1] 56/10
should [5] 6/23 18/25 41/13 54/9 54/9
shows [1] 7/3
sign [2] 31/16 35/2
signed [3] 11/8 23/6 36/17
significant [2] 43/21 44/2
similar [1] 44/19
simply [9] 19/5 19/25 20/17 22/5 32/10 36/7 38/20 39/10 57/4
Sing [1] 51/7
single [1] 44/12
sir [6] 2/12 2/17 2/18 6/16 8/5 51/2
site [1] 47/8
situation [4] 15/19 17/18 17/21 17/23
six [1] 35/14
smart [1] 13/7
so [85]
society [1] 15/20
some [10] 6/8 9/6 23/1 28/25 36/6 43/22 44/22 51/19 55/9 56/23
somebody's [2] 14/23 39/6
someone [5] 10/21 36/22 36/23 36/24 43/19
something [8] 18/7 18/8 18/23 18/23 18/24 22/11 47/9 50/8
somewhat [3] 16/21 22/11 44/23
somewhere [4] 7/5 17/5 19/4 22/15
sophisticated [1] 13/5
sorry [1] 51/2
sort [3] 3/22 17/13 20/20
sought [10] 4/16 23/12 29/22 29/25 31/8 32/15 33/5 54/20 55/25 57/2
source [2] 37/6 43/20
sourcing [1] 37/22
spanning [1] 34/24
SPECIAL [4] 1/19 1/19 2/8 2/8
specific [5] 8/15 23/1 36/2 42/4 56/1
specificity [1] 48/5
spent [1] 27/12
spring [3] 8/25 11/12 19/17
stale [5] 4/11 33/25 41/17 50/4 56/24
staleness [20] 5/19 15/16 16/1 22/11 22/16 22/25 29/15 30/5 30/9 30/16 30/24 31/19 32/9 32/14 32/25 33/23 35/24 49/15 51/9 51/12
standard [1] 40/9
standpoint [1] 3/10
stands [1] 59/10
start [4] 22/14 22/23 23/24 48/12
started [7] 17/3 22/15 49/3 50/16 51/10 51/11 51/14
starts [1] 51/13
state [1] 11/8
stated [1] 48/20
statement [4] 27/24 28/1 45/24 46/22
statements [2] 23/19 23/20
states [7] 1/1 1/4 2/5 4/11 7/8 60/5 60/11
statute [3] 6/6 19/16 58/15
statutes [1] 20/4
stenographically [1] 60/8
stenographically-reported [1] 60/8
stenotype [1] 1/22
step [3] 23/24 23/25 25/5
still [18] 9/7 9/13 13/14 14/4 15/15 17/2 17/7 22/13 31/5 32/5 34/7 34/11 37/18 41/18 49/10 50/18 51/11 51/16
stopped [1] 11/22
storage [4] 27/10 27/11 30/6 56/24
story [1] 22/5
straightforward [1] 5/25
strawman [1] 39/7
streamlined [1] 47/11
Street [2] 1/24 7/16
strong [1] 45/25
strongest [1] 51/21
stub [1] 36/9
stuff [4] 10/9 19/22 50/21 51/10
subject [1] 15/23
submission [3] 25/15 31/10 35/20
submit [1] 35/16
submitted [9] 24/3 24/15 25/22 25/24 32/22 34/16 35/18 37/19 38/16
submitting [2] 34/8 34/8
substantial [2] 35/2 51/4
substantially [1] 32/24
successful [2] 43/9 43/9
such [10] 27/7 30/5 32/15 40/4 40/5 40/7 46/25 50/4 50/5 56/23
sudden [1] 37/15
sufficient [6] 15/22 41/1 45/13 45/15 55/7 55/15
suggest [8] 16/1 17/5 17/7 21/21 36/8 37/12 53/13 53/20
suggestion [6] 12/25 28/4 28/5 36/2 38/18 57/7
suggests [10] 9/4 9/12 15/10 18/25 36/3 36/10 36/12 49/7 49/16 52/4
summer [4] 1/19 2/8 43/8 43/18
superseding [3] 29/2 42/23 44/8
supervised [4] 5/3 55/11 55/13 56/8
support [3] 24/23 55/17 56/19
supported [2] 38/20 41/17
supporting [1] 21/3
supposed [2] 29/18 29/20
suppress [12] 3/3 3/7 3/13 3/14 17/15 22/1 22/19 22/24 41/20 42/3 54/15 54/17
suppressed [1] 41/13
suppressing [1] 17/19
suppression [1] 17/15
Supreme [1] 49/19
sure [2] 43/23 58/22
suspect [1] 19/21
suspected [1] 40/1

