No. 22-2178

In the United States Court of Appeals for the Eighth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSHUA JAMES DUGGAR,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, D. CT. NO. 5:21-CR-50014 (HON. TIMOTHY L. BROOKS)

RESPONSE BRIEF OF THE UNITED STATES

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In November 2019, law-enforcement officers conducted a search of a used-car lot owned by Joshua Duggar, during which they seized Duggar's desktop computer and other devices. Subsequent forensic analysis revealed child sexual abuse material on a partitioned section of that computer protected by the same password Duggar had used for years across numerous accounts. Following a jury trial, Duggar was convicted of receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1), and sentenced to 151 months in prison, to be followed by 20 years of supervised release.

On appeal, Duggar asserts error in three of the district court's evidentiary rulings. First, he argues (Br. 19-31) that the court's limitation on his questioning of a potential witness deprived him of his constitutional right to present a defense. Second, he disputes (Br. 32-43) the court's resolution of his pretrial motion to suppress statements that he voluntarily offered to investigators during the car-lot search. Third, he contends (Br. 43-54) that the court abused its discretion when admitting and delimiting testimony about geolocation metadata extracted from one of his devices.

For the reasons that follow, Duggar's claims uniformly lack merit, and the district court's judgment should be affirmed in its entirety. But given the number of issues controverted between the parties on appeal and the substantial sentence imposed below, the government does not oppose Duggar's request (Br. i) for oral argument. In our view, an allotment of 15 minutes per side will be adequate to air these disagreements and address any questions that the Court may have.

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STATEMENT OF THE ISSUES

1. Whether the district court acted within its discretion when it required Duggar to first develop an evidentiary basis for a potential witness's proximity to the offense conduct before he could present that witness as an alternative perpetrator.

- *Holmes* v. *South Carolina*, 547 U.S. 319 (2006);
- *Armstrong* v. *Hobbs*, 698 F.3d 1063 (8th Cir. 2012);
- *United States* v. *DeNoyer*, 811 F.2d 436 (8th Cir. 1987).

2. Whether the district court correctly declined to suppress statements that Duggar offered to investigators on the premises of his own business, while under no physical restraints, after being repeatedly informed that he was not in custody and was free to leave at any time, and before voluntarily departing without being arrested.

- *United States* v. *Griffin*, 922 F.2d 1343 (8th Cir. 1990);
- *United States* v. *Hoeffener*, 950 F.3d 1037 (8th Cir. 2020);
- *United States* v. *Muhlenbruch*, 634 F.3d 987 (8th Cir. 2011).

3. Whether the district court acted within its discretion by permitting a government expert to testify about photographic metadata that he had analyzed and restricting a defense expert from opining on the same metadata that she acknowledged having never reviewed despite being provided an opportunity to do so.

- *United States* v. *Banks*, 43 F.4th 912 (8th Cir. 2022).

STATEMENT OF THE CASE

Following a jury trial, Duggar was convicted of receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1). R. Doc. 162 at 1. He was sentenced to 151 months in prison, to be followed by 20 years of supervised release. *Id.* at 2-3.

A. Factual Background

1. In May 2019, a member of the Internet Crimes Against Children taskforce was running "Torrential Downpour," a program that scans online networks for known files of child sexual abuse material (CSAM).[1] TR., Vol. 2, pp. 63-70. The program detected that a video containing CSAM was being shared by an Internet Protocol (IP) address in Springdale, Arkansas. *Id.* at 68. That video depicted "two prepubescent females, both nude, zoomed in on their vaginal areas being penetrated by an adult male's erect penis." *Id.* at 79. The next day, Torrential Downpour again alerted to the same IP address. *Id.* at 78-80. Follow-up inquiries by Homeland Security Investigations (HSI) revealed that the IP address "was registered to a Joshua Duggar." *Id.* at 129-30.

2. On November 8, 2019, HSI executed a search of Wholesale Motorcars, a used-car lot that Duggar owned. R. Doc. 77, at 23. HSI Special Agents Gerald Faulkner and Howard Aycock approached Duggar, identified themselves, and informed him that they were there to execute "a federal search warrant, not an arrest warrant." *Id.* at 26-27.

[1] The National Center for Missing & Exploited Children recommends using the term "child sexual abuse material" rather than "child pornography" to reflect that this material depicts the sexual abuse and exploitation of children. *See Overview*, Nat'l Ctr. for Missing & Exploited Children, https://www.missingkids.org/theissues/csam.

When Duggar pulled out a cell phone to call his attorney, Faulkner explained to him "that th[e] phone was considered evidence" and took it from his hand. *Id.* at 27. Faulkner made clear to Duggar that he "was free to leave if he chose to do so." *Ibid.*

About ten minutes later, the agents asked if Duggar was willing to speak to them. R. Doc. 77, at 32-33. Duggar agreed, and he, Faulkner, and Aycock got into Aycock's truck. *Id.* at 33-34. Duggar then asked, "Has somebody been downloading child pornography?" *Id.* at 35. Aycock confirmed that Duggar was "willing to speak with us now without an attorney present," to which Duggar responded, "I may not answer everything, I guess, but, yes." *Id.* at 39-41. Duggar signed a waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *Id.* at 41-42.

Faulkner told Duggar that an IP address participating in the "sharing of . . . child pornography" was registered under Duggar's name. R. Doc. 77, at 84-85. He asked if Duggar had ever "come across something of an inappropriate nature on the internet," to which Duggar replied, "Well, I—I can't answer that question." *Id.* at 89. When Faulkner asked specifically about "child pornography images of kids ranging between 5 and 10 years of age," Duggar replied, "I'd rather not answer that question." *Id.* at 92.

Duggar terminated the interview shortly thereafter and left the car lot. R. Doc. 77, at 99-105, 110. The HSI team continued to process the scene after Duggar's departure. *Id.* at 110. In addition to Duggar's previously confiscated iPhone, agents seized an HP desktop computer and an Apple MacBook laptop from the premises. *Ibid.*

3. James Fottrell, Director of the High Technology Investigative Unit at the Department of Justice, reviewed a forensic copy of Duggar's HP desktop and found that the computer had been outfitted with a password-protected, partitioned section running the Linux operating system. TR., Vol. 3, p. 466. A program called "Covenant Eyes," which "monitors the[] online usage" of individuals "who have pornography addictions," had been installed on the Windows side of the desktop but not the Linux partition. R. Doc. 77, at 128; *see* TR., Vol. 3, p. 368 (Covenant Eyes executive testifying that the program would not "catch anything from the Linux side"). Fottrell also examined the MacBook, on which he found an iPhone backup. TR., Vol. 4, p. 601.

Fottrell was able to create a timeline (Gov't Exh. 85) of five dates in May 2019:

May 11, 2019: At 5:47 p.m., the Linux installation program was downloaded on the HP desktop in Duggar's office. Gov't Exh. 28, at 12. At 5:58 p.m., Duggar's iPhone was used to take a picture at the car lot. Gov't Exh. 71; *see* Gov't Exh. 85, at 1.

May 13, 2019: At 1:52 p.m., the Linux partition was installed using the password "Intel 1988." Gov't Exh. 30. Duggar had used variants of "Intel 1988"—the last four digits of which are his birth year, R. Doc. 77, at 130—"ubiquitously" across "a number of different accounts" since at least 2014, TR. Vol. 4, pp. 801-07.[2] At 3:06 p.m., Duggar's iPhone took a photo at the car lot. Gov't Exh. 73; *see* Gov't Exh. 85, at 1.

[2] *See, e.g.*, TR., Vol. 4, p. 598 (browser password-manager application included "IntelJJD1988"); *id.* at 599 (Duggar's bank-account password was "Intel 1988!"); *id.* at 608-09 (emails identifying accounts Duggar had set up using password "Intel 1988").

May 14, 2019: At 4:14 p.m. and 4:20 p.m., Duggar's iPhone was used to take a photo of a vehicle at the car lot, Gov't Exh. 74, at 3; and of the HP desktop screen in Duggar's office, *id.* at 4. Between 5:05 p.m. and 5:38 p.m., multiple CSAM files were downloaded on the Linux partition. Gov't Exhs. 32, 38, 39, 85. At 5:42 p.m., the law-enforcement program Torrential Downpour detected that Duggar's IP address was sharing CSAM. Gov't Exh. 1; *see supra* p. 2. At 5:49 p.m., Duggar's iPhone sent a text message stating, "At my carlot." Gov't Exh. 75, at 2; *see* Gov't Exh. 85, at 1.

May 15, 2019: At 11:15 a.m., Duggar's iPhone was used to send a message stating, "I'm at my car lot now." Gov't Exh. 77, at 1. Twenty minutes later, a CSAM file named "14yo girl Suck and Fuck.flv.torrent" was downloaded on the Linux partition of the HP desktop. Gov't Exh. 39. Over the ensuing 15 minutes, several additional CSAM files were downloaded. Gov't Exh. 85, at 1. At 5:08 p.m., Duggar's iPhone sent a message stating, "I'm here at the car lot :) Will be here till around 6 or so." Gov't Exh. 77, at 4. Additional CSAM files were downloaded between 5:22 p.m. and 5:41 p.m. Gov't Exh. 85, at 2. At 5:58 p.m., Duggar's iPhone sent a message stating, "Still her[e] have customers here." Gov't Exh. 77, at 5; *see* Gov't Exh. 85, at 1-2.

