20-3267

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BRIAN FOLKS, AKA MOE, AKA MOET HART,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR THE UNITED STATES AS APPELLEE

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JURISDICTIONAL STATEMENT

This appeal is from the entry of judgment in a criminal case in the District of Vermont. SPA55-62.[1] The district court had jurisdiction under 18 U.S.C. 3231. The court entered judgment on September 23, 2020. SPA55-62. Defendant-appellant Brian Folks filed a timely notice of appeal. JA3405. This Court has jurisdiction under 28 U.S.C. 1291.

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[1] "SPA___" refers to the corresponding page numbers of Folks's Special Appendix. "JA__" refers to the corresponding page numbers of the Joint Appendix. "Br. __" refers to page numbers in Folks's opening brief. "R.___" refers to the docket number of the document in the district court.

INTRODUCTION AND STATEMENT OF THE ISSUES

A jury convicted Brian Folks on numerous drug-trafficking and sex-trafficking charges, including sex trafficking by force, fraud, or coercion and sex trafficking of a minor. Folks was sentenced to 270 months' imprisonment. On appeal, Folks primarily challenges the use of evidence from his computer, which he argues should have been suppressed on Fourth Amendment grounds and, relatedly, warranted a new trial. Folks also raises allegations of prosecutorial misconduct for the first time on appeal. The issues on appeal are:

1.a. Whether the district court properly denied Folks's motion to suppress where officers seized Folks's computer under an initial warrant that authorized the seizure of "electronics" and a wide variety of "documents" and "records" related to drug trafficking that may be kept in digital format and later obtained a second warrant before searching the computer.

b. In the alternative, whether the district court properly denied the motion because the plain view doctrine permitted officers' seizure of Folks's computer and, regardless, officers obtained a second warrant before searching the computer.

2.a. If the challenge is not waived, whether any delay by officers in obtaining a second warrant to search Folks's computer while he was in custody

awaiting trial violated the Fourth Amendment and required the district court to exclude the computer evidence.

b. Whether the second warrant, which permitted the government to make a forensic copy of Folks's entire computer without incorporating "minimization" procedures that no court has mandated, violated the Fourth Amendment and required suppression.

3. Whether, in any event, the exclusionary rule should not apply to evidence from the computer where the government reasonably relied on the second warrant in obtaining this evidence.

4.a. Whether an attempt to review the contents of Folks's computer, which inadvertently modified and created some computer files, violated the Fourth Amendment and required a new trial where the government offered only unaffected computer files at trial.

b. Whether the district court acted within its discretion in ruling post-trial that the unaffected computer files were authenticated consistent with Federal Rule of Evidence 901 and properly admitted.

5. Whether Folks has shown any prosecutorial misconduct that substantially prejudiced him and warrants a new trial.

6. Whether the cumulative error doctrine applies where, as here, there is no error, let alone multiple errors amounting to a due process violation.

STATEMENT OF THE CASE

1. Factual Background

a. Folks's Drug-Distribution Business

Between 2015 and 2016, Folks ran a drug-distribution business in and around Burlington, Vermont. See, *e.g.*, JA842-843, 845-846, 859. Folks worked with Donald McFarlan, who would bring Folks bulk heroin and crack cocaine from New York to Vermont. JA894-897, 1123, 1287-1296, 1300, 1305-1306, 1309-1313, 1320-1333, 1387. Folks also traveled to New York with Mandy Latulippe to transport heroin and crack cocaine to Burlington. JA868-872.

Folks employed several women along with Latulippe, including Mary, Chrissy, Ayla, and Hannah.[2] See, *e.g.*, JA845-850, 934, 1076-1077, 1393-1397. Latulippe, Mary, Chrissy, and Ayla bagged heroin and crack for individual sale. JA859-866, 1076-1077, 1083-1090, 1221-1222, 1299-1300, 1387-1388, 1393-1396. Latulippe, Mary, Chrissy, and Hannah also handled sales of heroin and crack to Folks's customers. JA845-850, 934, 1091-1095, 1387-1393. Chrissy also deposited money into bank accounts for Folks. JA1397, 1425-1426. Folks compensated the women, who all had severe drug habits, with drugs, except for Latulippe who did not use drugs. See, *e.g.*, JA848-849, 1077, 1414.

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[2] Last names of the women who worked for Folks, except for Latulippe who was a co-defendant, were not used at trial.

Folks was violent and degrading toward the women, threatening to "violate" them if they "violate[d]" him. JA881. Folks punished Latulippe for a stash that went missing, for example, by making her wear only a red apron while naked. JA885-888. When Latulippe botched another heroin sale, Folks recouped the money by ordering Latulippe to prostitute herself. JA932-934. Folks punched Mary when she took some heroin while bagging for him. JA1096, 1100. Whenever Mary wanted a cigarette, Folks would give her one only in exchange for a picture of her buttocks. JA1127-1128. Folks also raped Mary, threatened her with a gun, and beat her violently after she stole from him. JA1101-1105, 1130-1132.

In January 2016, McFarlan asked Chrissy to hold bulk heroin and crack cocaine that he brought up from New York for Folks. JA1320-1333, 1454. Chrissy gave the drugs to the police, with whom she was cooperating. JA1454-1459. Chrissy spoke to McFarlan and Folks by phone, lying about how police seized the stash. JA1459, 1472, 1479. Folks threatened to beat Chrissy for crying and told her to keep their names out of any police interactions. JA1474-1479.

After a bagging session on January 20, 2016, police pulled over a car carrying Folks, Latulippe, Mary, and a confidential informant who was driving. JA897-902, 919-924, 1123-1126, 1178-1190. Folks directed Latulippe to hide the

drugs under the driver's seat. JA920-922. Police seized the narcotics and arrested the driver-informant to avoid tipping off Folks. JA921-924, 1190.

Another confidential source (CS) worked with law enforcement to buy heroin from Folks four times in January and February 2016. JA655-712, 719-736, 765-789. CS spoke with Folks over the phone to set up each buy, and Folks arranged for CS to meet with Latulippe, who exchanged the heroin for cash. *Id.* Folks also told CS that he wanted to send McFarlan to the area where CS lived to expand his business. See JA692, 728, 774-776, 784-786, 1316.

b. Folks's Sex-Trafficking Operation

Folks made money by prostituting women, including Latulippe, Katelynn, Keisha, Danielle, and Ayla. See, *e.g.*, JA827, 830-831, 841-842, 851, 1107-1109, 1173, 1397-1399, 1433, 1608-1609, 1724-1725, 1838-1842, 1906-1907. He helped the women post on Backpage.com[3] to arrange "dates" for commercial sex, provided them cell phones to schedule those sessions, and arranged hotel rooms for them to use. See, *e.g.*, JA827-828, 831-834, 836-844, 1404-1405, 1408, 1433, 1608-1609, 1612-1613, 1727-1729, 1838-1844, 1906-1909. He also transported the women (or arranged transportation) to and from locations to perform sex work.

[3] Until the federal government seized it, Backpage.com allowed users to post advertisements for prostitution services via computer or mobile device without having to verify their identity. R.199, at 3 n.2.

See, *e.g.*, JA856-857, 1222-1224, 1404-1405, 1425, 1838-1843, 2058. Folks took a cut of the women's earnings and collected even more money from them when they bought drugs from him to feed their addictions. See, *e.g.*, JA830-831, 1301, 1406-1407. At Folks's direction, Latulippe and Chrissy supervised the women to ensure he got his money. JA834-835, 1406-1407.

Folks used violence and threats against Katelynn, Keisha, Danielle, and Ayla while they worked for him, which made them feel afraid. See, *e.g.*, JA1628, 1633-1634, 1745, 1758, 1937, 1978-1979, 2077-2078. Folks told Katelynn that he was a "gorilla pimp" that would "hit you and stuff." JA1735. Folks also grabbed Katelynn by the face and held a gun to her head. JA1737-1739. Katelynn witnessed Folks's violence toward his other sex workers, including punching one woman and grabbing and hitting another whom he violently chased after when she tried to leave. JA1739, 1741, 1744. Folks punished Keisha for stealing by taking her phone and raping her; afterward, he told her she was working for him and posted her ad on Backpage.com. JA1413, 1630-1635, 1662. When Danielle tried to leave upon realizing that Folks wanted her to prostitute, Folks blocked her exit and lifted his shirt to revealing a gun. JA1898-1900. He also told her he had once stabbed somebody. JA1899. Folks kicked Ayla out on the streets, and she saw him kick others out. JA2066-2069. He also slapped Ayla's face and pushed her. JA2073-2074. Mary saw Folks hit Ayla for refusing sex work. JA1118-1120.

Folks also used drugs to control Katelynn, Keisha, Danielle, and Ayla—all of whom suffered from severe drug addictions. See, *e.g.*, JA931-932, 1110, 1119, 1226-1227, 1398, 1402, 1406-1408, 1675, 1724-1725, 1893, 1907-1910, 2039-2040. Katelynn's drug usage increased while working for Folks, and he would not give her crack until after she made him money by prostituting. JA1732-1733, 1805. Folks withheld crack from Katelynn when she lost too much weight and was not making enough money for him. JA1735-1736, 1809. Keisha prostituted to support her severe heroin addiction, and Folks knew he had a "hold" on Keisha as her supplier. JA1609-1610, 1668, 1675. Folks withheld drugs from Danielle until after she took pictures for him to post on Backpage.com and performed sex work. JA1907-1910. Danielle's drug habit also intensified while working for Folks because she needed drugs to cope with the sex work. JA1950-1953. Before Ayla started prostituting for Folks, Folks began reducing the amount of heroin he gave her and told her he would provide the previous amount if she prostituted. JA2053-2056. Ayla eventually did so; whatever money she retained also went to Folks as her heroin source. JA2063-2064. Her drug use also increased while working for Folks, but she had to see clients first to get drugs. JA1408-1409, 2069-2072.

Folks also manipulated Katelynn, Keisha, Danielle, and Ayla into having sex with him or performing other degrading acts. Folks used drugs to lure Katelynn into having sex with him. JA1752-1753. He urinated on Keisha, and he shot her

in the buttocks with a BB gun before giving her drugs. JA1431, 1616-1617. Three times, Folks forced Danielle to have sex with him before giving her drugs. JA1938-1941. Folks used drugs to entice Ayla and Keisha to perform in a degrading sex act "challenge." JA1434, 1614-1615, 2082-2083. Folks sent Keisha degrading, sexual photos of Hannah, which reminded Keisha that he had pictures of her that he could use against her. JA1619-1620, 1628. Folks also threatened to use sexually explicit photos against Ayla. JA2083-2084.

c. Folks's Acts Involving Hannah, A Minor

Jasmine, who prostituted for Folks, introduced him to Hannah, her child's babysitter. JA1838-1842, 1848-1849. When Hannah came to the hotel where Jasmine worked, Folks took sexually explicit pictures of Hannah by herself and with other women who worked for Folks. JA1859-1860, 1863-1872. Hannah was only 17 at that time. JA2369-2376. Less than an hour after taking these pictures, Folks posted a Backpage.com ad featuring the pictures of Hannah and the other sex workers, offering all the females as available for commercial sex. JA2369-2376.

d. Folks's Arrest And The Seizure Of His Computer And Tablet

After six months of investigation, Drug Enforcement Agency (DEA) Agent Adam Chetwynd and Task Force Officer Rob Estes obtained an arrest warrant for Folks. See JA425; R.17. They also obtained search warrants for Folks's residence in Winooski, Vermont, and a Burlington residence, which Folks used in his drug

operation. JA44-70, 174-202. On July 19, 2016, they arrested Folks outside the Burlington residence and executed the search warrant for that location (Burlington Residence Warrant). JA425-426.