T

T-Mobile [1] 26/17
take [5] 13/5 13/6 29/20 49/25 50/8
taken [6] 4/24 13/1 34/19 39/12 40/25 49/10
takes [1] 35/16
taking [2] 5/5 35/11
talk [5] 8/18 16/7 16/8 30/12 42/13
talked [13] 27/1 27/5 30/1 31/6 31/20 32/12 33/1 36/11 36/11 37/24 40/12 49/2 53/3
talking [5] 22/24 22/24 23/24 27/12 50/6
talks [2] 27/17 28/17
telephone [1] 27/4
tell [7] 4/2 6/13 9/10 10/20 14/7 22/5 53/24
temporal [5] 6/3 50/2 50/3 55/14 55/14
term [1] 16/14
terms [3] 34/18 46/20 48/11
testing [1] 46/3
than [14] 7/20 8/15 13/5 15/17 16/6 17/8 19/10 22/15 33/17 41/1 45/23 50/25 57/4 57/21
thank [12] 6/17 22/20 22/21 48/16 48/17 48/19 54/12 54/13 58/23 59/6 59/8 59/9
that [420]
that's [58] 2/5 6/14 9/9 9/14 9/19 11/9 11/10 11/18 12/3 12/7 12/12 12/17 14/5 14/19 14/24 14/25 15/12 15/22 17/4 17/22 24/6 25/1 26/17 28/16 29/1 29/16 30/6 30/14 30/18 31/6 34/11 35/10 37/1 38/11 39/7 39/8 39/11 40/22 40/24 41/5 41/15 42/12 43/16 45/9 46/6 46/13 46/14 49/18 49/19 49/23 50/7 50/23 51/8 51/25 52/3 52/7 54/7 57/20
theft [18] 10/14 12/10 12/18 12/22 19/10 19/11 29/1 35/1 35/22 35/22 42/24 43/7 43/12 44/14 45/3 45/20 52/17 59/3
thefts [1] 52/20
their [6] 16/12 27/4 29/8 47/20 52/10 55/21
them [21] 12/15 13/1 13/1 13/2 20/14 20/20 21/22 27/4 28/25 33/17 40/23 42/5 43/10 48/24 49/10 49/10 49/25 49/25 54/9 54/11 58/3
themselves [2] 14/8 57/10
then [26] 3/11 4/3 4/14 7/19 9/19 10/5 11/21 13/2 15/13 15/22 16/5 20/2 22/12 22/25 23/18 30/2 34/10 34/13 37/14 39/21 39/23 49/25 51/14 51/15 53/4 56/9
there [88]
there's [60] 6/11 7/1 7/19 7/25 9/4 9/7 9/12 11/22 12/4 12/7 12/25 13/11 14/2 14/21 15/9 15/14 15/15 15/16 15/17 16/4 17/5 17/7 18/16 19/21 20/5 20/16 20/22 21/21 22/16 22/16 28/4 28/5 29/9 29/15 36/2 38/12 39/17 39/25 41/24 44/23 45/25 46/18 48/20 48/24 49/4 49/4 49/7 49/8 49/13 49/25 51/17 52/6 53/12 53/18 53/19 53/19 53/19 55/7 56/25 57/7
thereafter [1] 24/7
therefore [3] 14/4 51/25 53/22
therein [1] 23/15
these [28] 6/1 6/1 8/1 8/13 8/16 8/20 9/15 10/15 11/7 13/14 16/3 19/18 20/16 24/15 25/21 25/25 26/5 28/6 28/12 31/4 31/10 38/14 41/22 43/10 43/18 44/14 49/9 55/12
they [71]
they're [24] 6/2 6/3 6/4 6/4 14/7 14/8 14/12 14/20 14/20 18/7 19/12 20/4 20/9 20/12 20/14 44/23 49/16 50/11 50/17 52/15 52/16 53/5 57/9 58/13
theycallmedales [2] 24/20 25/9
thing [9] 7/17 9/15 11/8 11/14 13/8 13/13 15/25 17/25 18/1
things [14] 5/15 9/2 10/3 10/10 12/8 15/5 15/9 15/10 17/13 20/13 21/3 22/7