May 16, 2019: At 11:21 a.m., another CSAM file was downloaded on the Linux partition. Gov't Exh. 39. Fourteen minutes later, Duggar's iPhone was used to take a photo in his office at the car lot. Gov't Exh. 78; *see* Gov't Exh. 85, at 2.[3]

[3] All exhibits cited herein (excluding those already produced in Duggar's appendix) are included in a supplemental appendix filed alongside this brief.

B. Procedural History

1. In April 2021, a grand jury in the Western District of Arkansas indicted Duggar on one count each of receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1) (Count 1); and possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) (Count 2). R. Doc. 1, at 1-2.

2. Duggar moved to suppress the statements he had provided to HSI agents during the search of his car lot. R. Doc. 36. After an evidentiary hearing, the district court denied Duggar's motion. R. Doc. 77 (oral ruling); R. Doc. 61 (written ruling).

3. The government called ten trial witnesses: Detective Amber Kalmer, who testified about the Torrential Downpour hits that alerted her to Duggar's IP address, TR., Vol. 2, pp. 67-73; Faulkner, who described executing the car-lot search and interviewing Duggar, *id.* at 134-99; Matthew Waller, who testified that he was the only employee at Wholesale Motorcars in early 2019, TR., Vol. 3, p. 337; Jeffrey Wofford, an executive at Covenant Eyes, who described how their pornography-monitoring software operated, *id.* at 360-61; Jeff Pryor, an HSI agent who led the team that searched Duggar's property, *id.* at 377-78; Marshall Kennedy, an HSI computer analyst who imaged Duggar's devices and sent them to Fottrell, *id.* at 411; Fottrell, who testified about, *inter alia*, the CSAM he had found on Duggar's computer, TR., Vol. 4, pp. 584-86; Clint Branham, a close acquaintance of Duggar's, who testified that Duggar had discussed using a partition on his computer to circumvent the Covenant Eyes program, TR., Vol. 5, pp. 919-20; Jim Holt, a family friend, who recounted a conversation with

Duggar about how to set up a Linux partition, *id.* at 934; and Bobye Holt, who testified that Duggar had confessed to molesting four girls, including one as young as five years old, when he was a teenager, *id.* at 950-52.

The defense case centered on the possibility that Duggar's computer had been accessed remotely. He called two witnesses: Michele Bush, a forensic analyst who testified that she could not "rule out remote access," TR., Vol. 5, p. 1110, but acknowledged that the Linux partition had to have been installed by someone physically present at the computer, TR., Vol. 6, p. 1183; and Daniel Wilcox, a former law-enforcement officer who recounted playing an undercover role as a prospective vehicle-purchaser at Duggar's car lot before the search, *id.* at 1344-51.

4. The jury convicted Duggar on both counts. R. Doc. 120. Finding the possession charge to be a lesser-included offense of receipt, the district court dismissed Count 2 without prejudice and entered sentence only on Count 1. R. Doc. 159.

SUMMARY OF ARGUMENT

I. The district court correctly predicated Duggar's proposed strategy of portraying a witness as an alternative perpetrator—and, specifically, impugning that witness by reference to an unrelated prior conviction—on his first laying a foundation for the witness's capacity to have downloaded CSAM on Duggar's computer. That modest, contingent limitation was an appropriate exercise of the court's wide latitude to exclude irrelevant, misleading, and unfairly prejudicial evidence; and it was consistent with precedent of the Supreme Court, of this Court, and of its sibling circuits, all of

which have held that such a theory requires some nexus between the putative perpetrator and the offense conduct. In any event, the court's ruling had no effect on the verdict, as Duggar's scapegoat could not possibly have committed these offenses.

II. Duggar's Fifth Amendment rights are not implicated here because he was not in custody during his conversation with investigators. That interview occurred on the premises of Duggar's car lot, with no restraints on Duggar's movement, after Duggar had been repeatedly informed that he was not under arrest and was free to leave, and before Duggar exercised that liberty by ending the interview and voluntarily departing the scene without being arrested. The agent's warranted seizure of Duggar's cell phone does not indicate otherwise, as Duggar's attempt to contact counsel did not occur during or in close proximity to custodial interrogation. Moreover, even if the interaction qualified as custodial, Duggar knowingly and voluntarily waived his rights.

III. The district court appropriately admitted and delimited expert testimony about metadata gleaned from the iPhone backup on Duggar's MacBook. The government's expert—who testified to having analyzed thousands of devices across numerous investigations—was qualified to opine on the extraction and interpretation of metadata. The defense expert—who admitted having never reviewed the metadata that the government presented, despite having ample opportunity to do so—was appropriately limited from offering conjectural skepticism of the government's exhibits without any percipient basis. Regardless, the photographs, text messages, and other uncontroverted evidence corroborating the metadata rendered any error harmless.

ARGUMENT

I. The District Court Appropriately Required Duggar to Develop an Evidentiary Basis Before Presenting a Potential Witness as an Alternative Perpetrator.

A. Background

1. Before trial, Duggar pointed to three alternative perpetrators: William Mize, Joshua Williams, and Randall Berry. *See, e.g.*, R. Doc. 40, at 3-4; R. Doc. 67, at 2. Duggar withdrew his allegation against Joshua Williams after the government pointed out that one of Duggar's own attorneys had represented Joshua Williams in a criminal matter that resulted in his being held in custody during May 2019. R. Doc. 77, at 10-15. By the start of trial, Duggar floated a new name: Caleb Williams, a former Wholesale Motorcars employee. TR., Vol. 2, pp. 58-59. As with Duggar's other "suspects," "[n]one of [the government's] interviews, nor [its] forensic examinations, put Mr. Williams on the car lot on [the] dates in question in May 2019." TR., Vol. 3, p. 312.

Duggar informed the court that he planned to call Caleb Williams to the stand. TR., Vol. 6, p. 1353. The government sought to clarify that—based on the testimony about the necessity for in-person installation of the Linux partition, *see supra* p. 7—Duggar would "have to establish" that Williams was "there May 13th"; otherwise, his testimony would be irrelevant because he was not present for any of the pertinent conduct. *Id.* at 1354. The court stated that it would "not allow speculative testimony or speculative argument about alternative perpetrators" but that it did not yet know "what [Williams's] knowledge was." *Ibid.*

The parties agreed that Williams had told their investigators that he was not present at the car lot between May 14 and 16 (the dates when CSAM was downloaded). TR., Vol. 6, p. 1358. The government then noted that it had disclosed evidence showing that Williams was not at the lot—nor even in Arkansas—on the date the Linux partition was installed (May 13) or the dates when CSAM was downloaded (May 14-16):

> [H]e left Jed Duggar's car lot on May 11th, stopped in St. Louis and got a new iPhone, which we have the receipt and the Apple representative here verifying that he was there. He then drove to his mother's house [in Illinois] on May 11th. On May 12th, Mother's Day, we have his mother here who said, "By the way, I took a video of him," which we turned over the stills, "moving furniture," which she will identify. And then on May 13th, he does engraving, I mentioned, and this is a huge machine that his mom will verify also that he is in Illinois this entire time frame. It corroborates exactly what he said all the way up to the 16th where they left, as a family, in a van for a wedding.

Id. at 1359; *see also* R. Doc. 156, at 18 (cataloguing evidence). The government argued that, because Williams was far from the car lot during the relevant conduct, Duggar's theory was "a rabbit trail"—and "the only obvious reason why the defense is wanting to call [Williams]" was that "he's a sex offender." TR. Vol. 6, pp. 1359-60.

Duggar acknowledged that his "overriding purpose" for calling Williams was "to make an argument that he was an alternative perpetrator" but averred that he was "not exclusively" calling the witness for that purpose. TR., Vol. 6, p. 1360. Instead, Duggar asserted that Williams could testify "that he sold a car as a salesperson at the car lot," which "shows that there were other sales people other than is reflected in the employment records." *Ibid.* Duggar conceded, however, that "any application of [Rule]

403 would have to be based on consideration of how [Williams] testifies, what he says, how the Court observes him." *Id.* at 1361.