As relevant here, the Burlington Residence Warrant permitted the officers to seize the following items in connection with Folks's drug-trafficking activities:

> b. Any and all documents, records, and items of personal property relating to the purchase, possession or distribution of controlled substances, including the following: telephones and cellular telephones, smart phones, pagers, answering machines, caller ID boxes, ledgers, account books, receipts, log books, address books, telephone directories, notes, maps, correspondence, customer lists and records, suppliers' lists and records, delivery forms and records, mailing receipts, car and mailbox rental records, storage facility rental records, telephone answer pads, records relating to domestic and foreign travel such as tickets, passports visas, travel schedules, or correspondence;
>
> c. Any and all documents, records and articles of personal property evidencing the obtaining, secreting, transfer, expenditure, and concealment of money and assets derived from or to be used in the purchase, and distribution of controlled substances, including the following: U.S. currency, foreign currency, jewelry, bank books, bank statements, receipts, warranties, electronics, financial and negotiable instruments, checks, and money orders, records of wire transfers, tax records;
>
> d. Any and all documents, records, and articles of personal property showing the identity of persons occupying, possessing, residing in, owning, frequenting, or controlling the Subject Property, including: keys, rental agreements and records, deeds, mortgages, property acquisition records, utility and telephone bills and receipts, photographs, and storage records;
>
> e. Any and all passwords necessary to access the data contained within the cellular telephones, smart phones, and other electronic items being seized; and

JA202. Among other items, agents seized Folks's tower computer (computer) and a tablet computer (tablet). JA437-449.

e. The Search Of Folks's Computer

DEA officers provided the computer and tablet to the FBI to maintain during their continued investigation and Folks's detention. JA2197-2199. Before anyone searched the computer and tablet, Officer Estes obtained a second warrant on January 27, 2017 (Devices Warrant). JA71-97. The Devices Warrant authorized a search of Folks's computer and tablet for evidence of drug and sex trafficking, including, among other things:

- [D]igital photographs and videos of individuals involved in drug or human trafficking, of drug or commercial sex proceeds, controlled substances, cash, hotel rooms, automobiles used to transport controlled substances, and drug- or sex-related paraphernalia[; and]

- Evidence of user attribution (including the purpose of its use, who used it, and when) * * * and browsing history.

JA73. After obtaining the warrant, DEA officers retrieved the computer and tablet from the FBI to begin its review of their contents. JA2172.

On February 2, 2017, DEA intelligence analyst Marilyn Epp proceeded to execute the Devices Warrant by powering on the computer and attaching a keyboard and mouse to review its contents. JA2172-2174, 2310-2311. Because Epp could access only the "Guest" user profile, she quickly abandoned her efforts. JA2174-2175. The next day, after consulting the federal prosecutor assigned to the case, Epp delivered the computer to Frank Thornton, a digital forensics examiner. JA2176-2177, 2311.

Thornton accessed all of the user profiles and created a mirror copy of the computer's hard drive. JA2027-2028, 2201, 2206. He returned his forensic copy of the computer's contents to the DEA along with a report, both of which were disclosed to Folks. JA206. Thornton also provided extractions of photo and video files from the computer to facilitate the DEA's review. JA2203-2205. Epp and others then reviewed Thornton's extractions for data responsive to the Devices Warrant. JA2311-2313. The government did not report Epp's initial, attempted review to Folks before trial, but it was disclosed to Thornton. Thornton found that Epp's attempted review did not have any effect on the types of files sought under the warrant. JA2203-2204.

2. Procedural History

The government charged Folks and McFarlan in a 16-count Fourth Superseding Indictment.[4] JA98-115. As relevant here, both Folks and McFarlan were charged with conspiracy to distribute heroin and cocaine base, in violation of 21 U.S.C. 841(a), 841(b)(1)(B), and 846 (Count 1). Folks also was charged with one count of illegally possessing a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (Count 2); five counts of drug trafficking, including distribution of heroin and possession of heroin and cocaine base with the intent to distribute, in

[4] The government also charged Latulippe as a co-defendant in an earlier indictment, and she pleaded guilty to conspiracy to distribute. R.88.

violation of 21 U.S.C. 841(a), (b)(1)(C) and 18 U.S.C. 2 (Counts 3, 5, 7-9); five counts of sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. 1591 and 18 U.S.C. 2 (Counts 10-14); one count of sex trafficking of a minor, in violation of 18 U.S.C. 1591 and 18 U.S.C. 2 (Count 15); and one count of using one or more facilities in interstate commerce to promote prostitution, in violation of 18 U.S.C. 1952(a)(3)(A), (b)(1), and 18 U.S.C. 2 (Count 16). McFarlan pleaded guilty to the conspiracy charge, and Folks proceeded to trial. R.139.

a. Folks's Motions To Suppress Evidence From His Computer

Before trial, Folks moved to suppress evidence obtained from the computer and tablet seized under the Burlington Residence Warrant. JA116. As relevant here, Folks alleged that the seizure of his computer and tablet exceeded the scope of the warrant because the list of items to be seized did not include "computers."[5] JA116, 119, 124-129. The district court (Judge Crawford) denied the motion, upholding the seizure under the plain-view doctrine. JA563, 575. Judge Crawford did not analyze whether the warrant itself permitted the seizure of the computer and tablet. JA563.

Folks filed a separate motion to suppress evidence from the computer based on the Devices Warrant. JA132. He argued that, in authorizing the search of his

[5] Folks also challenged the warrant as lacking probable cause, an argument he abandoned on appeal.

computer, the warrant permitted the government's exposure to non-responsive data and lacked minimization procedures; he also argued that the warrant was not timely executed. JA135-145. Although he mentioned in his motion that the government obtained the Devices Warrant "more than six months" after seizing the computer, Folks did not argue that this delay violated the Fourth Amendment. Compare JA133, with JA135-145. Judge Crawford also denied this motion, finding no "prejudice to the defendant or staleness of the warrant." JA581.

b. Folks's Trial Objection To The Computer Evidence

The case was transferred to Judge Sessions and proceeded to an eleven-day trial. During Thornton's testimony, Folks objected to the admission of any digital evidence from his computer. JA2013-2022, 2029-2032, 2104-2119; R.436. In particular, Folks raised concerns about the chain of custody and about his expert Anthony Martino's determination that the computer was turned on for six hours on February 2, 2017, before Thornton made the forensic copy and during which 820 files were created and 1458 files were modified. R.436, at 2. After learning the newly created and modified files resulted from Epp's attempted review, Folks argued that Epp's actions had tainted the computer evidence and amounted to "tampering." R.436, at 1, 3-9.

The court held an evidentiary hearing to determine whether Epp had conducted her review in good faith and whether it had affected the exhibits that

the government sought to admit at trial. JA2161-2196. Epp testified that she attempted to review the computer's contents consistent with her training for cell phones, but that she was unaware of the different practices used for computers. JA2172-2173, 2178, 2180-2182, 2311. The government represented that its trial exhibits were not affected by the review because they had modified, accessed, or created (MAC) dates before February 2, 2017 (the date of Epp's attempted review), and were extracted from user profiles, not the guest profile that Epp had accessed. R.439, at 2-4, 6-7; JA2190-2191. Martino agreed there was no evidence showing that Epp's attempted review affected the files comprising the government's exhibits. JA2188-2191.

The court found that although Epp may have acted negligently in her attempted review, she did not act in bad faith. JA2194-2195, 2558. The court determined that because none of the government's exhibits had MAC dates of February 2, 2017, or later, the government could sufficiently authenticate the exhibits for use at trial. JA2558-2559. The court stated that it would permit Folks to elicit evidence at trial regarding the effects, if any, of Epp's review and the reliability of the computer evidence. JA2559.

c. Admission Of Computer Evidence At Trial

Through Epp's testimony at trial, the government admitted many exhibits obtained from Thornton's forensic extractions of Folks's computer, including:

Exhibit	Description	Testimony
34, 34C	Video of the January 20, 2016, traffic stop	JA901-902, 2400-2401
44, 44C	Video featuring Katelynn in an advertisement for commercial sex, and the computer file path matching the video's posts on YouTube.com and Facebook.com	JA2333-2337
47B	Photos of Hannah, including from when she was a minor and a screenshot of a Backpage ad featuring these same photos and demonstrating they were posted shortly after being taken to advertise the women for commercial sex. Additional photos include Hannah, naked in a red apron, and matching photos posted to Folks's Facebook account.	JA2369-2376
49B	Photos of Mary's buttocks that she gave to Folks in exchange for cigarettes	JA1127-1128, 2386
50B	Photos of Keisha, including those taken by Folks and used on Backpage.com	JA1637-1638, 2338-2340, 2348-2349
51B	Photos of Katelynn, including photos from Backpage.com and photos that matched ones found in Folks's planner and on his Facebook account	JA2315, 2320-2333
53B	Photo of Danielle	JA2349
54B	Photos of Ayla, including sexually explicit photos with Latulippe similar to photos of them posted in on Backpage.com	JA2056-2057, 2352-2355
68.2	Photos of identification documents and images of Folks in folder labeled "Jimmy Porter," which matches an email address used on Backpage.com	JA2365-2367
75	Internet search history showing weblink for payment on Backpage.com and other visits to Backpage.com	JA2229-2231
117, 117D	Hard drive file path matching Hannah video posted to Folks's Facebook account including sexually explicit photos of Hannah that showed her naked wearing a red apron	JA949-951, 2401-2403

124, 124B	Video of Folks describing degrading sex act "challenge" and the hard drive file path demonstrating its computer location	JA2403-2405
125, 125B	Video of preparation for degrading sex act "challenge" featuring Victoria and hard drive file path demonstrating its computer location	JA2406-2407
126B-C	Still shot from video of Folks urinating on Keisha and hard drive file path demonstrating its computer location	JA2407-2408
127B-C	Still shot from video of Folks urinating on Mary and hard drive file path demonstrating its computer location	JA2409
128	Video of Folks discussing urinating on women	JA2409-2410, 2422

See also R.461. Epp also testified that she found in the forensic extractions many photos of other women mentioned at trial as prostituting for Folks. JA2384-2385.

Folks cross-examined Thornton and Epp about Epp's attempted review. JA2232-2235, 2436-2444. Epp testified about her inexperience with the procedures for reviewing a computer's contents. JA2437. Defense expert Martino also testified about the proper procedures and gave his opinion that Epp's attempted review affected the overall integrity of the computer before Thornton conducted his forensic examination. JA2597-2606, 2612-2613.

d. Conviction And Post-Trial Motions

The jury convicted Folks of the drug- and sex-trafficking charges, but acquitted him of firearm possession. JA2659-2665. Folks filed post-trial motions for acquittal and for a new trial on the conspiracy to distribute heroin

and sex-trafficking charges. JA3136. The court granted the motion for acquittal on Count 11 (alleged sex trafficking of Keisha in 2013) but otherwise denied the motion (SPA39-40, 54):

Ct.	Description	Verdict	Motion
1	Conspiracy to Distribute Heroin	Guilty	Denied
2	Firearm Possession	Not Guilty	NA
3	Distribution of Heroin (1st Controlled Buy)	Guilty	NA
5	Distribution of Heroin (2d Controlled Buy)	Guilty	NA
7	Possession of Heroin and Cocaine Base	Guilty	NA
8	Distribution of Heroin (3d Controlled Buy)	Guilty	NA
9	Distribution of Heroin (4th Controlled Buy)	Guilty	NA
10	Sex Trafficking by Force, Fraud, Coercion (Katelynn)	Guilty	Denied
11	Sex Trafficking by Force, Fraud, Coercion (Keisha, 2013)	Guilty	Granted
12	Sex Trafficking by Force, Fraud, Coercion (Keisha, 2015)	Guilty	Denied
13	Sex Trafficking by Force, Fraud, Coercion (Danielle)	Guilty	Denied
14	Sex Trafficking by Force, Fraud, Coercion (Ayla)	Guilty	Denied
15	Sex Trafficking of A Minor (Hannah)	Guilty	Denied
16	Use of Interstate Commerce For Prostitution	Guilty	Denied

SPA39-40, 54; JA2659-2666.