T

things... [2] 26/4 26/7
think [37] 9/10 12/3 12/9 12/17 12/22 14/5 14/7 14/21 14/24 15/2 15/3 19/10 19/11 21/20 22/7 22/9 22/9 24/14 29/5 38/22 39/1 44/22 45/9 49/18 50/7 51/4 51/6 51/16 51/17 51/24 52/3 52/12 52/13 52/13 52/14 53/23 54/2
thinking [5] 12/13 17/18 18/20 38/5 46/14
thinks [1] 47/13
this [111]
Thomas [3] 1/23 60/4 60/16
thoroughly [1] 25/6
those [31] 7/20 10/4 10/10 15/8 15/10 20/4 20/13 22/7 22/18 25/25 27/22 28/19 28/23 30/21 32/15 32/18 34/15 34/18 38/3 39/17 39/17 40/14 43/2 43/5 43/6 45/6 46/25 52/7 55/24 56/13 56/17
thought [1] 12/9
three [4] 6/1 12/6 12/8 50/6
through [12] 3/1 3/18 3/25 22/7 23/10 29/2 42/23 46/3 54/24 54/25 56/4 56/14
throwing [1] 46/7
tied [1] 58/4
time [33] 4/14 5/4 5/22 10/4 10/11 13/22 14/9 14/20 19/17 19/20 21/24 21/25 27/12 29/10 29/16 31/25 33/9 34/10 37/2 39/22 49/14 49/20 50/23 52/15 53/18 55/9 56/10 56/13 56/16 56/18 56/20 57/9 57/25
times [2] 11/4 20/5
timing [1] 43/6
today [4] 2/10 18/17 39/23 48/7
together [12] 20/4 20/17 20/21 21/2 21/23 40/25 45/7 53/11 58/4 58/14 58/19 59/2
too [5] 15/6 18/16 24/21 40/17 45/7
took [1] 33/16
tool [3] 42/16 53/7 53/13
tools [5] 21/7 21/12 46/7 53/5 53/12
totality [3] 29/20 40/25 57/12
towards [1] 43/22
trade [7] 21/7 21/12 42/16 53/5 53/7 53/12 53/13
traded [1] 9/3
trades [1] 46/8
trafficking [2] 42/12 46/9
training [5] 5/12 27/2 27/3 29/6 55/3
transaction [1] 44/20
transcript [3] 1/11 60/8 60/9
transcription [1] 1/22
transfers [1] 53/20
transiency [1] 15/1
transmission [1] 7/13
trial [8] 2/22 2/24 2/24 22/2 44/4 45/18 45/19 45/20
trials [3] 46/22 47/5 47/9
tried [7] 20/12 21/24 45/7 45/22 52/8 58/19 59/2
tries [1] 16/1
troubling [1] 17/14
true [1] 60/7
trustee [1] 45/5
try [6] 20/4 20/7 20/8 44/4 54/9 54/9
trying [1] 20/16
two [20] 3/2 3/17 3/21 7/16 9/14 11/13 15/11 19/9 22/15 23/12 23/22 30/1 40/14 45/22 49/10 50/6 54/1 55/9 58/12 58/18
type [4] 31/1 32/1 32/16 33/6
types [2] 12/22 53/22
typical [1] 9/2
typically [4] 3/4 5/12 9/24 56/1