The district court largely agreed with the defense, permitting Duggar to call Williams as a witness and develop a basis for an alternative-perpetrator theory. The court explained to Duggar that he could call Williams and "establish background of who he is and what his connection is"; "discuss the dates of his employment"; "ask him whether or not he has knowledge or recollection of being present on the car lot on or about May 13 through May 16"; "inquire if he ever remoted in to the office machine, and if so, the time periods in which he would have remoted in." TR., Vol. 6, p. 1363. If such questioning "establishe[d] that [Williams] was present or that he had remoted in," the court stated that Duggar could "take this one step further" and "ask these other questions" to establish him as an alternative perpetrator. *Ibid.* The court ruled, however, that, "assuming . . . [Williams] wasn't present on the lot" and "he testifies that he's never remoted in, . . . the primary purpose or objective of calling the witness will have failed," and the court thus would not "allow speculative testimony that he was the alternative perpetrator." *Id.* at 1364. The court cited three cases for the proposition that alternative-perpetrator evidence must be grounded in some "'nonspeculative nexus between the crime charged and the alleged perpetrator.'" *Id.* at 1362 (discussing *Holmes* v. *South Carolina*, 547 U.S. 319 (2006); *United States* v. *Jordan*, 485 F.3d 1214 (10th Cir. 2007); and *United States* v. *McVeigh*, 153 F.3d 1166 (10th Cir. 1998)).

Duggar rested without calling Williams. TR., Vol. 6, p. 1365.

2. Post-trial, Duggar contended that the limitation on Williams's testimony "effectively precluded Duggar from presenting a necessary defense witness." R. Doc. 131, at 11. Denying relief, the court noted that it had "*expressly permitted* Mr. Duggar's counsel to call Mr. Williams to the stand," "suggested asking him preliminary questions to establish a 'background of who he is and what his connection is' to [the] case," and "*reserved ruling* on whether defense counsel would be permitted to take his questions a step farther and suggest Mr. Williams may have committed these crimes," since that presentation would require "an appropriate foundation." R. Doc. 156, at 19.

B. Standard of Review

This Court "review[s] evidentiary rulings for abuse of discretion" and "reverse[s] only 'if the district court's evidentiary rulings constitute a clear and prejudicial abuse of discretion.'" *United States* v. *Aungie*, 4 F.4th 638, 644 (8th Cir. 2021). Appellate courts "review a 'decision to admit [or deny] alternative perpetrator evidence under an abuse of discretion standard.'" *United States* v. *Meisel*, 875 F.3d 983, 998 (10th Cir. 2017).[4]

[4] Duggar seeks (Br. 19) *de novo* review on the ground that the ruling "implicate[d his] constitutional right to present a complete defense." This Court "ha[s] recognized the right of a criminal defendant to present a complete defense," but always "with the caveat that it may be limited by other legitimate interests of criminal trials, such as excluding incompetent, irrelevant, or privileged testimony." *United States* v. *West*, 829 F.3d 1013, 1017 (8th Cir. 2016). Whether such an exclusion was justified is a discretionary determination by the district court, to which "the 'Constitution leaves . . . wide latitude to exclude evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues.'" *Ibid.* Duggar's contention is ultimately a challenge to the court's exercise of its "wide latitude to exclude evidence" (*i.e.*, a garden-variety abuse-of-discretion claim) alongside an argument for why that ruling impaired his defense (*i.e.*, a garden-variety prejudice claim).

C. The District Court Acted Within Its Discretion by Conditioning Duggar's Alternative-Perpetrator Theory on the Testimony That Williams Provided.

This Court has recognized that district courts "ha[ve] wide latitude to exclude evidence as irrelevant and speculative." *United States* v. *Wilkens*, 742 F.3d 354, 364 (8th Cir. 2014). And Federal Rule of Evidence 403 permits a district court to "exclude [even] relevant evidence if its probative value is substantially outweighed by a danger of," *inter alia*, "unfair prejudice, confusing the issues, [or] misleading the jury." The district court appropriately exercised its broad discretion here by conditioning Duggar's depiction of Williams as an alternative perpetrator on his first developing an evidentiary basis establishing Williams's capacity to commit the offense conduct.

1. The District Court Did Not Preclude Williams's Testimony.

As a threshold matter, it is important to note what the district court did *not* do here. The court did not—contrary to Duggar's framing (Br. 25-26)—violate Duggar's right to compel the presence of a witness under the Compulsory Process Clause; rather, as Duggar acknowledges (Br. 22), Williams was "physically present," available to testify, and simply uncalled by the defense. The court likewise did not—contrary to Duggar's assertion (Br. 19)—"preclud[e him] from calling . . . a critical witness at trial"; instead, the court explicitly ruled that Williams *could* testify, imposed *no* limitation on Duggar's questioning of him with respect to any of the events or circumstances to which he was a percipient witness (*e.g.*, his employment at the car lot, his text messages with Duggar, etc.), and permitted Duggar to establish a factual basis for Williams's presence at the

car lot *or* remote access to Duggar's computer on any date between May 13 and 16, both through Williams's testimony and any other means.

The court imposed a singular, narrow, and contingent restriction: conditioning Duggar's presentation of Williams as an alternative perpetrator—principally, through the introduction of Williams's unrelated prior conviction—on Duggar's first having established some minimal connection between Williams and any of the events relevant to the charged offenses. Apparently aware that he could not adduce any nonspeculative nexus between Williams and the pertinent conduct through Williams's testimony, Duggar opted not to even try. But the court's hypothetical limitation did not preclude Duggar from calling Williams and adducing testimony relevant to his defense.

2. The District Court Appropriately Exercised Its Discretion Pursuant to Alternative-Perpetrator Precedent.

The district court appropriately prevented Duggar from injecting into the trial irrelevant and confusing testimony in service of an unsupported alternative-perpetrator theory. As the court noted, "the only proffered evidence was that Mr. Williams was *not* present in Arkansas on May 13-16"—the date range covering all conduct relevant here. R. Doc. 156, at 21. Nevertheless, the court gave Duggar leeway to call Williams and establish through his testimony his capacity to have committed these offenses—and thereby lay a foundation for Duggar's theory. That course was consistent with the guideposts for such evidence set out by the Supreme Court and this Court, and it accordingly represented an appropriate exercise of the district court's discretion.

a. In *Holmes* v. *South Carolina*, 547 U.S. 319 (2006), the Supreme Court struck down a South Carolina "rule that 'where there is strong evidence of [a defendant's] guilt . . . the proffered evidence about a third party's alleged guilt' may (or perhaps must) be excluded." *Id.* at 329. The Court noted "wide[] accept[ance]" of the principle that, while "[t]he accused may introduce any legal evidence tending to prove that another person may have committed the crime," such evidence "may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote." *Id.* at 327. That approach is permissible, the Court determined, because it "exclud[es] evidence that has only a very weak logical connection to the central issues." *Id.* at 330. The rule invalidated in *Holmes*, by contrast, effected a categorical exclusion whenever the prosecution's case was sufficiently strong, without weighing the countervailing value of "defense evidence of third-party guilt." *Id.* at 329.

Here, the court's limitation appropriately rested on the condition that Williams would testify as both parties had proffered—namely, that he would explain that he was nowhere near Duggar's computer on any relevant date. Duggar proffered no evidence from any other source that Williams was present at the car lot on the relevant dates or had ever remotely accessed Duggar's desktop.[5] He would thus have had to rely solely

[5] Duggar points (Br. 28) to evidence generally linking Williams to the car lot, such as his previous "use[of] the HP computer," his "messages with Duggar," and his prior "work[] at Wholesale Motorcars," including "a March 27, 2019 car sale[.]" The court expressly permitted Duggar to explore those topics in his questioning. *See supra* p. 11. But none of that evidence connects Williams to the car lot *at the time of the relevant conduct*.

on Williams's testimony to establish a foundation for that theory. Had Duggar called Williams and Williams testified as proffered, however, any connection between Williams and the offense conduct would have been so "speculative or remote" as to bear "only a very weak logical connection to the central issues" in the case, *Holmes*, 547 U.S. at 329—and was thus permissibly curtailed.

Although Duggar argues (Br. 23) that the district court applied an incorrect legal rule in limiting this evidence, the entire record shows that the court simply made a misstatement that it later corrected; it did not misunderstand or misapply governing principles. When ruling from the bench, the court quoted a section of *Holmes* that recited the state rule the Supreme Court invalidated, TR., Vol. 6, p. 1362, rather than the contrasting principle (which the *Holmes* Court endorsed) that alternative-perpetrator evidence "may be excluded where it does not sufficiently connect the other person to the crime," *Holmes*, 547 U.S. at 327. As the district court subsequently explained in its written ruling, it "inadvertently read the wrong passage into the record during the sidebar conference. However, immediately after reading the *Holmes* passage, the [c]ourt read from two other leading cases, . . . both of which correctly recited the legal standard the [c]ourt relied on." R. Doc. 156, at 19-20. That explanation is consistent with the court's statement during sidebar that "the money quote" was that alternative-perpetrator evidence requires a "'nonspeculative nexus between the crime charged and the alleged perpetrator.'" TR., Vol. 6, p. 1362; *accord* TR., Vol. 5, pp. 910-11 (court stating the correct "demonstrable nexus" principle the day before).

b. The district court's exercise of its discretion is likewise consistent with appellate caselaw—including this Court's precedent—applying *Holmes*.