Among other challenges, Folks argued for a new trial under Rule 33 by pressing his prior claims that "the seizure of the computer was beyond the scope of the [the Burlington Residence Warrant]" and that "the computer was improperly handled by [Epp] * * * and should not have been admitted." JA3190-3191. Folks did not elaborate on these arguments and did not renew

his motion to suppress the Devices Warrant. JA3190-3191. The court denied Folks's motion, stating in relevant part that it had resolved these issues previously and citing its decision on the trial objection to the computer evidence. SPA53-54.

e. Sentencing And Appeal

The district court sentenced Folks to 270 months' imprisonment as follows and entered judgment:

Counts	**Description**	**Concurrent Sentences**
1	Conspiracy to Distribute	270 Months
3, 5, 7-9	Distribution and Possession	240 Months
10, 12-15	Sex Trafficking	270 Months
16	Use of Interstate Commerce	60 Months

SPA55-62. Folks timely filed this appeal. JA3405.

SUMMARY OF THE ARGUMENT

This Court should affirm Folks's drug- and sex-trafficking convictions because his arguments on appeal lack merit and in any event do not warrant relief.

1.a. This Court should affirm the district court's denial of Folks's motions to suppress evidence from his computer because the computer's seizure and subsequent search complied with the Fourth Amendment. Even though the Burlington Residence Warrant did not expressly list computers, agents did not exceed the warrant's scope in seizing Folks's computer. First, the warrant authorized law enforcement to seize items of personal property, including

financially valuable "electronics" that may have been obtained through drug trafficking. Second, the warrant permitted agents to seize the computer as a logical container for digital documents and records associated with drug trafficking. To this end, the government acted reasonably by securing the computer and obtaining the Devices Warrant before searching it.

Even if the computer's seizure exceeded the scope of the Burlington Residence Warrant, a warrantless seizure of the computer was justified under the plain view doctrine. DEA agents had authority to enter and search the Burlington residence, and they discovered the computer in plain view on a table. The agents also had probable cause to believe that Folks's computer would contain evidence of both his drug- and sex-trafficking offenses, given that the DEA had contemporaneous authority to seize Folks's computer pursuant to a separate warrant for his Winooski residence. Thus, the criminal nature of Folks's computer was immediately apparent, permitting agents to seize it without a warrant. The agents also acted reasonably by securing the computer and later obtaining the Devices Warrant before searching it.

b. Folks next argues that the delay in obtaining the Devices Warrant to search his computer violated the Fourth Amendment. This argument is waived. But if not waived, this argument also fails. Because the DEA seized the computer with a warrant, the government did not act unlawfully by seeking the Devices

Warrant six months later. Even if agents seized the computer under the plain view doctrine, this delay still did not violate the Fourth Amendment because Folks had only a *de minimis* possessory interest in the computer while he was detained pending trial. Furthermore, the DEA continued to investigate Folks's criminal conduct during the intervening period in which agents reasonably believed they had seized the computer pursuant to a warrant.

Moreover, the Devices Warrant was not deficient under the Fourth Amendment simply because it permitted the government to make a forensic copy of Folks's hard drive and did not contain "minimization" procedures. First, the creation of a mirror copy is a routine procedure for executing a warrant to search a computer. The incidental viewing of non-responsive data while searching for responsive data does not violate the Fourth Amendment. Second, this Court has expressly declined to hold that any minimization procedures are necessary for a warrant to comport with the Fourth Amendment.

c. Finally, even if a Fourth Amendment violation occurred here, the exclusionary rule should not apply, given the government's good faith reliance on the Devices Warrant. No defect in the warrant itself prevents the application of the good faith doctrine, and the government disclosed relevant facts to the magistrate judge regarding the time lag between its seizure of the computer and its application for the Devices Warrant to search the computer. Furthermore, the DEA acted

reasonably throughout the investigation by seizing the computer and transferring it into the FBI's custody, continuing with the investigation, and subsequently obtaining another warrant before searching the computer's contents for the evidence used at trial. For these reasons, suppression is inappropriate.

2. This Court should affirm the district court's denial of Folks's Rule 33 motion, which is premised on the admission of allegedly unlawful computer evidence at trial. First, Epp's abandoned attempt at searching Folks's computer did not violate the Fourth Amendment. Folks has articulated no legal theory supporting such a challenge, and even if he did, no basis exists for excluding unaffected computer files. Second, the district court properly ruled that the government could authenticate the computer files it offered as trial exhibits. The government established chain of custody for the computer, and even Folks's expert agreed that Epp's attempted review did not affect the government's exhibits. Thus, the admission of the computer evidence was not a manifest injustice.

3. This Court should reject Folks's newly raised prosecutorial misconduct claims. Folks has not shown that the challenged conduct on cross-examination or in summation was both plainly improper and substantially prejudicial. This is especially true considering the broader context of this conduct and the strength of the trial evidence.

4. For all of these reasons, Folks's claim of cumulative error also fails.

ARGUMENT

I

THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF FOLKS'S MOTIONS TO SUPPRESS

This Court should affirm the district court's denial of Folks's two suppression motions. The government's seizure and subsequent search of Folks's computer did not violate the Fourth Amendment. Regardless, suppression is not an appropriate remedy even if a violation did occur because the agents here acted in good faith. See pp. 44-47, *infra*.

A. Standard Of Review

In reviewing the denial of a motion to suppress, this Court applies de novo review to the district court's conclusions of law and clear-error review to the district court's findings of fact. See *United States* v. *Smith*, 967 F.3d 198, 204-205 (2d Cir. 2020). This Court may uphold the validity of the judgment "on any ground that finds support in the record." *United States* v. *Ganias*, 824 F.3d 199, 208 (2d Cir. 2016) (en banc) (quoting *Headley* v. *Tilghman*, 53 F.3d 472, 476 (2d Cir. 1995)).

B. The Government Properly Seized Folks's Computer And Tablet Under The Burlington Residence Warrant

Although the district court resolved the lawfulness of the computer's seizure on other grounds, the Burlington Residence Warrant itself permitted law enforcement to seize Folks's computer and tablet.[6]

Under the Fourth Amendment, a warrant may issue only if "probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky* v. *King*, 563 U.S. 452, 459 (2011). To satisfy this standard, a search warrant must: (1) "identify the specific offense for which the police have established probable cause"; (2) "describe the place to be searched"; and (3) "specify the items to be seized by their relation to designated crimes." *United States* v. *Galpin*, 720 F.3d 436, 445-446 (2d Cir. 2013) (citations and quotation marks omitted). On appeal, Folks does not dispute that the Burlington Residence Warrant met the probable cause and particularity requirements. He argues only that the district court should have excluded the computer evidence because the seizure of his computer and tablet exceeded the warrant's scope. Br. 51-57. He is wrong.

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[6] Folks references both the computer and tablet, but the agents' seizure of the tablet is not at issue because the government did not obtain any evidence from the tablet. JA2142.

1. The Burlington Residence Warrant Permitted Agents To Seize Folks's Computer And Tablet

Law enforcement officers acted within the scope of the Burlington Residence Warrant when they seized Folks's computer and tablet. It does not matter that those items were not named explicitly in the warrant. The particularity requirement is intended to "prevent[] the seizure of one thing under a warrant describing another." *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976). A warrant satisfies the particularity requirement if it is "sufficiently specific to permit the rational exercise of judgment" by officers "in selecting what items to seize." *United States* v. *Shi Yan Liu*, 239 F.3d 138, 140 (2d Cir. 2000) (citation and quotation marks omitted). Even "broadly worded categories" can satisfy this requirement when "construed in light of an illustrative list of seizable items." *United States* v. *Riley*, 906 F.2d 841, 844 (2d Cir. 1990).

As a result, the Fourth Amendment does not require a warrant to specifically name each and every item or document to be seized, provided that the item or document "falls within [a particularly] described category." *Riley*, 906 F.2d at 845. As the Fifth Circuit has explained, a seizure complies with the Fourth Amendment where the item seized is "the functional equivalent" of items that were "adequately described," even when the "[disputed] item was not named in the warrant, either specifically or by type." *United States* v.

Fulton, 928 F.3d 429, 434 (5th Cir. 2019) (citation omitted), cert. denied, 140 S. Ct. 1133 (2020). For example, this Court has upheld the seizure of identification documents under a category authorizing the seizure of "documents relating to the illegal trafficking of firearms and ammunition," where those documents established a connection between the defendant and the premises where firearms were recovered. *United States* v. *Victor*, 394 F. App'x 747, 748 (2d Cir. 2010); see also *United States* v. *Yakovlev*, 508 F. App'x 34, 38 (2d Cir. 2013) (upholding seizure of underwear as within the scope of a warrant permitting a search for "human remains").

To determine a warrant's permissible scope, this Court looks "directly to the [warrant's] text." *United States* v. *Bershchansky*, 788 F.3d 102, 111 (2d Cir. 2015). Yet it should do so "'in a commonsense and realistic fashion,' eschewing '[t]echnical requirements of elaborate specificity.'" *United States* v. *Srivastava*, 540 F.3d 277, 287 (4th Cir. 2008) (quoting *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)); *United States* v. *Angelos*, 433 F.3d 738, 745 (10th Cir. 2006) (applying same standard). As with any Fourth Amendment analysis, "reasonableness" is the "touchstone." *Ganias*, 824 F.3d at 209. Here, law enforcement's seizure of Folks's computer and tablet was reasonable based on a "commonsense and realistic" interpretation of the warrant's terms.

a. The Tablet And Computer Are "Electronics"

Paragraph 1.c. of the search warrant authorized agents to seize "*articles of personal property* evidencing" the money and assets "derived from or to be used in" drug trafficking, including among other items, "*electronics*." JA202 (emphasis added). Folks's computer and tablet are, by definition, "electronics." As a result, a reasonable, commonsense interpretation of the category "articles of personal property" includes a computer and tablet.

b. The Tablet And Computer Are Likely Containers Of Documents And Records Pertaining To Drug Trafficking

Paragraphs 1.b-d authorized agents to seize "documents" and "records" relating to drug-trafficking activities and naturally encompassed Folks's computer and tablet. See JA202 ¶ 1.b-d. In the "age of modern technology," computers "can be repositories for documents and records" and are thus likely to be a "logical container" for such items described in a warrant. *United States* v. *Giberson*, 527 F.3d 882, 887 (9th Cir. 2008). Indeed, the warrant plainly contemplated the need to access "data contained within the cellular telephones, smart phones, and *other electronic items* being seized." JA202 ¶ 1.e.[7]

[7] In the affidavit accompanying the warrant application, Agent Chetwynd indicated that relevant records might be found on computers and on other digital devices. JA195 ¶ 67(e).

