JAM:NCG
F. #2022R00224

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

Docket No. 22–CR-149 (NRM)

KURBONALI SULTANOV,

Defendant.

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GOVERNMENT'S MEMORANDUM OF LAW IN OPPPOSITION TO THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

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PRELIMINARY STATEMENT

The defendant moves to suppress evidence pursuant to a manual search of his cell phone, which was obtained from the defendant during a Customs and Border Protection ("CBP") examination at John F. Kennedy International Airport ("JFK Airport") on March 5, 2022, as well as statements obtained during an interview conducted the same day. See ECF No. 21 ("Def. Mem."). The defendant argues that such evidence was obtained in violation of the Fourth and Fifth Amendments. The defendant's arguments are without merit, and, for the reasons set forth below, the Court should deny the defendant's motion in its entirety.

STATEMENT OF FACTS

On Saturday, March 5, 2022,[1] the defendant flew into JFK Airport from Uzbekistan via Istanbul, Turkey onboard Turkish Airlines flight TK 3. Like all international travelers, the defendant was required to clear customs before being formally admitted into the United States. At the time of his entry into the United States, there was a CBP alert in place, referred to as a Treasury Enforcement Communication System ("TECS") record entry or "lookout," that advised any CBP officer at JFK Airport to conduct a secondary border enforcement inspection of the defendant before admitting him into the United States. This alert existed because the defendant had been flagged as a potential purchaser of child pornography. Child pornography is contraband under federal law, and CBP officers are charged as part of their duties as border enforcement officers to prevent such materials from entering the United States.

[1] These facts are drawn from the Complaint in this case, an audio recording of the interview of the defendant, attached to the government's opposition as Exhibit A and provided to the Court, documents produced to the defendant as discovery in this case, a flyer that CBP provided to the defendant, attached to the government's opposition as Exhibit B, the defendant's affidavit attached to the defendant's motion ("Def. Aff."), and facts that the government proffers in connection with the instant motion and would establish at an evidentiary hearing.

Therefore, at the primary border inspection area, at approximately 12:17 pm, the defendant was referred to a secondary inspection location.

The secondary inspection area is a large room near the baggage claim area, separated by double doors from baggage claim, which seats up to approximately thirty people. In the secondary inspection area, the inspecting CBP officer ("Inspecting CBP Officer") asked the defendant if he had a cell phone. The defendant responded in the affirmative and provided it to the Inspecting CBP Officer. The cell phone was a Samsung Galaxy phone with serial number R5C1270B733T. The phone was on, but locked, so the Inspecting CBP Officer asked the defendant for the passcode to the phone. The defendant voluntarily provided the passcode. During this interaction, the Inspecting CBP Officer and the defendant spoke in English. At approximately 12:40 pm, the Inspecting CBP Officer informed the defendant that he was inspecting his phone. In accordance with the Inspecting CBP Officer's training, he provided the defendant with a flyer regarding border searches of electronic devices. See Ex. B. The Inspecting CBP Officer placed the device in airplane mode and then conducted a manual search of the phone. At approximately 12:50 pm, the Inspecting CBP Officer found images and videos depicting what appeared to be child pornography involving infants and toddlers on the cell phone. After child pornography was found on the phone, at approximately 1:14 pm, CBP contacted the Homeland Security Investigations ("HSI") duty agent to ask that HSI agents respond to JFK Airport. At approximately 1:51 pm, an HSI supervisor confirmed that HSI agents would respond to JFK Airport. At approximately 3:53 pm, two Special Agents from HSI on the Child Exploitation Investigations Team ("Special Agent 1" and "Special Agent 2,"

collectively, "Special Agents"), responded to JFK Airport.[2] Upon arrival, they also conducted a manual search of the defendant's phone and confirmed the presence of child pornography on the phone. Prior to their arrival, the defendant waited in the secondary inspection area.

Specifically, the Special Agents observed approximately 10 thumbnail images which appeared to be child sexual abuse material. They observed several of the videos in detail. Specifically, there was an approximately ten-minute-long video showing an approximately four-year-old female toddler laying on a bed with a pubescent 12 to 16-year-old female who was topless; an adult male forces the older female to perform oral sex on the toddler; the video finishes with the adult male performing penetrative sex on the toddler. Another video showed an approximately 12 to 14-year-old female inserting two red markers or pens into her vagina. A third video showed an approximately 12 to 14-year-old female inserting the handle of a hairbrush into her vagina.