In *Armstrong* v. *Hobbs*, 698 F.3d 1063 (8th Cir. 2012), this Court evaluated an Arkansas state-court rule "under which defendants may not introduce evidence tending to show that someone other than the defendant committed the crime charged unless that evidence points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible." *Id.* at 1065. In upholding that rule, this Court noted that *Holmes* had endorsed a substantially similar principle: namely, that it is permissible to "exclude[] 'evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.'" *Id.* at 1067. This Court then concluded that "exclud[ing alternative-perpetrator] evidence based on the strength of the link between that evidence and the crime" is "exactly the type of analysis the Supreme Court validated in *Holmes*." *Ibid.*

This Court's sibling circuits have applied *Holmes* in the same manner. As the district court noted, the Tenth Circuit has held that "courts may properly deny admission of alternative perpetrator evidence that fails to establish, either on its own or in combination with other evidence in the record, a non-speculative 'nexus' between the crime charged and the alleged perpetrator." *Jordan*, 485 F.3d at 1219. The Second

and Fourth Circuits have similarly urged that "[a] court must be sensitive to the special problems presented by 'alternative perpetrator' evidence and must ensure that the defendant shows a sufficient nexus between the crime charged and the asserted 'alternative perpetrator.'" *United States* v. *Hendricks*, 921 F.3d 320, 331 (2d Cir. 2019); *United States* v. *Hicks*, 307 F. App'x 758, 761 (4th Cir. 2009) (unpublished) ("[T]here must be evidence that there is a connection between the other perpetrators and the crime, not mere speculation on the part of the defendant."). The Fourth Circuit's decision in *Hicks* is particularly on point, as it affirmed the exclusion of an alternative-perpetrator theory in a CSAM case because the defendant could not "demonstrate a nexus between the crime charged and the alleged alternative perpetrator[.]" *Ibid.* In sum, the consensus view[6] is that "[i]t is not sufficient for a defendant merely to offer up unsupported speculation that another person may have done the crime" because "[s]uch speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice." *Jordan*, 485 F.3d at 1219.

[6] Faintly suggesting a circuit split, Duggar cites (Br. 30-31) *United States* v. *Crosby*, 75 F.3d 1343 (9th Cir. 1996), but that case does him no favors. There, the Ninth Circuit vacated a conviction based on its finding that "[t]he excluded evidence . . . showed that someone other than Crosby had the opportunity, ability and motive to commit the crime." *Id.* at 1347 (noting that the alternative perpetrator, *inter alia*, "lived a mere five miles from where the assault occurred *and was in the general area at the time*" (emphasis added)). Here, Duggar's own expert narrowed the field of individuals who had "the opportunity[or] ability" to commit the offenses to those with physical access to Duggar's computer on May 13, 2019. Because uncontroverted evidence placed Williams outside Arkansas between May 13 and 16, *Crosby*'s distinct holding on materially different facts is inapposite.

3. The District Court's Exercise of Discretion Was Consistent with This Court's Guidance Against Alternative-Perpetrator Evidence Based on Prior Offenses.

As the district court correctly determined, "the only reason for calling [Williams] was to reveal his sex offense conviction to the jury." R. Doc. 156, at 21. But "[w]ithout proof of a non-speculative nexus between Mr. Williams and the offense conduct in this case, the jury's knowledge of his sex offense conviction was of little probative value and would have misle[d] the jury and likely created the danger of unfair prejudice—all which are legitimate grounds to exclude this evidence under Rule 403." *Ibid.*

Indeed, this Court has flagged the danger of alternative-perpetrator evidence predicated on unrelated prior offenses. In *United States* v. *DeNoyer*, 811 F.2d 436 (8th Cir. 1987)—a child-sexual-abuse case—this Court reviewed the district court's "exclusion of [the defendant's] offers to prove that his wife's brother undressed a five-year-old girl at a prayer meeting; that a neighbor two houses away from the DeNoyer dwelling had committed sodomy a year previous to the incident in the case at bar; and that other deviant sex offenders were operating in the community." *Id.* at 440. Deeming such testimony "pure 'red herring' [that] had no probative value in establishing the culpability of any party other than the defendant," this Court held that "[t]his sort of evidence was properly excluded as remote and speculative." *Ibid.*; *see also United States* v. *Thibeaux*, 784 F.3d 1221, 1226 (8th Cir. 2015) ("Evidence of other crimes committed by another person to show that person committed the crime at issue is admissible, provided the circumstances of the other crime are sufficiently similar to

make it relevant," but "such evidence 'may be excluded where it does not sufficiently connect the other person to the crime.'").

Likewise here, pitching Williams as the perpetrator based on his unrelated prior conviction was "pure 'red herring,'" and the court appropriately required Duggar to establish an adequate foundation before introducing that evidence.

D. Any Error Was Harmless Because Williams Was Not a Plausible Alternative Perpetrator.

Even if this Court were to identify an abuse of discretion, such an error could not have swayed the verdict. "An evidentiary error is harmless if the substantial rights of the defendant were unaffected and the error did not influence or had only a slight influence on the verdict." *United States* v. *Peneaux*, 432 F.3d 882, 894 (8th Cir. 2005).

Williams's testimony would not have affected the verdict. This Court need not even consider the overwhelming evidence implicating Duggar as the culprit, including: the testimony that he had discussed setting up a Linux partition to avoid the Covenant Eyes software; the fact that the partition was created with an unusual password that Duggar had used across numerous accounts for years; and the text messages placing Duggar at his car lot on the same dates and times that CSAM was downloaded on his computer in his office. The critical point is that *no evidence* inculpates Williams.

As the district court explained, Duggar's attorneys "made the strategic decision *not* to call Mr. Williams to the stand because: (1) they knew they could not lay a nonspeculative foundation for his testimony, and (2) any such attempt to do so would

invite the Government's proffered rebuttal testimony." R. Doc. 156, at 20. Discussing Williams's expected testimony, Duggar "confirmed he was aware of no evidence placing Mr. Williams in Arkansas between May 14 and May 16, 2019"—the dates of the offense conduct—and, in fact, "had no evidence that Mr. Williams was in Arkansas on May 13 or anytime thereafter." *Id.* at 20-21. Quite the contrary: "the only proffered evidence was that Mr. Williams was *not* present in Arkansas on May 13-16." *Id.* at 21.

That timeline is fatal to Duggar's theory because both forensic experts—the government's and Duggar's—testified that the Linux partition (which contained all of the CSAM) had been installed on May 13 by someone *physically present* at Duggar's computer. *See* TR., Vol. 3, p. 493 (Q: "[W]ould someone have to physically be present at the HP computer to do that?" Fottrell: "Yes."); TR., Vol. 4, p. 588 (Fottrell: "Somebody needs to be physically there" because "the act of installing the Ubuntu Linux operating system" requires "install[ing] a thumb drive"); TR., Vol. 6, pp. 1182-83 (Q: "[Y]ou agree that the installation had to have been done by someone who was physically present at the car lot, is that right?" Bush: "Yes.").

To be sure, the experts diverged as to whether the Linux partition might have been accessed remotely between May 14 and 16, with Fottrell testifying that he "did [not] find any evidence that this computer had been remotely accessed," TR., Vol. 4, p. 856; and Bush agreeing that "[t]he evidence doesn't exist" to support remote access, TR., Vol. 6, p. 1230, while maintaining that she could not "rule out remote access," TR., Vol. 5, p. 1110. But even granting the theoretical possibility of remote access, Duggar

has never explained how Williams could have *physically installed* the partition on the desktop when he was, according to all available evidence, not even in the same state on the date of installation. Duggar also has never explained how, if someone else installed the partition, Williams would have learned of that fact and obtained remote access for the purpose of viewing CSAM on Duggar's newly partitioned computer. That Duggar cannot articulate a minimally plausible inculpatory theory as to Williams both confirms that the court's ruling was correct and demonstrates that even an error in that respect would not have affected the verdict.

II. The District Court Correctly Declined to Suppress Duggar's Noncustodial Statements to Investigators.

A. Background

Duggar moved to suppress his statements during the November 2019 search, contending that—although he signed a waiver after being informed of his *Miranda* rights—Faulkner's earlier seizure of Duggar's phone negated his consent. R. Doc. 36. The district court held an evidentiary hearing, at which Faulkner testified. R. Doc. 77. The focus was whether the agents' conversation with Duggar had been custodial; indeed, Duggar's counsel "concede[d] that whether Mr. Duggar was in custody is a threshold issue that's necessary for us to prevail on this motion." *Id.* at 229-30.

The district court denied the motion. The court first applied the six-factor test set out in *United States* v. *Griffin*, 922 F.2d 1343 (8th Cir. 1990), to determine whether the agents' conversation with Duggar qualified as custodial. R. Doc. 77, at 247-60. The

court concluded that "Duggar was not in custody at any point during the encounter" and recognized "that that finding drives a lot of the legal analysis." *Id.* at 260.

B. Standard of Review

On review of a suppression ruling, "[t]he trial court's findings of fact are reviewed for clear error and its denial of the suppression motion is reviewed *de novo*." *United States* v. *Ford*, 888 F.3d 922, 925 (8th Cir. 2018).