For decades, courts routinely have upheld searches and/or seizures of containers not expressly identified in a search warrant because they were likely to hold documents and records permitted to be seized. See, *e.g.*, *United States* v. *Reyes*, 798 F.2d 380, 382-383 (10th Cir. 1986) (holding search warrant authorizing seizure of drug trafficking records permitted seizure of cassette tape); *United States* v. *Santarelli*, 778 F.2d 609, 615-616 (11th Cir. 1985) (holding warrant authorizing search for records permitted search of each record in filing cabinet); *United State*s v. *Gomez-Soto*, 723 F.2d 649, 654-655 (9th Cir. 1984) (holding search and seizure of briefcase and microcassette as "logical container" for items authorized by warrant). The Fifth Circuit has extended this rationale to the search of a cell phone in a drug case when the warrant did not specifically identify cell phones, but permitted a search for "records, sales and/or purchase invoices." *United States* v. *Aguirre*, 664 F.3d 606, 614-615 (5th Cir. 2011). Courts have justified this flexibility in part because a warrant cannot be "expected to describe with exactitude the precise form the records would take." *Giberson*, 527 F.3d at 887 (quoting *Reyes*, 798 F.2d at 383).

Against this backdrop, the Ninth Circuit has held that the seizure of a computer to "secure" its contents was "within the scope of a warrant['s]" authorization to seize documents where law enforcements officers could reasonably "believe that the items they were authorized to seize would be found

in [a] computer." *Giberson*, 527 F.3d at 888. Such a seizure is "particularly appropriate" where law enforcement obtains a second warrant to authorize searching the computer's files. *Id.* at 889. The Eighth Circuit also has held that a warrant authorizing the seizure of business records "logically and reasonably" included the search of a business computer, even though it did not expressly list computers. *United States* v. *Hudspeth*, 459 F.3d 922, 927 (8th Cir. 2006), opinion reinstated in relevant part after reh'g, 518 F.3d 954 (2008).

Here, Paragraph 1.b-d of the warrant authorized the seizure of documents and records that law enforcement officers could reasonably believe would be on Folks's computer and tablet, including those (highlighted):

b. Any and all documents, records, and items of personal property relating to the purchase, possession or distribution of controlled substances, including the following: telephones and cellular telephones, smart phones, pagers, answering machines, caller ID boxes, ledgers, account books, receipts, log books, address books, telephone directories, notes, maps, correspondence, customer lists and records, suppliers' lists and records, delivery forms and records, mailing receipts, car and mailbox rental records, storage facility rental records, telephone answer pads, records relating to domestic and foreign travel such as tickets, passports visas, travel schedules, or correspondence;

c. Any and all documents, records and articles of personal property evidencing the obtaining, secreting, transfer, expenditure, and concealment of money and assets derived from or to be used in the purchase, and distribution of controlled substances, including the following: U.S. currency, foreign currency, jewelry, bank books, bank statements, receipts, warranties, electronics, financial and negotiable instruments, checks, and money orders, records of wire transfers, tax records;

d. Any and all documents, records, and articles of personal property showing the identity of persons occupying, possessing, residing in, owning, frequenting, or controlling the Subject Property, including: keys, rental agreements and records, deeds, mortgages, property acquisition records, utility and telephone bills and receipts, photographs, and storage records;

JA202 ¶ 1.b-d. Folks does not, and cannot, dispute that it was reasonable for law enforcement to believe these records or documents authorized for seizure could be stored digitally on his computer or tablet.

Finally, the government acted reasonably by obtaining a second warrant before searching the computer and tablet for evidence. See *Giberson*, 527 F.3d at 887 (counseling such an approach). For all of these reasons, agents acted within the scope of the warrant when they seized Folks's computer and tablet.

2. Folks's Arguments That The Seizure Of His Computer And Tablet Exceeded The Scope Of The Warrant Are Unpersuasive

Folks argues that the warrant could not have authorized the seizure of his computer and tablet because the word "computer" was intentionally omitted from the warrant application. Br. 51, 53-56. Folks's assertion is unsupported by the record.[8] In any event, the correct inquiry is whether the seizure was within the scope of the warrant *that was authorized* by the magistrate judge. For the reasons already given, it was.

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[8] In connection with this assertion, Folks makes two claims that are unsupported by the record and for which no factual findings exist (see JA560-563): (1) that the magistrate judge's procedures required a certain showing to seize a computer that the government knew it could not satisfy; and (2) that judicial authorization for seizing computers in drug cases is uncommon in the District of Vermont. Br. 53, 55-56; see JA472-474 (objection regarding the characterization of the magistrate's procedures), 503-530 (providing executed warrants from the federal judicial district as examples but without any indication whether a computer was found but not seized in the places searched).

Separately, Folks argues that the warrant could not have authorized the seizure of the computer because the warrant pertained only to evidence of drug trafficking, not sex trafficking. Br. 54-55. But the question whether the seizure was authorized turns on whether, at the time, it was reasonable to believe the computer would contain (or was itself) evidence of drug trafficking. It was. Thus, that the computer ultimately proved more useful to the sex-trafficking charges does not mean that its seizure exceeded the warrant's scope. Moreover, the government sought separate authorization to review the contents of the computer and tablet for evidence of both drug trafficking and sex trafficking. See JA71-97.

C. Alternatively, The Government Lawfully Seized The Computer And Tablet Under The Plain View Doctrine

This Court also can uphold the seizure of Folks's computer and tablet under the plain view doctrine, as the district court did.

Under the "plain view" exception to the Fourth Amendment's warrant requirement, officers may lawfully seize an item without a warrant. *United States* v. *Andino*, 768 F.3d 94, 99-100 (2d Cir. 2014). This exception applies when "(1) the officer is lawfully in a position from which the officer views an object, (2) the object's incriminating character is immediately apparent, and (3) the officer has a lawful right of access to the object." *United States* v. *Babilonia*, 854 F.3d 163, 179-180 (2d Cir. 2017) (citation, quotation marks, and

alterations omitted). When a law enforcement officer searches a location pursuant to a "warrant for another object," the plain view doctrine "supplement[s] the prior justification" and "permits the warrantless seizure." *Id.* at 180 (quoting *Horton* v. *California*, 496 U.S. 128, 135-136 (1990)).

Folks does not challenge the agents' right to be present in the Burlington residence or to lawfully access the seized objects while executing the warrant. See Br. 51-57. The agents found Folks's computer in plain view on a table in the dining room area (JA435, 445-448) and the tablet in a bag that was hanging on a coat hook (JA439-440). Folks argues only that the criminal nature of the computer and tablet were not immediately apparent because such devices are "ubiquitous in many households." Br. 53. As explained below, his argument fails.

1. The Government Had Probable Cause To Seize Folks's Computer And Tablet Under The Plain View Doctrine

In applying the plain view exception, this Court has held that the seizure of everyday objects found in households, like cell phones, tablets, and computers, is "justified where the officers have probable cause to believe that the objects contain or constitute evidence." *Babilonia*, 854 F.3d at 180. The existence of "probable cause" is an "objective" inquiry based on the "the facts available to the officer at the moment of the seizure" and viewed through the

lens of the "officer's experience and training." *United States* v. *$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 84-85 (2d Cir. 2002).

In *Babilonia*, for example, this Court upheld the warrantless seizure of several cell phones and a tablet in connection with a murder-for-hire and drug trafficking investigation based on what the investigation revealed about the defendant's activities. 854 F.3d at 172-173. Before the seizure, police discovered the defendant used cell phones in connection with the crimes, which justified the seizure of such phones and a tablet under the plain view doctrine. *Id.* at 180-181. The Court also was "not troubled" by the seizure because law enforcement sought a second warrant before searching the devices' contents. *Id.* at 181; see also *United States* v. *Place*, 462 U.S. 696, 701 (1983) ("Where law enforcement authorities have probable cause to believe that a container holds * * * evidence of a crime," the Fourth Amendment permits its warrantless seizure "pending issuance of a warrant to examine its contents.").

When the agents here seized the computer and tablet, the investigation into Folks's drug- and sex-trafficking activities had been ongoing for more than six months and had yielded important information. JA178. The investigation revealed, through several controlled buys, that Folks was selling drugs and using a cell phone to arrange drug sales. JA182-187, 190-193. Folks also was recruiting and providing women for commercial sex, including by text message.

JA180-181, 193. The investigation had uncovered related advertisements on Backpage.com as well as related photos and videos on Youtube.com and Facebook.com. JA180-181. Such digital evidence (*i.e.*, data and text messages from a cell phone, photos and videos, and website activity) by its nature can be transferred seamlessly among devices via cloud-based storage systems and can be otherwise accessible across internet-enabled devices like computers and tablets. Based on these facts, an objective law enforcement officer would have probable cause to believe that the computer and tablet at the Burlington residence would contain digital evidence of Folks's criminal activity, as the district court found. JA562-564.

Indeed, these are the very facts underlying the warrant sought for Folks's residence in Winooski, which *expressly* authorized the seizure of a computer. JA48. The DEA obtained the Winooski Warrant at the same time as it obtained the Burlington Residence Warrant, using the same affidavit by Agent Chetwynd. JA45-70, JA174-198. Thus, when the DEA entered the Burlington residence and learned that Folks was staying there (and not in Winooski) and that the computer on the table belonged to him, it was immediately apparent that the computer likely would contain incriminating evidence. JA435.

In addition, in his affidavit in support of the Burlington and Winooski warrants and at the suppression hearing, Agent Chetwynd identified many types

of digital evidence that he expected to find on computers and other electronic devices based on his training and experience. JA195-198, 449-451. These items included:

- drug "customers names" and "contact lists" for drug "trafficking associates";
- financial records, photographs, and receipts reflecting funds involved in drug trafficking;
- photos of potential victims of sex trafficking; and
- IP addresses, advertisements, and names of individuals involved with sex trafficking.

JA449-451. This further supports the existence of probable cause to believe that Folks's tablet and computer would contain evidence of his drug and sex trafficking. Finally, consistent with *Babilonia*, the officers acted reasonably by waiting to search the tablet and computer until after obtaining a second warrant.

2. Folks's Challenges To Agent Chetwynd's Testimony Do Not Negate The Existence Of Probable Cause

Folks disputes the accuracy and relevance of Agent Chetwynd's knowledge, training, and experience to argue that the plain view exception does not apply. Br. 52-53, 56-57. But Folks's arguments do not undermine the probable cause that existed to believe incriminating evidence would be found on his computer and tablet.

First, Folks asserts that computers are rarely seized in drug cases in Vermont and therefore Agent Chetwynd made inaccurate representations of his training and experience. Br. 52-53. But this assertion, even assuming it were true, does not undermine the particular investigative facts available to law enforcement, including the existence of extensive digital evidence relating to both drug and sex trafficking given Folks's use of cell phones and web postings. Moreover, the fact that Agent Chetwynd could recall seizing a computer only two or three times in his 14-year career does not conflict with his testimony that both his *training and* experience supported a reasonable belief that evidence would be found on a computer or other electronic devices. JA195-196, 449-451.

Next, Folks unsuccessfully argues that Agent Chetwynd's knowledge, training, and experience are irrelevant because Officer Estes, and not Agent Chetwynd, seized the computer. Br. 56-57. As an initial matter, the standard for assessing probable cause is an objective one, viewed through the lens of a reasonable law enforcement officer under the totality of the circumstances. See *U.S. Funds*, 287 F.3d at 84-85. Furthermore, as the two case agents assigned to the investigation into Folks's criminal activity, Agent Chetwynd and Officer Estes worked alongside one another. JA483-484, 650. They had a similar number of years of experience as well as relevant training. JA74, 484. Finally,

Agent Chetwynd testified that he held two operational meetings to discuss the execution of the search warrant at the Burlington Residence, including providing background information about the investigation to all officers involved in the search. JA431-432, 483-484. Under these circumstances, Agent Chetwynd's testimony provides relevant insight into whether the incriminating character of the computer and tablet would be immediately apparent to a reasonable law enforcement officer.