At approximately 4:20 pm, shortly after the Special Agents arrived at JFK Airport, the Special Agents initiated an interview of the defendant, which was audio-recorded. See Ex. A. Prior to beginning the interview, Special Agent 1 asked the defendant if he was comfortable speaking in English, to which the defendant responded, "If you're talking slowly." Ex. A. Special Agent 1 said he would "keep it slow then." Ex. A. Special Agent 1 proceeded to inform the defendant that he was not under arrest, but that he wanted to advise him of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny, and he provided the defendant with a written Miranda waiver form in English. After Special Agent 1 read the Miranda warnings, the defendant said that he understood them "50/50," to which Special Agent 1

[2] Because it was a Saturday, the Special Agents were not working that day but were called to respond to the airport.

responded that he would "explain anything." Ex. A. The defendant immediately stated that he had a video, but that he did not know it was illegal to have it. Ex. A. The defendant clarified that he wanted to understand what is "happening to right now" and whether "I am not gonna arrest," see Def. Aff. ¶ 23; Ex. A, and Special Agent 1 responded "yeah." Id. Special Agent 1 later repeated that the defendant was not currently under arrest (as Special Agent 1 had not yet spoken with a duty Assistant United States Attorney regarding the facts and circumstances of the case). Special Agent 1 also told the defendant he did not have to sign the Miranda waiver form, and the defendant did not sign the form. Ex. A.

The defendant entered his passcode into his phone, showed the agents his phone, and navigated to a folder titled "Po", which appeared to contain sexually explicit videos. He stated he created the "Po" folder and placed videos in it that he downloaded from the Internet. He said he did not realize it is illegal to have these videos.

During the interview, Special Agent 1 thanked the defendant for providing them with the passcode to his cell phone, stating that it makes everything easier, to which the defendant responded, "I'll show you," see Ex. A at 19:17, took the phone, and navigated to relevant parts of his phone for the Special Agents. The defendant also told the Special Agents, "you can check it yourself," referring to his cell phone. Ex. A at 26:09. At several points during the interview, the defendant navigated to applications and videos in his phone to show the Special Agents.

During the interview, the defendant also stated he had purchased a pack of videos for approximately $50 and downloaded the videos, which he paid for through PayPal. The defendant stated he communicated with the seller through a Russian social media application called "Odnoklasnic" and purchased the videos while he was in the United States. The defendant

admitted that he observed girls as young as five-years-old in a video. He said he does not like these videos but did not have time to delete them, but he would have done so if he had known the videos were illegal. The defendant recalled he purchased approximately 180 videos on this occasion.

The defendant also admitted to possessing a video which he described showing "guy and lady with a very very young girl." He claimed he had tried to delete the video on more than one occasion but had been distracted and forgot to delete it. He also stated that he watches the videos when he is bored. The defendant stated the above-mentioned video, and others, were still on the phone, and claimed he did not have time to delete the videos.

The interview lasted approximately one hour. The defendant spoke with the Special Agents in English during the entirety of the interview. The defendant asked the Special Agents to clarify certain things at various points during the interview but did not ask for an interpreter at any point. See Ex. A.

Following the interview, the defendant was arrested and charged with possession of child pornography. On March 7, 2022, the defendant was arraigned before the Honorable Taryn A. Merkl. On March 17, 2022, the Honorable James R. Cho signed a search warrant authorizing HSI to forensically examine the contents of two of the defendant's cell phones—the cell phone which CBP initially manually reviewed—and another cell phone that was on Sultanov's person at the time of his arrest, but which was powered down at that time. See Docket No. 22-MJ-319.

ARGUMENT

The defendant's motion to suppress the child pornography seized from his cellular telephones should be denied. The defendant moves to suppress the child pornography and other

evidence seized from his cellular telephone, asserting that it was obtained in violation of the Fourth and Fifth Amendments. Specifically, the defendant asserts that (i) he disclosed the phone's passcode without first being advised of his Miranda rights, in violation of the Fifth Amendment, (ii) the manual search of the defendant's phone was conducted without a search warrant or reasonable suspicion, in violation of the Fourth Amendment, and (iii) the defendant's statements to law enforcement should be suppressed because they were not given voluntarily. Each of these arguments fail, and the motion should be denied.

I. THE DEFENDANT'S DISCLOSURE OF HIS PHONE'S PASSCODE DID NOT VIOLATE THE FIFTH AMENDMENT

The defendant seeks to suppress the child pornography obtained from his cellular telephones by arguing that law enforcement obtained that evidence only after obtaining his passcode during an un-Mirandized interrogation. Setting aside that law enforcement subsequently obtained a search warrant for the device, the defendant's argument fails because the defendant was subject to a lawful border interview, was not in custody when he disclosed the phone's passcode, and voluntarily provided the passcode when it was requested.