C. Because Duggar Was Never in Custody, No Violation of His Rights Occurred.

The Fifth Amendment, as interpreted in *Miranda*, prohibits "introducing into evidence statements made by the defendant during a custodial interrogation unless the defendant has been previously advised of his . . . privilege against self-incrimination and right to an attorney." *United States* v. *Chipps*, 410 F.3d 438, 445 (8th Cir. 2005). *Miranda* rights attach "only when a suspect interrogated by the police is 'in custody.'" *Thompson* v. *Keohane*, 516 U.S. 99, 102 (1995).

A person is not "in custody" unless his "freedom of action is curtailed to a degree associated with formal arrest." *Berkemer* v. *McCarty*, 468 U.S. 420, 440 (1984). In *Griffin*, this Court identified six "indicia of custody" to guide this analysis:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest;
>
> (2) whether the suspect possessed unrestrained freedom of movement during questioning;
>
> (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions;

> (4) whether strong arm tactics or deceptive stratagems were employed during questioning;
>
> (5) whether the atmosphere of the questioning was police dominated; or,
>
> (6) whether the suspect was placed under arrest at the termination of the questioning.

922 F.2d at 1349. As explained below, each of those factors supports the district court's determination that Duggar was not in custody on November 8, 2019.

1. Duggar Was Repeatedly Informed That He Was Not Under Arrest and Was Free to Leave.

This Court has recognized that "[t]he most obvious and effective means of demonstrating that a suspect has not been 'taken into custody . . .' is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will." *Griffin*, 922 F.2d at 1349. "That a person is told repeatedly that he is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. So powerful, indeed, that no governing precedent of the Supreme Court or this court . . . holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning." *United States* v. *Czichray*, 378 F.3d 822, 826 (8th Cir. 2004). The district court thus correctly characterized this first factor as the "most critical" one. R. Doc. 61, at 6.

Duggar was informed from the beginning of the search and repeatedly thereafter that he was not under arrest and was free to leave. When the agents first encountered Duggar, they made clear that they were executing a "search warrant, not an arrest warrant, and he was free to leave." R. Doc. 77, at 27. Duggar informed the agents

"that his wife was currently pregnant and due possibly any day, [and] that he might have to leave the car lot to either go contact her or to make sure that she wasn't trying to contact him," to which the agents responded that "that was perfectly fine." *Id.* at 29.

Most tellingly, Duggar and the agents had an extended colloquy in which they reassured him that he was not in custody and amended a form to that effect. Provided with a statement-of-rights form, Duggar questioned the language reading "taken into custody." R. Doc. 77, at 41. The agents explained again that he was not under arrest:

> Aycock: No. So as we explained, this is a search warrant. This is not an arrest warrant, so you are free to leave at any time.
> . . .
> Faulkner: As a matter of fact, if need be, if you'd like, I can scratch that out.
> Duggar: Okay. Yeah, that may be better, just to put—just go ahead and scratch it out.
> Faulkner: Sure. I forgot about that.
> Duggar: I feel better about that. All right.

Id. at 41-42. The agents crossed out the "taken into custody" language, and Duggar signed the modified form. *Id.* at 42; Gov't Exh. 21.

Accordingly, the court correctly held that the first *Griffin* factor "weigh[ed] in the Government's favor." R. Doc. 61, at 6.

2. Duggar Was Not Restrained at Any Point.

This Court has found significant the fact that officers permitted an interviewee to move about and have a conversation outside their presence, noting that "[t]his kind of latitude is clearly inconsistent with custodial interrogation." *United States* v. *Jorgensen*,

871 F.2d 725, 729 (8th Cir. 1989). Here, Duggar maintained unencumbered freedom of movement throughout the search—both "free roam of the entire lot" and the explicit option to leave the premises. R. Doc. 77, at 30-31. He was never handcuffed, guarded, or escorted, nor were his keys confiscated. *Ibid.* When Duggar voluntarily accompanied the agents to Aycock's vehicle, he sat in the front-passenger seat; the doors remained unlocked; and no obstacle blocked him from exiting the vehicle and departing the premises, *id.* at 35—which he eventually did, at a time of his choosing, *id.* at 110.

Accordingly, the court correctly found that "this factor weighs in the Government's favor." R. Doc. 61, at 6.

3. Duggar Voluntarily Acquiesced to the Agents' Invitation to Speak with Them.

"[T]his Court has frequently found custody lacking where suspects take the initiative to offer statements or voluntarily arrange for questioning." *Griffin*, 922 F.2d at 1351 (collecting cases). Without dispute, the HSI agents were the ones who approached Duggar. R. Doc. 77, at 32-33. But there is a "disjunctive prong [to] the third mitigating factor—whether the defendant voluntarily acquiesced to requests by federal agents to answer questions." *United States* v. *Axsom*, 289 F.3d 496, 501 (8th Cir. 2002). Duggar not only voluntarily acquiesced to questioning but in fact posed the first such question himself, asking the agents: "'What is this all about? Has somebody been downloading child pornography?'" R. Doc. 77, at 35. The district court thus correctly found that Duggar "acquiesced to the[] questioning" and "underst[ood] that he was free

to refuse to answer questions and to stop the questioning when he chose," and it appropriately weighed the third factor in the government's favor. R. Doc. 61, at 6-7.

In *United States* v. *Hoeffener*, 950 F.3d 1037 (8th Cir. 2020), this Court deemed an interaction non-custodial under similar circumstances—notwithstanding the officers' initiation of the conversation. There, as here, police conducting a search "asked [the defendant] if he would sit in the front seat of [an officer's] unmarked vehicle to talk about the reason for the search warrant." *Id.* at 1046. There, as here, the defendant "willingly and voluntarily did so." *Ibid.* There, as here, the defendant "was not handcuffed or otherwise restrained" and exhibited an "inquisitive but polite and cooperative [attitude] during the questioning." *Ibid.* And there, this Court "conclude[d the defendant] was not in custody during the in-vehicle questioning" and affirmed the denial of his suppression motion. *Ibid.* The same result should obtain here.

4. The Agents Did Not Employ Deceptive or Coercive Tactics.

"[T]he absence of [deceptive or coercive] tactics is a factor which can assist [this Court] in reaching an objective conclusion that the suspect could not have associated the questioning with formal arrest." *Griffin*, 922 F.2d at 1351. The record here is devoid of any evidence that the agents used deceptive tactics in their conversation with Duggar.

Duggar also evinced no indication of feeling coerced during the conversation. Faulkner testified that Duggar's demeanor was "[c]alm" when he agreed to speak to the agents. R. Doc. 77, at 33. Duggar was also assertive: He declined to sign the agents' statement-of-rights form until they had amended it to reflect that he was not in custody;

and, at several points, he refused to answer the agents' questions. *See, e.g.*, *id.* at 50 (refuses to provide iPhone passcode); *id.* at 63 ("I'd rather not get into any specifics on knowledge."); *id.* at 91 ("I don't want to get into blanket statements about anything.").

With no hint of coercion and abundant indicia of Duggar's relative comfort and command of the interaction, the district court correctly found "no compelling evidence that the agents used 'strong-arm' tactics." R. Doc. 61, at 7.[7]

5. The Conversation Was Not Police-Dominated.

In *Griffin*, this Court recognized that "[a]n interrogation which occurs in an atmosphere dominated by the police . . . is more likely to be viewed as custodial than one which does not." 922 F.2d at 1351-52. Of particular salience to that criterion is "whether the police assume control of the interrogation site and dictate the course of conduct followed by the suspect or other persons present at the scene." *Id.* at 1352. Here, the HSI team that executed the search did not "dictate" Duggar's course of conduct or assume control over any persons on the scene.

Nevertheless, the district court found the evidence on this factor equivocal. On the one hand, "[t]here were numerous police vehicles present at the scene," "a single entry point onto the premises," and certain officers—though not Faulkner or Aycock—dressed "in tactical gear." R. Doc. 61, at 9. "At the same time, no weapons were drawn,

[7] To the extent any party was attempting to exert leverage, it was Duggar, who informed the agents that he personally knew the then-U.S. Attorney for the Western District of Arkansas, as well as Ken Cuccinelli, who was at the time a high-ranking political appointee in the Department of Homeland Security. R. Doc. 77, at 104-05.

no one was placed in handcuffs, and Mr. Duggar and his employees were all told they were free to leave"—making this "standard fare for the execution of a federal search warrant." *Ibid.* Ultimately, the court concluded that the overall "atmosphere was police-dominated, and this factor weighs slightly in favor of Mr. Duggar." *Ibid.*

The government does not contend that the court clearly erred in that assessment, though we note our ongoing disagreement with its approach to this factor. This Court's decision in *Axsom*, *supra*, is instructive. There, the district court had "found that the presence of nine agents and specialists in [the defendant]'s small house established . . . a police dominated atmosphere." 289 F.3d at 502. This Court concluded otherwise, noting that, "[w]hile nine persons participated in the execution of the search warrant, only two agents conducted the interview," which "consisted of two-way questioning" between the defendant and the officers. *Ibid.* The same rationale applies to Duggar's conversation with the HSI agents, and an appropriate focus on that setting—rather than the broader operation—places this prong too in the government's column.