D. The Six-Month Delay In Obtaining The Devices Warrant To Search Folks's Computer Did Not Violate The Fourth Amendment

For the first time on appeal, Folks argues (Br. 58-59) that the six-month delay between seizing his computer and obtaining the Devices Warrant to search its contents violated the Fourth Amendment.[9] Generally, when a defendant fails to raise an argument in a pre-trial suppression motion, the argument is waived absent some showing of good cause for failing to raise the issue below. See *United States* v. *Conners*, 816 F. App'x 515, 518 (2d Cir. 2020) (citing *United States* v. *Yousef*, 327 F.3d 56, 144 (2d Cir. 2003) and Fed. R. Crim. P. 12(b)(3)(C) and (c)(3)). Folks has made no such showing here, and this Court should deem his argument waived.

[9] Folks mentioned the six-month period it took the government to obtain the Devices Warrant in the factual background to his suppression motion, but did not argue that the delay constituted a Fourth Amendment violation. JA133.

But if this Court were to consider the issue, it should reject Folks's argument. The delay in obtaining the Devices Warrant did not violate the Fourth Amendment for the reasons explained below.

1. Any Delay Was Reasonable Because The Computer Was Seized With A Warrant

Folks's argument about any delay faces an initial hurdle because his computer was seized pursuant to a valid warrant. Although courts have criticized delays of less than six months between seizing an electronic device and applying for a warrant to search its contents, they have done so when the government has seized the device without a warrant. See, *e.g.*, *United States* v. *Pratt*, 915 F.3d 266, 270, 273 (4th Cir. 2019) (31-day delay unreasonable after warrantless seizure of cell phone); *United States* v. *Mitchell*, 565 F.3d 1347, 1350-1352 (11th Cir. 2009) (21-day delay unreasonable after warrantless seizure of hard drive). This is because the "right of police to temporarily seize a person's property pending the issuance of a warrant presupposes that the police will act with diligence to apply for the warrant." *United States* v. *Smith*, 967 F.3d 198, 205 (2d Cir. 2020). Here, the agents properly seized the computer under the Burlington Residence Warrant, see pp. 25-31, *supra*, and included it among other evidence in the list of items seized. See JA453 (listing inventory from warrant's execution). As a result, the delay in obtaining the Devices Warrant did not violate the Fourth Amendment.

2. Even If The Seizure Were Warrantless, The Delay Was Reasonable Based On The Circumstances

Even assuming the government seized the computer without a warrant under the plain view doctrine, the delay in obtaining the Devices Warrant did not violate the Fourth Amendment. This Court considers four factors in assessing the reasonableness of the delay: (1) "the length of the delay"; (2) "the importance of the seized property to the defendant"; (3) "whether the defendant had a reduced [possessory] interest in the seized item"; and (4) "the strength of the state's justification for the delay." *Smith*, 967 F.3d at 206. Because Folks failed to raise this challenge below the district court did not make any factual findings or weigh the *Smith* factors; nonetheless, this claim fails.

First, as the Supreme Court has emphasized, "a seizure affects only possessory interests, not privacy interests." *Segura* v. *United States*, 468 U.S. 796, 810 (1984). For this reason, the reasonableness of any delay in obtaining a search warrant after a warrantless seizure hinges on the effect of the delay on the defendant's possessory interest. Here, Folks's possessory interest in his computer was "virtually nonexistent" because he was in custody awaiting trial during the entire period of the delay. *Segura*, 468 U.S. at 813; see also *United States* v. *Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015) (noting diminished

possessory interest in computer while in custody). He would have lacked access to the computer in any event.

Nor did the government waste the time between the seizure and the application for the Devices Warrant. To the contrary, the government continued to diligently investigate Folks by conducting additional interviews of previously identified sex-trafficking victims, identifying additional victims, and reviewing subpoenaed records from Backpage.com. JA85-88, 90-92. The government thus strengthened the justification for the warrant during the intervening period. This provides a sharp contrast to the circumstances in *Smith*, where the probable cause supporting the warrant was identical to the probable cause that existed on the day the item was originally seized. 967 F.3d at 207.

Finally, the DEA's belief that it properly seized the computer under the Burlington Residence warrant provides sufficient justification for the delay here. JA199-202, 453. This Court has found a 13-month delay was not unreasonable where an officer's mistaken belief that he had already obtained a warrant for his search caused the delay. *United States* v. *Howe*, 545 F. App'x 64, 65-66 (2d Cir. 2013). Here, as in *Howe*, the failure to prioritize obtaining the search warrant while the investigation remained ongoing was reasonable given the DEA's understanding it had properly seized the computer and thus

already had a justification to search the computer, at least with respect to Folks's drug-trafficking offenses. For these reasons, even if this Court were to consider Folks's challenge in the first instance, it should conclude that the delay in obtaining the Devices Warrant did not violate the Fourth Amendment.

E. The Devices Warrant To Search The Computer Does Not Otherwise Violate The Fourth Amendment

Folks next argues that the Devices Warrant violates the Fourth Amendment because it (1) permitted the "over-seizure of data" and (2) did not have any allegedly required "minimization procedures."[10] Br. 49, 59-60. While a computer may contain a vast number of files that fall outside the scope of a warrant, the government does not violate the Fourth Amendment by "cursorily" examining such files in the course of identifying those within the warrant's scope. *United States* v. *Ulbricht*, 858 F.3d 71, 103 (2d Cir. 2017), abrogated on other grounds by *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018). This type of "invasion of a criminal defendant's privacy is inevitable * * * in almost any warranted search." *Ulbricht*, 858 F.3d at 103 (citing *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976)). Although Judge

[10] Folks specifies two procedures: (1) using a "taint team" to separate non-responsive data from responsive data; and (2) identifying what the government would do with non-responsive data. Br. 59.

Crawford did not address Folks's arguments in denying his motion to suppress the Devices Warrant, they fail.

1. Folks's Challenge To The "Over-Seizure" Of Data

Folks argues that the warrant "contemplated" the "over-seizure of data," but he does not identify any digital evidence that was improperly seized under the Devices Warrant or explain how the warrant permitted such "over-seizure." Nor has Folks presented any evidence that the government "engaged in a prohibited exploratory rummaging or made inadvertent discoveries in [its] search of his computer" while searching for responsive data. *United States* v. *Evers*, 669 F.3d 645, 653 (6th Cir. 2012). As a result, Folks apparently faults the government's forensic copying of his computer's hard drive. But that, too, fails to advance his argument. See *United States* v. *Ganias*, 824 F.3d 199, 215 (2d Cir. 2016) (en banc); Fed. R. Crim. P. 41(e)(2)(B).

Indeed, forensic copying of a computer's hard drive to execute a search warrant for digital evidence is routine. Rule 41(e) expressly contemplates that law enforcement may "copy the *entire* storage medium and review it later to determine what electronically stored information falls within the scope of the warrant." Fed. R. Crim. P. 41 advisory committee's note to 2009 amendment (emphasis added). Moreover, in *Ganias*, this Court did not question the propriety of copying an entire hard drive, and noted that even long-term

retention of such a copy may be reasonable under the Fourth Amendment. 824 F.3d at 215.

Folks's cannot rely on *United States* v. *Tamura*, 694 F.2d 591 (9th Cir. 1982) to argue otherwise. Br. 59-60. There, the Ninth Circuit held that the government violated the Fourth Amendment by seizing numerous boxes of both responsive and non-responsive paper documents from a business for an off-site review and by refusing to return the documents not subject to the warrant once they were identified. *Tamura*, 694 F.2d at 594-595. But this Court has questioned *Tamura*'s applicability to computer searches, given the differences between the "discrete" nature of paper files and the complexities of digital files and storage media, and Folks offers no reason that this Court's concerns would apply with any less force here. See *Ganias*, 824 F.3d at 210-215.

2. Folks's Challenge To The Lack Of "Minimization Procedures"

Folks also challenges the warrant's lack of "minimization procedures." But he does not identify any controlling precedent holding that the Fourth Amendment requires such procedures. Although a Ninth Circuit concurrence set forth "guidance" for warrants involving digital data, see *United States* v. *Comprehensive Drug Testing* (*CDT*), 623 F.3d 1162, 1180 (2010) (en banc), this Court has declined to impose any "specific search protocols or minimization undertakings"—including those identified in *CDT*—"as basic predicates for

upholding digital search warrants." *United States* v. *Galpin*, 720 F.3d 436, 451 (2d Cir. 2013). Indeed, when defendants have concerns about the retention of computer files not responsive to a warrant, they can file a motion under Rule 41(g) for the return or destruction of such files. *Ganias*, 824 F.3d at 211, 218-219. Folks filed no such motion.

Nor are the two cases that Folks cites (Br. 49-50) persuasive. First, in *In Re Search Warrant*, 193 Vt. 51 (2012), the Vermont Supreme Court concluded that a magistrate judge could impose minimization procedures but "d[id] not hold" that such "ex ante instructions are ever required." *Id.* at 65. Similarly, the federal district court case Folks cites involved a magistrate judge's explanation for imposing minimization procedures with respect to the specific warrant at issue there because of its invasion on third parties' rights. See *In the Matter of the Search of Info. Associated with the Facebook Account Identified by the Username Aaron.Alexis that is Stored at Premise Controlled by Facebook, Inc.*, 21 F. Supp. 3d 1, 10 (D.D.C. 2013). Neither case stated that the Fourth Amendment always requires the use of specific minimization procedures, as Folks seemingly argues.

F. Regardless Of Any Alleged Fourth Amendment Violation In Seizing Or Searching The Computer, The Government Acted In Good Faith

Regardless of whether a Fourth Amendment violation occurred, suppression of the computer evidence here is not appropriate because the

government acted in good faith throughout the pendency of this case. As this Court recently reiterated, a defendant is not "automatically entitle[d]" to the "suppression of evidence," which is a remedy of "last resort." *United States* v. *Felder*, 993 F.3d 57, 75 (2d Cir. 2021). Rather, the exclusionary rule is a "prudential doctrine," the "sole purpose" of which is to "deter future Fourth Amendment violations." *Davis* v. *United States*, 564 U.S. 229, 236-237 (2011). Only when law enforcement exhibits "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights" does exclusion of evidence outweigh its costs to the justice system. *Id.* at 238.

In determining whether the government's good faith precludes application of the exclusionary rule, the relevant inquiry is "whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *United States* v. *Bershchansky*, 788 F.3d 102, 113 (2d Cir. 2015) (quotation omitted). Even when a warrant is premised on a predicate Fourth Amendment violation, the good faith doctrine still applies if law enforcement had "no significant reason to believe that their predicate act was unconstitutional" and the "issuing magistrate was apprised of the relevant conduct." *Ganias*, 824 F.3d at 223 (quotation marks and citation omitted).

Both circumstances are present here. First, Officer Estes had no reason to believe that either the seizure of the computer under the Burlington

Residence Warrant or any subsequent delay in obtaining the Devices Warrant violated the Fourth Amendment. Even if the seizure of the computer exceeded the scope of the Burlington Residence Warrant, but see pp. 25-31, *supra* (arguing otherwise), it was "close enough to the line of validity" that a reasonable officer would not have been aware of any Fourth Amendment violation when seeking the Devices Warrant. *United States* v. *Fulton*, 928 F.3d 429, 435-436 (5th Cir. 2019) (finding question of whether seizure was proper did not have an "easy negative answer" and thus could not have been meaningfully deterred), cert. denied, 140 S. Ct. 1133 (2020).