U

U.S [3] 2/6 2/6 16/19
U.S.C [1] 60/7
UI [4] 25/15 35/5 35/8 38/14
ultimately [2] 39/19 52/6
umbrella [1] 58/14
under [5] 26/18 47/15 50/1 58/14 58/14
underlying [3] 2/22 43/6 43/7
understand [6] 19/8 19/12 19/14 43/17 46/11 53/17
understanding [3] 3/1 3/10 6/15
understands [2] 43/4 43/20
unemployment [11] 23/21 24/3 24/5 25/13 25/14 25/23 31/13 32/22 34/9 36/23 37/20
unfortunately [1] 53/12
UNITED [6] 1/1 1/4 2/5 4/11 60/5 60/11
unlawful [2] 33/23 57/6
unless [2] 19/5 57/16
unlike [1] 56/22
unpublished [1] 44/24
until [2] 13/2 35/9
up [21] 2/22 12/17 13/2 13/3 18/23 24/17 27/14 27/14 27/19 30/15 30/19 30/21 32/20 35/9 38/12 43/1 43/25 52/11 54/4 54/7 57/15
uploaded [3] 24/23 25/24 28/19
uploading [1] 31/11
upon [4] 5/12 54/21 55/3 55/21
us [1] 2/7
use [14] 8/14 8/18 8/19 9/16 27/6 31/12 33/11 33/11 40/19 43/1 45/3 47/9 55/16 56/3
used [27] 5/7 5/7 5/11 8/1 8/12 8/12 8/16 8/17 8/20 8/20 13/14 14/15 20/23 24/20 26/16 26/20 28/24 28/25 43/24 52/4 52/7 53/1 53/21 54/22 54/22 55/8 55/22
using [6] 9/25 38/7 38/8 42/25 42/25 43/21

V

valid [1] 57/19
valued [1] 43/3
various [1] 26/24
vastly [1] 53/22
vehicle [1] 42/11
venture [1] 43/9
venue [1] 44/11
very [10] 11/7 12/8 16/8 16/9 22/20 37/14 40/8 43/2 58/24 59/9
victims [1] 43/1
victims' [1] 43/2
view [2] 4/21 19/2
views [1] 54/8
violations [1] 34/1
virtually [2] 27/4 40/23
VOA [7] 12/25 13/1 17/6 33/18 38/3 38/18 56/9
Volunteers [6] 5/4 7/7 7/10 7/12 33/10 37/23
vs [1] 1/6