6. Duggar Was Not Arrested at the Scene and Instead Departed of His Own Volition.

Finally, there is no dispute as to how this interaction concluded: Duggar terminated the interview, exited the vehicle, and departed the premises without being arrested. R. Doc. 77, at 110. Before doing so, Duggar told the agents that he would "probably leave here sooner than later" but "just want[ed] to make sure you guys have access to everything you need." *Id.* at 99-100. Faulkner asked Duggar for "some

guidance on how [he] want[ed] this locked up"—referring to the car lot—and Duggar told him, "my guy's here too" and could assist after Duggar left. *Ibid.* Duggar even exchanged business cards with the agents before departing. *Id.* at 104-05. The court correctly determined that "this factor also weighs in the Government's favor"—and that, "[c]onsidering all six factors, Mr. Duggar was not in custody." R. Doc. 61, at 9.

In support of that ruling, the court cited *United States* v. *Muhlenbruch*, 634 F.3d 987 (8th Cir. 2011)—a case presenting circumstances significantly closer to the custodial line than anything that occurred here. After police confronted Muhlenbruch at his home without informing him of "the reason for their presence, he accompanied the officers to the police station for questioning." *Id.* at 996. Although "Muhlenbruch was told that he was not under arrest[,] . . . he was placed in the back seat of a patrol car" for transport. *Ibid.* At the station, "Muhlenbruch was interviewed by two officers in a small room with the door closed," where "he confessed to downloading child pornography." *Ibid.* Following this confession, however, "Muhlenbruch was not arrested," and "the officers gave him a ride home." *Ibid.* If, "[b]ased on the totality of the circumstances, [this Court] f[ou]nd that Muhlenbruch was not 'in custody' at the time of his interview," *id.* at 997, then *a fortiori* Duggar was not "in custody" during his conversation with agents on his own property, which he departed without requiring the assistance or permission of law enforcement.

D. The Seizure of Duggar's Cell Phone Does Not Implicate *Miranda*.

Duggar claims (Br. 39-43) that Faulkner's seizure of Duggar's cell phone violated his constitutional rights because Duggar was attempting to call his attorney. But this Court's caselaw is pellucid: When a person is not in custody, "the [F]ifth [A]mendment right to counsel is not implicated." *United States* v. *Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983). "Given that [Duggar] was not 'in custody' at the time of the interview, his right to counsel under the Fifth Amendment is not implicated and [this Court] need not address [his] additional argument that the officers denied his allegedly unambiguous request for counsel [before] the interview." *Muhlenbruch*, 634 F.3d at 997. Nevertheless, we briefly address his claims (Br. 39-43) as to the seizure of his cell phone.

1. To begin, Duggar does not dispute that the search warrant authorized seizure of "any and all" "device[s] capable of" storing CSAM, including "cellular telephones." R. Doc. 45-1, at 25. Before removing the phone from Duggar's hand, Faulkner "explained that it was going to be seized pursuant to the search warrant." R. Doc. 77, at 161. There is nothing "egregious" (Br. 41) about seizing a cell phone during a search for digital contraband, thereby ensuring the suspect does not delete evidence.

2. Duggar contends (Br. 36) that "[t]his situation was tantamount to a traffic stop on a rural highway during which law enforcement seizes a driver's phone and refuses him access to his car but tells him he is free to leave." That analogy holds only to the extent that the hypothetical pulled-over driver had dozens of other vehicles available to him in an adjacent lot that he owned. As the court noted, this search

occurred *on Duggar's used-car lot*, and he thus "ha[d] the ability, when he did choose to leave, to leave in one of the vehicles on the lot." R. Doc. 77, at 250-51. In any event, the question whether Duggar *could* leave the premises without access to his phone is conclusively answered by the fact that Duggar *did* leave the premises without access to his phone. The warranted seizure of his phone does not control the custodial analysis.

3. Assuming *arguendo* that Duggar's attempt to use his cell phone invoked his right to counsel and that the subsequent interview was custodial, such a pre-interview invocation would not have been effective. The Supreme Court "has never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *Bobby* v. *Dixon*, 565 U.S. 23, 28 (2011) (per curiam). Rather, the invocation must reflect that it is for the purpose of having counsel at the interrogation. *See United States* v. *Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999) ("*Miranda* applies only where a suspect requests . . . assistance during interrogation[.] . . . A statement concerning an attorney made before interrogation begins is far less likely to be a request for attorney assistance during interrogation[.]"). Because questioning had not begun, any invocation was anticipatory and thus ineffective even if Duggar was later taken into custody.

4. Finally, even if (1) Duggar effectively invoked his right to counsel, and (2) the interview qualified as custodial, such that (3) his *Miranda* rights were implicated, Duggar knowingly and voluntarily waived them. To be effective, a "waiver 'must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,'" and "the suspect must have waived his

rights 'with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *United States* v. *Vinton*, 631 F.3d 476, 483 (8th Cir. 2011). Here, no evidence suggests that Duggar was "intimidat[ed], coerc[ed], or dece[ived]" by the HSI agents; rather, as explained *supra* pp. 27-28, the record reflects that Duggar was comfortable and in command of the situation, which he eventually voluntarily departed. And no reason exists to conclude that Duggar lacked full awareness of his rights; instead, as noted *supra* p. 25, he read, discussed, edited, and signed the statement-of-rights form embodying his waiver, Gov't Exh. 21.

III. The District Court Did Not Abuse Its Discretion in Delimiting Testimony About Photographic Metadata.

A. Background

1. The government provided Duggar with its expert notice in July 2021. The notice identified Marshall Kennedy and James Fottrell as testifying experts. R. Doc. 134-1, at 1-3. The government also informed Duggar that, *inter alia*,

- a forensic examination of the MacBook seized from his car lot "revealed that [Duggar] was backing up or syncing his cellular phone to the MacBook during the timeframe at issue";
- "text messages or other electronic messages sent and received by [Duggar] during the timeframe at issue . . . were recovered from the MacBook"; and
- "digital photos taken by [Duggar] that contain metadata, including geolocation information, . . . were recovered from the MacBook."

Id. at 2.

2. At trial, Fottrell was recognized as an expert in computer forensic examinations. TR., Vol. 3, p. 452. He testified that, "[u]sing [his] forensic[] tools, [he] conducted an examination" of Duggar's devices. *Id.* at 454; *see also ibid.* (identifying forensic tools). During that examination, Fottrell extracted "EXIF information" (or "metadata"), which he first introduced to the jury during his discussion of the CSAM thumbnails he had recovered from Duggar's desktop. *Id.* at 504-05. Fottrell explained that EXIF information is "extra information that the computer generates and stores when it creates those thumbnail images." *Ibid.*

Fottrell then testified that he had located an iPhone backup on Duggar's MacBook, "extract[ed] all of that information[,] and conduct[ed] an examination of the iPhone 8 data." TR., Vol. 4, pp. 601-02. He told the jury that he "was primarily interested in two things": "photos that were taken on that iPhone" and "text messages that were sent and received on that iPhone." *Id.* at 617. Fottrell explained that, like the CSAM thumbnails, iPhone photos "contain[] a lot of EXIF information" that he was able to extract during his forensic examination, and that this metadata includes "the GPS coordinates of where you were when that picture was taken." *Id.* at 617-18. The government then introduced several "photos that [Fottrell] printed out associated with the iPhone," alongside their "associated metadata." *Id.* at 618; *see* Gov't Exh. 71.

Duggar objected, stating that he opposed "any expert testimony in the admission of these exhibits as it relates to geolocation" because Fottrell was "not qualified to offer testimony as to geolocation." TR., Vol. 4, p. 619. The government countered that

Fottrell was simply "going to say that there are GPS coordinates associated with the image that you can plug into a map, like Google [M]aps." *Id.* at 620. And with respect to reliability, the government noted that Duggar could "certainly cross-examine the witness, but right now, there's no evidence that these are unreliable." *Ibid.*

The district court overruled the objection, finding "that this is an issue that goes to weight and credibility, not admissibility." TR., Vol. 4, p. 620. The court further agreed with the government that Fottrell's recollection of plotting geolocation coordinates need not be admitted as expert testimony. *Ibid.* In the alternative, the court observed that Fottrell "has been qualified as a 702 expert as well and can offer expert opinions when asked to do so." *Ibid.*

The government subsequently introduced six sets of images from Duggar's iPhone backup, accompanied by date- and time-stamps and map insets. *See* Gov't Exhs. 71, 73, 74, 76, 78, 80. Those images were presented in exhibits that Fottrell created through the Windows Photos application, based on raw data Fottrell had extracted using forensic tools. TR., Vol. 4, pp. 622-23; *see infra* p. 46. Fottrell attested to the accuracy of the exhibits by explaining that he had "look[ed] at [each] photo, look[ed] at the EXIF information about location, and confirm[ed] that [the resulting maps we]re generally accurate." TR., Vol. 4, p. 622. He explained that he uses "checks and balances" to verify that the exhibits accurately reflect the metadata he extracted: "I can look at the raw data that has the GPS coordinate in latitude and longitude[,] . . . copy and paste that into a Google [M]aps program and . . . verify that it's basically accurate"

based on the known location of Duggar's car lot. *Ibid.* Fottrell noted that he undertakes this checks-and-balances approach to metadata "consistently in many cases." *Ibid.*

The metadata information reflected in the exhibits was consistent with the content of the photos. For example, several photos depicted rows of parked vehicles; all of those photos geolocated to Duggar's car lot. *See, e.g.*, Gov't Exh. 71; Gov't Exh. 74, at 6-7. Two photos depicted Duggar taking selfies in front of his car-lot office, with a "Wholesale Motorcars" banner and a clock reading "4:51" in the background; the metadata geolocated those photos to Duggar's car lot and time-stamped them at 4:47 p.m. Gov't Exh. 80, at 1-2. Fottrell used the photos and messages from Duggar's iPhone backup to construct a timeline confirming his presence at the lot when the Linux partition was installed and each time CSAM was downloaded. *See* Gov't Exh. 85.