Second, the agents disclosed relevant information in the affidavit for the Devices Warrant, which identified the date of the computer's seizure on July 19, 2016, more than six months before the application to search the computer's contents. JA92. In addition, the affidavit indicated that the computer was seized pursuant to a "search[] incident to FOLKS' July 19 arrest" rather than mentioning the Burlington Residence Warrant. JA92. Although inaccurate in a "technical" sense, this description was factually correct in a commonsense way: the Burlington Residence Warrant was executed shortly after Folks was arrested outside the residence on the same day. JA425; R.17. As a result of this description, however, Officer Estes put the magistrate judge on notice that the computer might have been seized without a warrant. Given the presentation of

these facts to the magistrate and the close nature of any question regarding the warrant's scope, this Court should not hesitate to apply the good-faith doctrine.

Finally, the agents "acted reasonably throughout the investigation." *Ganias*, 824 F.3d at 225. After seizing Folks's computer, the DEA agents immediately secured it, transferring it to the FBI. JA2172. The agents then sought a second warrant before conducting any actual review of Folks's computer for evidence of both drug and sex trafficking. JA71-97. The delay in obtaining that second warrant was reasonable given that the investigation remained ongoing, Folks was in custody, and law enforcement understood the computer had been seized with a warrant. The computer was transferred back into the DEA's custody to execute the Devices Warrant, and when the DEA learned that it could not access the computer,[11] it sought a forensic examiner's help. JA2174-2177. Finally, Folks does not dispute that the items seized from his computer and used at trial fell within the scope of the Devices Warrant. For these reasons, suppression is not warranted.

[11] To the extent Folks suggests that Epp's attempted review of the computer's contents violated the Fourth Amendment, an "isolated" act of "simple negligence" does not justify exclusion. *Smith*, 967 F.3d at 211-212; see also pp. 48-51, *infra*.

II

THIS DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING FOLKS'S MOTION FOR A NEW TRIAL

This Court should affirm the district court's denial of Folks's motion for a new trial. Folks has not shown that his conviction is a manifest injustice resulting from the admission of any improper computer evidence at trial.

A. Standard Of Review

This Court reviews the denial of a motion for a new trial "deferentially and will reverse only for abuse of discretion." *United States* v. *Snype*, 441 F.3d 119, 140 (2d Cir. 2006). A district court abuses its discretion when (1) its "decision rests on an error of law" or a "clearly erroneous factual finding," or (2) its decision "cannot be located within the range of permissible decisions." *United States* v. *Owen*, 500 F.3d 83, 87 (2d Cir. 2007) (citation omitted).

B. A New Trial Is Not Warranted Because Epp's Attempted Review Did Not Preclude The Admission Of The Later-Accessed Computer Evidence

A court may grant a new trial if the "interest of justice so requires." Fed. R. Crim. P. 33(a). A defendant bears a heavy burden in seeking a new trial, as such motions "are granted only in extraordinary circumstances." *United States* v. *McCourty*, 562 F.3d 458, 475 (2d Cir. 2009) (internal quotation marks and citation omitted). "[T]he ultimate test is whether letting a guilty verdict stand would be a manifest injustice." *Snype*, 441 F.3d at 140 (internal quotation

marks and citation omitted). This Court has framed this inquiry as requiring "real concern that an innocent person may have been convicted." *Ibid.* (citation omitted).

Folks asserts that he should receive a new trial because Epp's attempted review was unreasonable and thus violated the Fourth Amendment. Br. 61. Even assuming this Court considers this argument—which departs in significant respects from what Folks argued below and thus should be deemed waived[12]—Folks cannot show that the district court abused its discretion in denying his motion where the interests of justice required no such relief.

1. Epp's Attempted Review Did Not Violate The Fourth Amendment Or Require Blanket Suppression Of The Computer Evidence

Epp's attempted review of Folks's computer—after agents had obtained the Devices Warrant but before the DEA enlisted a forensics expert—affected approximately 2200 files, all but one of which (a system-created file) were

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[12] Folks devoted just two sentences to a variation of this argument in his new trial motion:

> As set forth in a Motion to Suppress * * * *see* Doc. 143, Mr. Folks contends that the seizure of the computer was beyond the scope of the search warrant for [the Burlington residence]. Mr. Folks further asserts that the computer was improperly handled by IA Epp, and that as a result, the integrity of the computer's data was at issue and should not have been admitted.

JA3190. Folks did not mention the Devices Warrant or argue that Epp's conduct amounted to a Fourth Amendment violation.

found in an area of the computer divorced from any user profile. JA2558. None of these files were used at trial, and even Folks's expert found no evidence that Epp's attempted review affected the government's exhibits. JA2188-2191. Folks essentially argues that Epp's alleged violation of the Fourth Amendment in executing the Devices Warrant required blanket suppression of all files from his computer, and not just those affected by her initial review. See Br. 61-63. The admission and use of any computer evidence whatsoever, so says Folks, resulted in manifest injustice.

This argument fails for two reasons. First, Folks has not identified any precedent indicating that Epp's attempted review, which admittedly departed from standard protocol, violated the Fourth Amendment. Folks discusses *United States* v. *Triumph Capital Group, Inc.*, 211 F.R.D. 31, 48 (D. Conn. 2002), but he does not reference any legal principle arising from that case. See Br. 62-63 (citing the findings of fact). Second, even if Folks had demonstrated a legal basis for a Fourth Amendment violation here, there would be nothing to suppress. Folks has not shown that Epp's attempted review was a "but-for cause of obtaining" the computer files that were admitted at trial. *Hudson* v. *Michigan*, 547 U.S. 586, 592 (2006) (finding such causation a "necessary" but not sufficient condition for application of exclusionary rule). In other words, had Epp never attempted her initial review, the government still would have discovered the

images and videos that comprised the trial evidence. There can be no manifest injustice from an impropriety that did not affect the trial outcome.

Nor would blanket suppression be appropriate to reach all the computer files regardless of whether Epp's attempted review affected them. Blanket suppression is an "extreme remedy" that "should only be imposed in the most extraordinary cases." *United States* v. *Shi Yan Liu*, 239 F.3d 138, 142 (2d Cir. 2000) (citation omitted). It typically requires a showing that government agents "flagrantly disregarded" the terms of a warrant by (1) affecting a "widespread seizure of items that were not within the scope of the warrant" and (2) failed to act "in good faith." *Id.* at 140 (citation omitted).

Folks has shown neither. Indeed, the district court found, at worst, that Epp's attempted review "may have been negligent," but that she did not act in bad faith. JA2558. Again, this argument provides no basis for concluding that Folks should have prevailed on his motion for a new trial.

2. The District Court Did Not Abuse Its Discretion By Relying On Prior Rulings To Deny Folks's Motion

Folks also has not shown that the district court abused its discretion by citing its past decisions to deny Folks's motion for a new trial. In particular, Folks faults Judge Sessions for purportedly relying on Judge Crawford's denial of the motion to suppress the Devices Warrant. Br. 61. Folks suggests that had Epp's attempted review been disclosed to Judge Crawford, he would have

granted Folks's suppression motion, and thus reliance on this decision is error. But this mischaracterizes the record—Judge Sessions did not rely on Judge Crawford's Devices Warrant ruling to deny Folks's motion. SPA53-54. Nor could he, as Folks never raised any challenge to the Devices Warrant in his post-trial motion. JA3190.

Instead, Folks's post-trial motion echoed his trial objection to the admissibility of the computer evidence by questioning the impact of Epp's attempted review on the computer's integrity. Compare JA3190, with R.436, at 6-9. The motion did not elaborate on the earlier objection or explain how Judge Sessions wrongly decided that issue at trial upon conducting an evidentiary hearing. JA3190. As a result, Folks cannot show that Judge Sessions abused his discretion by relying on his prior decision that the computer evidence was admissible under Federal Rule of Evidence 901(a) notwithstanding the impact of Epp's attempted review. SPA53-54 (citing JA2555-2559).

Under Rule 901(a), authentication requires producing "evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). This rule does not "erect a particularly high hurdle," and a district court "has broad discretion to determine whether a piece of evidence has been properly authenticated." *United States* v. *Tin Yat Chin*, 371 F.3d 31,

37 (2d Cir. 2004) (citation omitted). As relevant here, Folks conceded during trial that the government established the chain of custody for his computer. R.436, at 3. The government also sought to admit only files that had "modified, accessed, [or] created" dates *before* Epp's attempted review on February 2, 2017. R.439, at 2-4, 6; JA2190-2191. Folks's expert agreed that Epp's attempted review did not affect the files the government sought to introduce. JA2189-2191. And Folks has not identified any files used at trial that were affected by Epp's attempted review. Thus, the computer files were admissible under Rule 901. JA2559.

Furthermore, Folks's argument that Epp's attempted review "tampered" with the "integrity" of the computer goes to the "weight of the evidence rather than to its admissibility." *United States* v. *Sovie*, 122 F.3d 122, 127 (2d Cir. 1997). To this end, the district court properly permitted Folks to challenge the weight of the computer evidence in light of Epp's attempted review. JA2559. Folks's expert testified about the ways Epp's attempted review departed from standard practice (JA2597-2606), and Folks cross-examined Epp and Thornton about the propriety of the attempted review (JA2232-2235, 2436-2444). However, Folks's expert also testified that Epp's review did not affect the government's trial exhibits. JA2188-2191. That the jury ultimately agreed

with the government and convicted Folks is not a basis for granting a new trial. Simply put, there was no abuse of discretion.

III

THERE WAS NO PROSECUTORIAL MISCONDUCT WARRANTING A NEW TRIAL

Folks argues for the first time on appeal that aspects of the government's cross-examination and summation amounted to prosecutorial misconduct. Folks's arguments lack merit, especially when reviewed for plain error.

A. Standard Of Review

Folks concedes (Br. 64) that the plain error standard applies to his newly raised prosecutorial misconduct claims. Folks must demonstrate that there was "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States* v. *Solano*, 966 F.3d 184, 193 (2d Cir. 2020) (internal quotation marks and citation omitted). Even if these three conditions are satisfied, this Court may exercise its "discretion to notice a forfeited error" only if "(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (alteration, internal quotation marks, and citation).

This Court considers an error "plain" if it so "egregious and obvious that a trial judge * * * would be derelict in permitting it in a trial today." *United States* v. *Bastian*, 770 F.3d 212, 220 (2d Cir. 2014) (citation omitted). This Court seldom finds plain error "where the operative legal question is unsettled, including where

there is no binding precedent from the Supreme Court or this Court." *Ibid.* (citation omitted). An error affects substantial rights when "there is a reasonable probability that the error affected the outcome of the trial." *Solano*, 966 F.3d at 193 (citation omitted). Furthermore, on plain-error review, the misconduct must "amount[] to 'flagrant abuse'" that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Williams*, 690 F.3d 70, 75 (2d Cir. 2012) (citation omitted).

B. Folks Cannot Show That The Government's Conduct On Cross Examination Or Summation Warrants A New Trial

To obtain a new trial based on prosecutorial misconduct, a defendant bears a "heavy burden"; he must show not only that the government's conduct was improper, but also that when "viewed against the entire argument to the jury, and in the context of the entire trial, was so severe and significant as to have substantially prejudiced" him. *United States* v. *Sheehan*, 838 F.3d 109, 127-128 (2d Cir. 2016) (citations omitted). In assessing substantial prejudice, this Court considers "the severity of the misconduct," the curative measures taken, and "the certainty of conviction absent the misconduct." *United States* v. *Certified Env't Servs., Inc.*, 753 F.3d 72, 95 (2d Cir. 2014) (citation omitted) (summation); *United States* v. *McCarthy*, 54 F.3d 51, 55 (2d Cir. 1995) (cross-examination).