W

Walk [1] 23/10
want [4] 17/18 17/20 18/8 29/14
wanted [1] 3/9
warned [1] 25/18
warrant [30] 3/16 3/17 4/23 6/10 6/12 15/22 18/10 18/15 19/19 23/5 23/13 25/8 25/10 25/11 26/19 29/11 29/19 31/16 31/18 32/6 35/3 42/1 44/1 49/6 49/21 54/18 54/20 57/2 57/18 57/22
warranted [1] 3/18
warrants [2] 4/18 4/20
was [155]
wasn't [2] 10/25 57/14
watch [1] 18/1
way [6] 6/23 7/11 14/1 25/5 44/5 46/13
ways [1] 58/11
we [61]
We'll [1] 22/25
we're [8] 2/10 6/15 11/25 17/19 29/17 37/20 38/5 50/6
we've [2] 37/5 37/23
weapon [1] 20/7
weeks [1] 20/2
weigh [1] 58/5
weighs [1] 35/24
well [31] 2/8 3/2 3/5 3/9 4/22 6/7 9/18 10/24 11/24 13/4 15/6 18/10 20/7 20/12 20/14 20/24 21/17 27/2 31/7 31/14 37/18 40/8 45/10 47/6 47/7 47/9 50/8 50/22 52/9 58/8 58/24
well-established [1] 40/8
Wells [1] 25/20
went [2] 18/14 19/20
were [47] 3/21 4/4 4/4 4/7 4/13 4/18 4/20 4/21 7/1 8/6 10/4 12/14 12/16 12/23 12/23 14/10 15/2 15/8 17/14 17/17 19/18 21/5 21/10 21/23 24/7 24/15 24/23 25/17 25/23 27/20 28/19 28/23 28/25 34/19 35/15 37/3 38/16 41/16 41/21 45/2 46/1 47/3 50/19 52/3 56/13 57/8 58/17
weren't [3] 15/5 15/6 58/4
what [42] 3/4 3/10 5/15 5/15 6/15 7/15 8/10 10/7 10/19 11/18 11/19 12/8 14/2 14/5 14/19 14/20 14/24 14/25 15/12 18/2 18/20 19/22 20/18 22/2 23/25 27/25 33/3 35/7 43/16 43/24 46/12 46/14 48/8 48/8 49/17 49/18 52/1 52/3 54/7 54/8 56/9 57/21
what's [4] 10/18 10/18 39/12 42/8
whatsoever [3] 11/20 16/18 48/12
when [24] 4/23 8/5 11/7 11/9 11/16 12/13 13/3 17/3 19/20 28/2 28/19 30/4 34/11 34/18 35/16 35/18 38/5 38/21 39/1 50/10 54/9 57/12 58/5 59/1
where [25] 3/11 3/12 4/16 6/14 6/14 7/5 12/17 14/22 16/4 16/6 17/18 18/21 20/1 26/21 28/13 33/25 37/14 39/3 40/7 44/9 44/13 53/15 56/13 57/9 57/18
where's [1] 34/2
whereby [1] 42/25
wherever [2] 13/2 49/25
whether [5] 14/8 29/22 29/23 50/3 54/1
which [25] 3/6 3/15 15/16 16/8 16/9 23/5 24/6 26/21 27/16 29/13 30/8 34/5 35/21 35/24 38/22 38/24 39/16 39/19 41/9 44/24 51/6 52/11 54/23 56/13 56/18
while [4] 34/9 55/12 55/12 56/9
who [9] 2/15 5/22 11/8 21/21 26/4 32/17 36/22 43/19 49/22
who's [1] 43/19
whole [1] 22/5
whose [2] 36/23 36/24
why [10] 2/3 6/15 17/22 18/22 18/22 18/23 18/24 45/14 49/19 52/7
Wi [1] 38/7
Wi-Fi [1] 38/7
will [17] 2/22 6/10 22/2 28/22 30/12 30/13 34/17 38/13 44/3 44/7 44/11 45/12 45/18 48/21 56/21 58/9 58/18
wire [12] 12/5 23/8 26/3 42/24 43/7 44/8 44/10 44/13 44/18 47/22 49/13 49/22
wires [1] 53/19
wishes [1] 47/24
within [6] 4/10 54/20 55/7 56/6 56/9 57/9
without [1] 9/6
witness [1] 46/7
witnesses [1] 46/20
word [1] 18/5
words [2] 17/1 51/5
worried [1] 4/1
worry [1] 3/25
worth [1] 36/21
would [73]
wouldn't [1] 45/15
wrong [2] 3/11 38/20

Y

Yeah [3] 15/8 34/2 46/14
year [2] 4/12 36/17
yearly [1] 9/3
years [10] 9/14 11/13 12/6 15/11 22/15 49/11 50/7 50/7 51/6 54/2
Yep [1] 26/9
yes [37] 2/4 2/13 6/24 7/24 8/5 8/23 8/25 9/5 10/1 10/5 11/2 12/19 13/10 13/17 13/21 14/17 18/13 18/16 21/8 21/11 21/14 22/23 23/11 26/11 28/3 34/3 42/7 42/10 42/22 46/5 46/11 48/3 51/2 51/3 52/24 53/6 58/23
you [75]
you're [9] 6/13 11/21 26/8 33/19 33/20 38/7 38/8 48/6 53/24
your [98]

Z

zero [2] 16/16 48/22