3. During the defense case, Duggar called computer forensic analyst Michele Bush. TR., Vol. 5, p. 973. She acknowledged that the data on the MacBook was "consistent with [its] belonging to Mr. Duggar." *Id.* at 980. Examining Gov't Exh. 76, one of the photo-and-metadata displays that Fottrell created to explain information to the jury, Bush identified it as a screenshot from "the default Windows photo application," which she stated was not "forensic software." *Id.* at 1139. Defense counsel then asked Bush if she "ha[d] an opinion as to whether the EXIF data on the documents that Mr. Fottrell testified using this same Windows image viewer is reliable or unreliable," and she said "[i]n this form, it's unreliable." *Id.* at 1140.

The government objected because it "ha[d] not received any notice about what [Bush's] reliability opinion is based on." TR., Vol. 5, p. 1140. Duggar responded that Bush would testify "that using this tool is unreliable. It could be accurate, it could not be accurate[.]" *Id.* at 1142. The government stated that, "if [Bush] has conducted her own analysis[,] . . . she can testify to that," but it objected to Bush's "just generally throwing out that she doesn't think this is reliable without any specific belief that any of the images are unreliable." *Id.* at 1145.

The court ruled that Bush could testify that "the government's expert has used tools that she doesn't recognize as being scientifically forensic" and pointed out that "she already has" so testified. TR., Vol. 5, p. 1146. She could not, however, "opine that the geolocation data here is wrong because sometimes it is wrong in some cases on some images" when Duggar was "not even contending that there's anything incorrect about the geolocation data." *Ibid.* The latter, in the court's view, would have been "[g]rossly misleading" to the jury. *Ibid.*

4. Toward the end of the defense case, Duggar reraised the prospect of Bush testifying about the accuracy of the government's exhibits. TR., Vol. 6, p. 1307. The government argued that Bush had not examined the metadata reflected in the exhibits and thus could not relevantly testify about their accuracy. *Id.* at 1309-10. After Duggar conceded that he did not know whether Bush had "independently looked at the metadata," the court excused the jury to *voir dire* the witness. *Id.* at 1310.

During *voir dire*, Bush testified that metadata can include "multiple dates and times," TR., Vol. 6, p. 1314, and that Windows Photos is not "reliable to determine dates and times as far as metadata . . . because it's not a forensic tool," *id.* at 1317. She admitted, however, that she had not independently examined the metadata—despite having had access to it—and "ha[d] no idea" whether the metadata in the government's exhibits was accurate. *Id.* at 1319. Bush then confirmed to the court that she "ha[d] not examined the data that [she] would need to form an opinion" as to "whether or not the time-stamp data . . . is materially accurate or not." *Id.* at 1321.

The district court "rul[ed] under 403 that it w[ould] not allow this witness to go down a path that would lead, at its end, to speculative testimony about whether the [metadata] is accurate or not." TR., Vol. 6, p. 1322. The court found that, contrary to Bush's statement "that she starts with facts and follows them to a conclusion, here, she knows the conclusion that she wants to reach and she looks to possibilities upon possibilities to back into that." *Ibid.* Because, despite being "aware of its existence, [Bush] hasn't examined the data," the court determined that her testimony would "mislead" and "confuse the Jury," particularly when Duggar had never argued that he "either agree[s] or disagree[s] with the accuracy." *Ibid.*

B. Standard of Review

As noted *supra* p. 12, this Court "reverse[s] only 'if the district court's evidentiary rulings constitute a clear and prejudicial abuse of discretion.'" *Aungie*, 4 F.4th at 644.

C. Fottrell's Testimony Was Correctly Admitted.

Duggar complains (Br. 43-48) that Fottrell was allowed to testify about metadata confirming that photos of used cars and selfies depicting Duggar in front of his car-lot office were, in fact, taken at Duggar's used-car lot. His argument is meritless. To begin, he conflates three distinct topics: (1) geolocation information automatically generated by cell phones, which is widely recognized as reliable; (2) the extraction of metadata containing that information, about which the government adduced expert testimony; and (3) the plotting of geolocation coordinates in general-use software like Google Maps, which is within the ken of lay witnesses.[8] As to the first, "the use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts." *United States* v. *Jones*, 918 F. Supp. 2d 1, 5 (D.D.C. 2013). As to the second, the court correctly deemed Fottrell qualified based on his extensive experience forensically analyzing devices. As to the third, Fottrell's recounting of routine investigative steps he undertook was permissible lay testimony.

[8] This confusion stems from the belated and inconsistent objections that Duggar raised during trial. Despite being on notice of this expert testimony, Duggar never filed a motion pursuant to *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), or any other motion *in limine* on the topic. The first time metadata came up, he raised no objection. TR., Vol. 3, pp. 504-05. The second time, he objected solely to "testimony related to geolocation." TR., Vol. 4, p. 619. The third time, he additionally found fault with "the dates and times" drawn from the metadata. TR., Vol. 5, p. 1144.

1. Fottrell's Experience Qualified Him to Testify About the Extraction of Metadata from Duggar's iPhone Backup.

a. It is necessary at the outset to correct Duggar's repeated misstatements (Br. 17, 43, 47-48) concerning the government's compliance with the expert-notice requirements of Rule 16(a)(1)(G). More than four months before trial, the government filed a notice stating that Fottrell was expected to offer expert testimony on "digital photos taken by [Duggar] that contain metadata, including geolocation information, . . . recovered from the MacBook." R. Doc. 134-1, at 2-3. The government's notice, while listing the geolocation metadata from the iPhone backup under topics that Kennedy was expected to cover, also clearly stated that Fottrell would "provide expert testimony confirming and/or independently conveying any and all of the disclosures/opinions listed above under CFA Kennedy's expert disclosure section." *Id.* at 1-2. Nowhere does Duggar acknowledge these disclosures or attempt to reconcile them with his request for relief on his claimed Rule 16 violation—which this Court should deny.

b. Not only was Fottrell noticed as an expert on iPhone metadata—he was qualified to opine as one. Fottrell testified to having "been involved with forensically examining . . . [t]housands" of devices. TR., Vol. 3, p. 448. He listed with specificity the "forensic[] tools" that he used when examining the MacBook on which the iPhone backup was stored. *Id.* at 454. He introduced metadata—without objection—when discussing his forensic examination of thumbnail images. *Id.* at 504-05. He explained how the "Apple proprietary format" in iPhone photos "contains a lot of EXIF

information," including "the GPS coordinates of where you were when that picture was taken." TR., Vol. 4, pp. 617-18; *see also id.* at 809 (explaining the "synchroniz[ation]" process for date-and-time metadata). He confirmed that he "commonly use[s] EXIF information that [he] find[s] in images during the course of [his] investigations" and has verified its accuracy by comparing it to known location information. *Id.* at 621-22.

Nothing more was required to establish either Fottrell's expertise or the reliability of the metadata. Duggar contends (Br. 45) that Fottrell's testimony was improperly admitted because he did not "explain what technology produced th[e metadata] coordinates." But Federal Rule of Evidence 703 permits experts to "rely on . . . facts or data" so long as that data is of the type that other "experts in the particular field would reasonably rely on." That is certainly true of cell-phone metadata, which federal courts have routinely treated as reliable evidence without first requiring a granular explanation of the underlying technology. *See Jones*, 918 F. Supp. 2d at 5 (collecting cases). Indeed, the Federal Rules of Evidence now recognize "[d]ata copied from an electronic device" and "record[s] generated by an electronic process" as "items of evidence [that] are self-authenticating." Fed. R. Evid. 902(13) & (14). The Rule drafters envisioned a scenario much like this one:

> The defendant has claimed alibi. The police seize the defendant's iPhone. The iPhone contains several photographs. The iPhone's software automatically generates and records metadata about the photographs: the dates, times, and GPS coordinates of each photograph. The date, time, and place of a photograph could corroborate or contradict the alibi.