1. Folks Has Not Shown That The Government's Cross-Examination Substantially Prejudiced Him

Folks has identified a handful of instances during his cross-examination in which the government asked him whether other witnesses "lied" or were "dishonest" in their testimony. Br. 31, 33-34. The government concedes that such questions were improper. *United States* v. *Truman*, 688 F.3d 129, 143 (2d Cir. 2012).[13]

But even if a few of the government's questions on cross-examination were plainly improper, they were not so "severe or significant" as to deprive Folks of a fair trial when "viewed in the context of the entire trial." *Truman*, 688 F.3d at 144. (internal quotation marks and citation omitted).

In the absence of "starkly offensive prosecutorial delinquencies," defendants fail to show substantial prejudice from "were-they-lying" questions. *United States* v. *Gaind*, 31 F.3d 73, 77 (2d Cir. 1994) (discussing *United States* v. *Richter*, 826

[13] Folks suggests that every time the government asked him whether he disputed other witnesses' testimony as "false," it committed misconduct. Br. 30-41 (emphasizing such questions). That is incorrect: Neither this Court nor others have found fault with questions that highlight conflicting testimony provided they do not require the defendant to "condemn the prior witness as a purveyor of *deliberate* falsehood, i.e., a liar." *United States* v. *Gaind*, 31 F.3d 73, 77 (2d Cir. 1994) (emphasis added); *United States* v. *DeSimone*, 699 F.3d 113, 127-128 (1st Cir. 2012) (no plain error in asking whether prior testimony was "not true"); see also *Truman*, 688 F.3d at 137, 143 (declining to address impropriety of prosecutor's questions whether other testimony was "true").

F.2d 206 (2d Cir. 1987)); see also *United States* v. *Allen*, 831 F. App'x 580, 582 (2d Cir. 2020) (same, citing *Gaind*, 31 F.3d at 77). In *Richter*, the most relevant case for Folks's claim, this Court noted that improper questioning on cross-examination had "compel[led] [the] defendant" to accuse a *law enforcement officer* of lying in his testimony. 826 F.2d at 208. The Court stated that this alone it might have "overlook[ed]." *Ibid.* But then, in its rebuttal case, the prosecution called another law enforcement officer to bolster the testimony of the first and repeatedly emphasized in summation that finding the defendant not guilty required believing that the *two* law enforcement officers had lied. *Id.* at 208-210. This latter conduct was "patently misleading," this Court explained, because the ultimate legal issue did not "hinge[] upon the veracity of the FBI agents," but on other facts the jury needed to find to convict the defendant. *Id.* at 209. This Court concluded that the government's conduct caused substantial prejudice warranting a new trial. *Id.* at 209-210. Conversely, this Court has not deemed it substantially prejudicial where the government asked improper "were-they-lying" questions about the testimony of lay witnesses, even where those questions were later referenced in summation, as alleged here (Br. 67-69). See *Truman*, 688 F.3d at 143-144.

Although it would have been better to proceed differently on cross-examination, the government did not engage in the type of "starkly offensive" and

misleading conduct that occurred in *Richter*. Many law enforcement officers testified in the government's case-in-chief, yet none of the improper questions involved asking whether those law enforcement officers had lied on the stand. Such a scenario is more likely to be prejudicial than asking such questions about lay witnesses because law enforcement's "credibility might be strengthened by the association with the government." *United States* v. *Weiss*, 930 F.2d 185, 195 (2d Cir. 1991). Nor did the government call any rebuttal witnesses "to substantiate the testimony of government witnesses after [Folks] testified." *Ibid.*

Most significantly, the government did not rely on this improper questioning to "patently mislead" the jury about the ultimate issues in the case. True, the government may have referenced this improper line of questioning by commenting that Folks "testified" that "all seven of these women[] were lying." Br. 69 (quoting JA3031). But this comment alone is not sufficiently prejudicial as to have changed the outcome at trial or called into question the fairness, integrity, or public reputation of judicial proceedings. See *Truman*, 688 F.3d at 143-144. The government made this statement only after Folks's counsel expressly accused the government's witnesses of lying "over and over and over again," including "lying about stuff that's so crucial in this case that it would sway" the jury's "decision one

way or the other."[14] JA2988-2989. Folks has not alleged that the challenged statement patently misled the jury about the ultimate issues in the case, as was the case in *Richter*, nor could he, as the government did not misdirect the jury's attention from what they needed to find to convict.

2. The Conduct Challenged In The Government's Summation Does Not Warrant A New Trial

Folks raises several challenges to comments the government made during closing argument, all of which relate to credibility. Br. 67-71. In particular, Folks takes issue with: (1) comments regarding the defendant's credibility; (2) comments regarding the defense expert's credibility; and (3) alleged vouching for the women who testified that they worked in Folks's drug- or sex-trafficking operations. But none of these comments were plainly improper, and even if they were, they did not substantially prejudice Folks when viewed in the entire context of the trial.

[14] Although the government in rebuttal characterized Folks as portraying the government's witnesses as "lying," none of these other instances directly reference Folks's testimony on the stand. See Br. 42-43 (citing JA3036-3037, 3039, 3042). Because this court does not "lightly infer" a remark in summation has its "most dangerous meaning," *United States* v. *Aquart*, 912 F.3d 1, 27 (2d Cir. 2018) (citation omitted), cert. denied, 140 S. Ct. 511 (2019), these remarks should be viewed as permissible references to defense counsel's express accusations that the witnesses were lying. See, *e.g.*, JA2988-2989.

a. The Government's Comments Regarding Folks's Credibility Were Not Plainly Improper

First, Folks asserts (Br. 68) that the government inappropriately argued that Folks had an incentive to lie because of his interest in the outcome at trial. In so doing, Folks relies on *United States* v. *Solano*, 966 F.3d 184 (2d Cir. 2020). There, this Court ruled that a district court may not instruct a jury that a testifying defendant has a motive to testify falsely due to his interest in the trial's outcome. *Id.* at 196. Such an instruction, this Court explained, undermines the presumption of innocence by ignoring that an innocent defendant has a motive to testify truthfully. *Id.* at 194. The case did not concern, as this case does, whether a prosecutor's similar statement during summation is improper. Nor does Folks identify any precedent, controlling or otherwise, which settles that question. Cf. *United States* v. *Smith*, 778 F.2d 925, 929 (2d Cir. 1985) (declining to decide such issue); *United States* v. *Salazar*, 485 F.2d 1272, 1280 (2d Cir. 1973) (finding no prejudicial error where prosecutor suggested that the defendant had a "greater motive to lie" than a government witness). As such, even if this comment was improper, it was not plainly so. See *Bastian*, 770 F.3d at 220.

Next, Folks challenges (Br. 41, 69-70) the government's comment that the defendant "heard all the testimony before he testified and could incorporate that into his testimony." JA2955. Again, Folks has not pointed to any

controlling authority establishing this statement was improper. To the contrary, the Supreme Court has held that "[a]llowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate." *Portuondo* v. *Agard*, 529 U.S. 61, 73 (2000). Thus, this comment was not improper.

Finally, Folks challenges (Br. 42-44, 69) the government's argument in rebuttal that believing Folks's testimony meant that the women who testified for the government were lying. Again, Folks's cites no authority establishing the impropriety of such an argument. Br. 69. Rather, this Court has held that a prosecutor permissibly may argue that believing a defendant's testimony requires the jury to find that certain government's witnesses had lied. *United States* v. *Shareef*, 190 F.3d 71, 79 (2d Cir. 1999). Additionally, a prosecutor may "make temperate use of forms of the word 'lie' * * * to characterize disputed testimony where credibility was clearly an issue," particularly where the prosecutor ties credibility to specific evidence before the jury. *Ibid.* (internal quotation marks and citations omitted).

Under this Court's precedent, and considering the broader context, the government permissibly argued on rebuttal that Folks's testimony was not "credible" (JA3038), was "improbable" (JA3041), and that his version of events meant that the women who testified for the government "were lying

about * * * his involvement" (JA3039). As Folks admits, the government "highlighted each of the witness' [sic] contrary testimony" before challenging Folks's credibility. Br. 42. Indeed, the government devoted much of rebuttal (JA3031-3053) to highlighting specific evidence that the jury should consider in weighing the credibility of Folks's version of events, including:

- consistent testimony among the government's witnesses (and defendant's witness) about whether Folks posted the women on Backpage.com, taught them to prostitute, and received 50% or more of their earnings (JA3034-3036, 3042);

- differences in demeanor on the stand between Folks and the government's witnesses (JA3032, 3036-3038, 3042);

- Folks's corroboration of dates and places that the government's witnesses mentioned (JA3037-3038);

- Folks's inconsistent testimony between direct and cross-examination regarding bagging drugs and selling drugs in the controlled buys (JA3039); and

- the conflict between Folks's testimony that he respected the women and that they benefitted equally from their arrangement with him and the video and photographic evidence depicting his degrading treatment of them (JA3032-3033, 3040-3041).

Furthermore, the government's comments permissibly responded to defense counsel's express and repeated accusations in closing that the government's witnesses were lying. See JA2989, 2993, 2998, 3000, 3002, 3005-3006. Indeed, defense counsel accused the government of failing to explain "why [the jury] should believe these witnesses * * * in the face of all

the lies that have been told." JA3007. When defense counsel "impugns [the] integrity" of the government's case or "attack[s] the prosecutor's credibility" or the credibility of witnesses, the government "is entitled to reply with rebutting language suitable to the occasion." *United States* v. *Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (citation omitted). And due to the improvisational nature of summation, "courts will not lightly infer that every [challenged] remark is intended to carry its most dangerous meaning." *United States* v. *Aquart*, 912 F.3d 1, 27 (2d Cir. 2018) (citation omitted), cert. denied, 140 S. Ct. 511 (2019). The government did not engage in misconduct by using defense counsel's repeated attacks that the witnesses were lying to frame its rebuttal.[15] For all of these reasons, the challenged remarks were not plainly improper.

b. The Government's Comments Regarding The Defense's Expert Were Not Improper

Without citing any authority, Folks also asserts (Br. 70) that the government committed misconduct by arguing that the defendant's computer

[15] Although defense counsel did not call the government's witnesses "hussies," Br. 43, 69 (citing JA3042), counsel did remark negatively on their sexual conduct in asking the jury to "judge what took place in this case." See JA2984-2986 (asking the jury to factor in "the women's world" in which they willingly gave "oral sex in exchange for drugs" and sent Folks nude photos of themselves). The government admits that this characterization of defense counsel's argument was not as "nuanced as the power of hindsight in a non-summation context would permit," but it was not plainly improper under the circumstances. *Sheehan*, 838 F.3d at 128 (citation omitted).

forensics expert, Anthony Martino, had a financial motive to testify at length. JA2958-2959. Not so. The "government has broad latitude in the inferences it may reasonably suggest to the jury during summation." *United States* v. *Edwards*, 342 F.3d 168, 181 (2d Cir. 2003) (citation omitted). Here, the government established on cross-examination that the expert's trial fee was higher than his consultation fee. JA2645. As a result, it was reasonable to infer that Martino had a financial reason to extend his testimony. Under these circumstances, and in the absence of any contrary authority, the challenged remark was not improper, let alone plainly so.

c. The Government Did Not Engage In Improper Vouching

Folks also incorrectly claims (Br. 67, 69) that the government improperly vouched for its witnesses. A prosecutor may not "'vouch' for their witnesses' truthfulness" by "express[ing] his or her *personal* belief or opinion as to the truth or falsity of any testimony." *Carr*, 424 F.3d at 227 (emphasis added; citations omitted; brackets in original). Such statements are improper when they "imply the existence of evidence not placed before the jury" and carry "the imprimatur of the Government," which "may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Williams*, 690 F.3d at 76 (citations omitted).

This Court has noted that "what might superficially appear to be improper vouching * * * may turn out on closer examination to be permissible reference to the evidence in the case." *Williams*, 690 F.3d at 76 (citation omitted). That is the case here. Folks alleges that the government engaged in improper vouching by stating that certain testimony of defense witness Brittany Barber was "credible" and that the government's witnesses were "a lot more credible than" Folks. Br. 43, 69. In making these comments, however, the prosecutor did not suggest he "had special knowledge of facts not before the jury," but instead "directed the jury's attention to evidence supporting his contention." *United States* v. *Perez*, 144 F.3d 204, 210 (2d Cir. 1998). The prosecutor described the women who testified as "more credible than" Folks based on their demeanor on the stand, which the prosecutor compared. JA3036-3038. Similarly, the prosecutor described Barber's testimony as "credible" by highlighting times her testimony was consistent with that of other witnesses, including by having a 50/50 arrangement with Folks and describing the effects of addiction on her decision-making. JA3046-3047. Context makes clear that neither of these instances involves the prosecutor sharing his personal belief that the witnesses were truthful based on extra-record evidence.

Second, prosecutors have "greater leeway in commenting on the credibility of their witnesses when the defense has attacked that credibility." *Perez*, 144 F.3d at 210. As a result, this court has excused the use of "I" statements, like those challenged here (Br. 69), when the government is responding to defense counsel "impugning of the credibility of the government's witnesses." *United States* v. *Hightower*, 376 F. App'x 60, 64 (2d Cir. 2010). Here, defense counsel repeatedly accused the government's witnesses of lying. See pp. 58-59, 62-63 *supra*. Although the prosecutor's comments in response to defense counsel's credibility attacks may have been inartful, this Court does not "lightly infer" that such remarks are "intended to carry [their] most dangerous meaning." *Aquart*, 912 F.3d at 27 (citation omitted). Under the circumstances, the prosecutor did not improperly vouch for any witnesses based on his position as a prosecutor.[16]

d. Even If Plainly Improper, The Government's Remarks Did Not Substantially Prejudice Folks

Even if any of these challenged remarks were plainly improper, they did not cause Folks substantial prejudice. Indeed, it is the "rare case in which [this

[16] For these same reasons, the prosecution's statement in rebuttal that the government's witnesses were "brave" for testifying was not improper vouching. See Br. 70. Here again, the government offered an assessment of its witnesses based on their demeanor on the stand, particularly referencing Mary and Chrissy, who both broke down in tears while testifying. JA3042.

Court] will identify a prosecutor's summation comments, even if objectionable" as warranting a new trial. *Aquart*, 912 F.3d at 27 (citation omitted). When considering here the "severity of the [alleged] misconduct," the curative measures taken, and "the certainty of conviction absent the [alleged] misconduct," Folks was not substantially prejudiced. *Certified Env't Servs*, 753 F.3d at 95 (citation omitted).

i. Severity Of The Alleged Misconduct

The alleged misconduct was not so "severe or significant" when judged in the context of the entire trial. *Sheehan*, 838 F.3d at 128 (citation omitted). Unlike in *Richter*, where the government created the accusation of government agents lying in the first instance, here, defense counsel first raised the prospect of government witnesses lying. Throughout defense counsel's cross-examination, counsel repeatedly insinuated or directly accused the women who testified for the government of lying on the stand. See, *e.g.*, JA1016, 1020, 1028, 1064-1065 (accusing Latulippe of lying to her advantage and asking her to state that "Ayla lies a lot"); JA1500-1502, 1526 (asking Chrissy whether she has no "problem lying if it would benefit [her]").

Additionally, the vast majority of the challenged remarks came on rebuttal after defense counsel attacked the government by suggesting that "only the defense" had raised the issue of credibility and that the government was not telling

the jurors "why [they] should believe these witnesses * * * in the face of all the lies that have been told." JA3007. Viewed in this context, the challenged comments were "invited by" defense counsel, which does not excuse them if they were improper, but is an appropriate consideration in determining "their effect on the trial as a whole." *Darden* v. *Wainwright*, 477 U.S. 168, 182 (1986); see also *United States* v. *Tocco*, 135 F.3d 116, 130 (2d Cir. 1998) (relying on invited reply doctrine). Furthermore, the government tempered its comments by cautioning the jury to "regard the testimony of the women carefully" and to "think carefully about their credibility" given that they struggled with addiction at the time of the disputed events. JA3034. Thus, when viewed against the entire trial and the argument to the jury, any improper remarks were not severe enough to substantially prejudice Folks.

ii. Curative Measures Taken

The district court's charge to the jury also mitigated any potential prejudice. The court instructed the jurors that "the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case," that the jurors were "the sole judges of the credibility of the witnesses," and that it was the jury's "job to determine the credibility or believability of each witness." JA3062-3063. This Court has treated such instructions as curative when government conduct improperly pervaded the province of the jury's credibility determinations, as Folks

alleges here. See, *e.g.*, *United States* v. *Greenberg*, 659 F. App'x 694, 697 (2d Cir. 2016); *United States* v. *Arias-Javier*, 392 F. App'x 896, 899 (2d Cir. 2010).

iii. Certainty Of Conviction

Finally, absent the alleged prosecutorial misconduct, Folks's conviction is not in doubt. As for the drug-trafficking charges, the jury heard ample evidence that did not even involve the credibility of testimony that was the subject of allegedly improper remarks. This evidence included:

- McFarlan's testimony about his involvement with Folks's drug business, including the quantities of heroin and crack cocaine McFarlan brought up from New York for Folks to sell, including the large quantities of heroin and crack he gave to Chrissy to hold (JA1287-1296, 1300, 1305-1306, 1309-1313, 1320-1333);

- McFarlan's testimony about the bagging sessions and his role watching women working for Folks bagging drugs (JA1292-1296);

- Agent Chetwynd's and CS's testimony regarding the four controlled heroin buys, including audio and visual recordings of the buys involving Folks as well as related recordings of phone calls and text messages with Folks (JA655-712, 719-736, 765-789);

- audio recordings of Folks, McFarlan, and Chrissy regarding the heroin and crack cocaine McFarlan gave Chrissy to hold that she turned over during the police investigation into Folks, including Folks threatening to beat Chrissy for crying and Folks telling her not to mention him to police (JA1325-1326 (Gov. Ex. 24), 1471-1481 (Gov. Ex. 24));

- testimony from local police about a traffic stop based on a tip that Folks would be transporting significant amounts of narcotics and the physical evidence of narcotics obtained from that stop (JA1178-1190);

- testimony from local police about the physical evidence seized from the Burlington residence where Folks stayed, including items used to package drugs for resale, such as wax-style and other baggies, a grinder, Inositol (drug-cutting agent), and a digital scale (JA1818-1829 (Gov. Exs. 61, 66, 81, 85, 86)); and

- expert testimony regarding the substances recovered from the controlled buys and law enforcement's searches (JA1561-1572).

Consistent with McFarlan's testimony, Folks admitted during his testimony that he knew McFarlan from New York, that McFarlan supplied him with drugs, that Folks purchased drugs in New York and brought them back to Vermont, and that Folks arranged the sales in connection with the DEA's controlled heroin buys. JA2779-2782, 2801, 2806-2811.

As for the sex-trafficking charges, the government provided sufficient evidence to corroborate the testimony of the women that Folks caused them to engage in commercial sex acts by force, fraud, or coercion, or, in the case of Hannah, that he trafficked a minor. The jury saw the pictures of Hannah on Folks's hard drive from when she was only 17, and then saw that those same pictures were posted to Backpage.com within an hour. JA2369-2376. The jury saw photos of Katelynn, Keisha, and Ayla from Folks's hard drive and then saw those same or similar photos on Backpage.com. JA2338-2340, JA2348-2349, 2315, 2320-2333, 2352-2355. The government's evidence also included hotel

receipts, phone records, Folks's Facebook posts, and exhibits from Backpage.com connected to Folks. See, *e.g.*, JA2350-2353, 2365-2367, 2390-2396, 2398-2401.

Most importantly, Folks's own testimony regarding facts relevant to the sex-trafficking charges supported those charges and was plainly incredible as to his treatment of the women and their independent willingness to engage in commercial sex acts (see, *e.g.*, JA2710, 2714-2715). Folks admitted to:

- earning money from the women's sex work, including making a 50/50 arrangement with Katelynn (*e.g.*, JA2688, 2734, 2741-2742);
- being at the hotels and other locations where the women testified they worked (*e.g.*, JA2684-2688, 2706-2708, 2715-2716, 2729, 2737-2738, 2740-2741);
- providing the women with cell phones (*e.g.*, JA2710);
- helping the women take pictures and post Backpage.com ads for commercial sex, including the pictures of Hannah (*e.g.*, JA2725-2726, 2728-2729, 2737-2738, 2740);
- transporting the women to locations to perform commercial sex (*e.g.*, JA2688, 2708-2709, 2732-2733); and
- providing the women with drugs—and even describing what the women described as "withholding" drugs as keeping them in "maintenance"—but not helping them to "get high" (JA2744-2745).

According to Folks, all he asked was that the women "[m]ake sure I got gas in my car, and give me whatever you want to give me." JA2741-2742. Folks also claimed to be in the porn industry, making money off of photos and videos. JA2694-2695, 2720-2721. But Folks significantly elaborated on this business only

after the prosecution presented him with a page from his journal containing a menu with prices for sexual acts, which he claimed was part of a scheme to film pornography by making the participants pay to star in it. JA2852-2854 (Ex. 141).

Finally, although Folks denied mistreating his sex workers or the women who worked for him in his drug business (see, *e.g.*, JA2799-2801), the jury saw photographic and video evidence to the contrary. Among other graphic evidence, this evidence consisted of stills from videos of Folks urinating on Keisha and Mary (JA2407-2408), photos of Mary that Folks made her give to him in exchange for cigarettes (JA1127-1128), and videos relating to the degrading sex act "challenge" featuring another woman working for Folks (JA2406-2407). The jury saw the red apron Latulippe claimed she was forced to wear hanging up in video of a controlled buy and in a photo of Hannah wearing it while naked, just as Latulippe said she was made to do. JA949-951. All of this evidence bolstered the testimony and credibility of the women who testified at trial. For all of these reasons, Folks's sex-trafficking convictions would not have been in doubt absent the alleged misconduct. Accordingly, Folks cannot show he is entitled to a new trial.

IV

THERE IS NO CUMULATIVE ERROR

Folks argues cumulative error as a final attempt at relief. Br. 73. Under this doctrine, if a defendant can show that "the cumulative effect of a trial

court's errors, even if they are harmless when considered singly" amounts to a "violation of due process," then this Court may grant a new trial. *United States* v. *Zemlyansy*, 908 F.3d 1, 18 (2d Cir. 2018) (alteration and citation omitted), cert. denied, 149 S. Ct. 1355 (2019).

The cumulative error doctrine does not apply here, where there is no error, let alone multiple errors amounting to a due process violation. First, for the reasons explained in Arguments I and II, there were no errors in admitting the computer evidence. Second, as set forth in Argument III, to the extent that prosecutorial misconduct occurred, these errors, even when viewed together, did not substantially prejudice Folks. Accordingly, Folks's cumulative error argument fails.

CONCLUSION

This Court should affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of 2d Cir. Local Rule 32.1(a)(4)(A) and this Court's order dated June 21, 2021 because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 15,967 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman, 14-point font.

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Date: June 25, 2021

CERTIFICATE OF SERVICE

I certify that on June 25, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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