31 Fed. Prac. & Proc. Evid. § 7147. Although this evidence was admitted through in-court testimony rather than an out-of-court certification permitted by Rule 902, Duggar can hardly complain that he was permitted to cross-examine a live witness rather than contend with a representation on paper. And that is how Duggar should have exposed any unreliability in the metadata: through cross-examination, not exclusion.

This Court's recent decision in *United States* v. *Banks*, 43 F.4th 912 (8th Cir. 2022), is instructive. There, as here, the government introduced cell-phone photos and their associated metadata to establish the circumstances under which the defendant had possessed contraband (in that case, guns and drugs). *Id.* at 917. There, as here, the government adduced testimony from one of its investigators "explain[ing] the process of extracting data from those phones" and identifying the data to include "the dates when files were created and other metadata associated with the media files stored on the phones." *Id.* at 918. And there, this Court found an adequate "basis to believe that the exhibits had been created within the relevant time frame and stored on [the defendant]'s cellular phones." *Ibid.* The same outcome is warranted here.

c. Duggar's cited authority—*United States* v. *Crawford*, No. 1:19-cr-170, 2021 WL 2367592 (W.D.N.Y. Jan. 14, 2021) (unpublished)—is not to the contrary. There, the government received location records from Google and introduced maps through an agent with no expertise in how the underlying records were produced. *Id.* at *3. The court required the government "to provide an expert witness to explain and support the methods used by Google to obtain the geolocation data." *Ibid.* Here, by contrast,

Fottrell (1) is an expert in digital forensics, including metadata; (2) explained how the iPhone automatically attaches geolocation and date-and-time metadata to photos; (3) extracted that data himself rather than relying on a non-testifying third party; and (4) confirmed its accuracy through "checks and balances" extrinsic to the metadata.[9]

2. Fottrell Also Appropriately Testified as a Fact Witness.

The primary matter that the government contended to be lay testimony was Fottrell's use of generally available mapping software ("like Google [M]aps") to plot the coordinates from the metadata and confirm that they matched the location of Duggar's car lot. TR., Vol. 4, p. 620. Even Duggar's proffered authority holds that the "plotting of the Google-provided data points on a map does not involve 'scientific, technical, or other specialized knowledge,' and therefore does not constitute expert testimony under Rule 702." *Crawford*, 2021 WL 2367592, at *3. The court thus correctly determined that Fottrell's "act of plugging coordinates from EXIF data into Google Maps and then testifying about the results was lay testimony under Rule 701." R. Doc. 156, at 28.

Likewise permissible as lay testimony was Fottrell's explanation that he uses "checks and balances"—*i.e.*, extrinsic facts about the case—to verify the metadata. For

[9] Duggar's claim (Br. 46-47) that the government is "taking an opportunistically inconsistent position" on the reliability of this data misapprehends *United States* v. *Boyajian*, No. 09-cr-933, 2012 WL 4094977 (C.D. Cal. 2012) (unpublished). The government expressed concern about the reliability of the particular metadata in that case because it came from "a standalone camera (as opposed to a camera phone)," which reflects "dates and times . . . set by the user." *Id.* at *17. Here, Fottrell explained the iPhone's *automatic* generation of metadata. TR., Vol. 4, pp. 621-22.

example, on May 14, 2019, the metadata on two images showed that they were taken at 4:14 p.m. and 4:20 p.m. at Duggar's car lot. Gov't Exh. 74, at 3-4. Any witness familiar with the case could confirm the locational accuracy through (1) the photos' content (an unplated car, *id.* at 3; and Duggar's desktop, *id.* at 4) plainly depicting the car lot; and (2) text messages Duggar sent at 4:49 p.m. ("Got stuck here and still not free yet," Gov't Exh. 75, at 1) and 5:49 p.m. ("At my carlot," *id.* at 2). That the metadata geolocating to Duggar's car lot was consistent with photos depicting his car lot and messages placing him at his car lot is yet another basis to deem this evidence reliable.

D. Bush's Testimony Was Appropriately Excluded.

The court appropriately excluded Bush's testimony as to both the purported unreliability of specific metadata that she had concededly failed to analyze and the non-forensic nature of a software program that no party had characterized as a forensic tool.

1. Bush Could Not Relevantly Testify About Metadata She Admitted to Having Never Reviewed.

Federal Rule of Evidence 703 provides that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." No rule, however, permits a witness to speculate about the possible existence of facts that are concededly unknown to her. Yet that is what Bush aimed to do here: After proffering that photographic metadata can include "multiple dates and times," TR., Vol. 6, p. 1314, she was forced to admit that she "ha[d] not examined the data [she] would

need to form an opinion" about the photos in the government's exhibits, despite those photos and their associated metadata "hav[ing] been available to [her]," *id.* at 1318-21.

Duggar asserts (Br. 51-52) that "Bush had no reason to forensically analyze and form an expert opinion on these photos because the Government admittedly failed to comply with Rule 16 by including this topic in its expert disclosure." As discussed, that is incorrect. *See* R. Doc. 156, at 28 (court finding that Duggar "was on notice that Mr. Fottrell would be opining at trial about the metadata gleaned from the photo[s]").

Duggar next contends (Br. 52-53) that the government "opened the door by asking Bush directly about the timestamps on the photos on cross-examination." But "[t]he doctrine of opening the door" applies only "when the opposing party has made unfair prejudicial use of related evidence." *United States* v. *Midkiff*, 614 F.3d 431, 442 (8th Cir. 2010). That doctrine is doubly inapplicable here. First, nothing about the cross-examination was "unfair": Although Bush was asked about government exhibits, she made clear that her answers were contingent on the accuracy of those exhibits—and that she was expressly *not* vouching for them. *See, e.g.*, TR., Vol. 6, pp. 1238-39 (Q: "You haven't independently confirmed the accuracy of this image?" Bush: "No, not personally."). Second, the evidence allowed through an open door "must rebut something that had been elicited on cross-examination." *United States* v. *Finch*, 16 F.3d 228, 233 (8th Cir. 1994). But here, Bush's testimony could not have rebutted metadata she had not analyzed—and would, instead, have likely *confirmed* her cross-examination testimony that she had "not personally" reviewed the exhibits.

Accordingly, the court correctly excluded Bush from speculating about facts that she could have ascertained but chose to ignore.

2. Bush's Proffered Testimony About the Program Fottrell Used to Format Exhibits for the Jury Was Properly Excluded.

Finally, Duggar asserts (Br. 50) that Bush should have been allowed to testify about "the software Fottrell used to . . . extract the EXIF metadata—Windows Photos." But that misstates Fottrell's testimony: He never claimed to have used Windows Photos to *extract* metadata; rather, he used that program solely to *display* the metadata that he had already extracted using forensic tools. *See* TR., Vol. 4, pp. 622-23 (explaining that he "look[s] at the raw data" when verifying accuracy and that Windows Photos "is just a simple way to kind of show that information"); TR., Vol. 3, p. 454 (listing the forensic tools he used on the MacBook). In that sense, Windows Photos is no different from Microsoft Excel, which Fottrell used to display the metadata extracted from CSAM thumbnails. *See* Gov't Exh. 32. It would be absurd to adduce expert testimony that data *displayed* in an Excel file is unreliable because Excel is not itself a forensic tool capable of *extracting* data. But that is exactly the argument that Duggar contends the court should have allowed Bush to propound to the jury. It was well within the court's discretion to exclude that confusing and irrelevant testimony.[10]

[10] In any event, if Duggar's goal was informing the jury that Windows Photos is not a forensic tool, he elicited testimony to that effect from both Fottrell, TR., Vol. 4, p. 683, and Bush, TR., Vol. 5, p. 1139.

E. Any Error Relating to Photographic Metadata Was Harmless.

As noted *supra* pp. 43-44, on multiple offense-conduct dates, Duggar sent messages stating that he was at his car lot. *See* Gov't Exh. 85. Because he has not contested the accuracy of those date- and time-stamps—which independently place him at the scene of the crime—any error relating to the photographic metadata is harmless.

* * *

Abundant evidence established that Joshua Duggar downloaded child sexual abuse material on a partition he set up, using his recurring password, on his computer, in his office, on the premises of his car lot. The district court correctly declined to suppress his noncustodial statements to investigators and appropriately limited his questioning of both a putative alternative perpetrator who was in a different state at the time of the offense conduct and an expert witness who acknowledged having never analyzed the metadata about which she sought to testify. But even if each of those evidentiary rulings had gone the other way, any rational jury would still have convicted Duggar. He has never offered a plausible exonerative explanation for the events of May 2019, and his efforts to scapegoat an uninvolved third party and create an irrelevant methodological dispute cast no doubt—much less a reasonable one—on his guilt.[11]

[11] Because Duggar "does not meaningfully develop" a cumulative-error claim (*see* Br. 54), any such contention—in addition to being meritless—is waived. *United States* v. *Reed*, 972 F.3d 946, 955 n.5 (8th Cir. 2020).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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