A. Law Related to Interviews at the U.S. Border

Generally, a person must be advised of certain rights before being subject to a "custodial interrogation." Miranda v. Arizona, 384 U.S. 436, 444 (1966). For Miranda warnings to be required, a court must find both that (1) there was an "interrogation" of the defendant, and (2) the interrogation was while the defendant was in "custody." United States v. FNU LNU, 653 F.3d 144, 148 (2d Cir. 2011). "On a motion to suppress at a criminal trial statements obtained from a defendant in alleged violation of his Miranda rights, the defendant bears the burden of demonstrating an adequate basis for the relief requested in the motion." United States v. Aguilar,

No. 20-cr-390 (ENV), 2022 U.S. Dist. LEXIS 139688, at *12 (E.D.N.Y. July 23, 2022). Specifically, "the defendant must demonstrate that he was subject to custodial interrogation." Id.

"[C]ustody for Miranda purposes is not coterminous with . . . the colloquial understanding of custody." FNU LNU, 653 F.3d at 152-53. In determining whether a defendant is in Miranda custody, "the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (internal quotations omitted); see also Howes v. Fields, 565 U.S. 499, 509 (2012) (issue is "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in Miranda."). The Second Circuit, interpreting the Supreme Court in Berkemer v. McCarty, 468 U.S. 420 (1984), has indicated that two "particularly relevant" factors in determining whether an investigative seizure "involves restraints generally associated with a formal arrest" are "whether a reasonable person in the suspect's shoes would have understood that his detention was not likely to be 'temporary and brief,'" and "whether a person stopped under the circumstances at issue would feel that he was 'completely at the mercy of the police.'" United States v. Newton, 369 F.3d 659, 675 (2d Cir. 2004) (quoting Berkemer, 468 U.S. at 438). The test is objective, based upon the perspective of a reasonable person in the suspect's position. See Berkemer, 468 U.S. at 442.

The Second Circuit has made clear that questioning at an airport, particularly when individuals are arriving from a foreign country, presents unique factors that must be considered in the foregoing analysis. When arriving at a U.S. airport, such as was the case here, "compulsory questioning—with no freedom to enter the United States and with nowhere else to go—inheres in the situation" and the traveler "has voluntarily submitted to some degree of confinement and restraint by approaching the border." FNU LNU, 653 F.3d at 153. As a result,

"a reasonable traveler will expect some constraints as well as questions and follow-up about his or her citizenship, authorization to enter the country, destination, baggage, and so on." Id. at 153-54. This expectation of constraints and questions, and the fact that "at least initially, every traveler in the airport must submit to the same sort of questioning while not free to leave[,] reduces the likelihood that reasonable persons in that situation would consider themselves to be under arrest." Id. at 154. The inquiry is holistic and involves considering the circumstances of the suspect's encounter with authorities, including, among other things, duration, location, voluntariness, the presence of weapons or restraint of the defendant. See FNU LNU, 653 F.3d at 153-54. "[T]he circumstances also include, and especially so in border situations, the nature of the questions asked." Id. at 154. The analysis is an objective one, based on what a reasonable person would believe. Id.

The ability for border enforcement officials to engage in routine inquiries related to a person attempting to enter the United States, and what they are seeking to enter the country with, is firmly rooted in long-standing precedent related to the government's broad authority at the national border. "As the Supreme Court stated in Carroll v. United States, 267 U.S. 132,154 (1925), the rationale behind a routine customs inquiry is that 'national self protection reasonably requir[es] one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.'" United States v. Silva, 715 F.2d 43, 46-47 (2d Cir. 1983). See also United States v. Ramsey, 431 U.S. 606, 616 (1977) (border searches are considered reasonable "pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country").

Consistent with these principles, the Second Circuit has repeatedly examined facts and circumstances surrounding secondary inspections at airports and border crossings and has

routinely found that they amount to nothing more than a routine, non-custodial border search. See, e.g., United States v. Broughton, 600 F. App'x 780, 783 (2d Cir. 2015) (affirming that defendant was not in custody after being escorted by law enforcement to a private part of the airport to field test a white powdery substance found on the defendant's belongings); United States v. Yilmaz, 508 F. App'x 49, 52 (2d Cir. 2013) (affirming as non-custodial a 90-minute inspection at vehicular border crossing); FNU LNU, 653 F.3d at 155 (finding non-custodial a 90-minute airport interrogation in which defendant was finger-printed and confronted with apparent false statements in an old passport application); Tabbaa v. Chertoff, 509 F.3d 89, 100 (2d Cir. 2007) (detention of four to six hours was routine in the border context); United States v. Kamaldoss, No. 19-CR-543 (ARR), 2022 WL 1200776, at *7-8 (E.D.N.Y. Apr. 22, 2022) (defendant was not in custody when asked for his passcode because the "question was not so accusatory as to change the very fabric of the encounter"); United States v. Hassan, No. 18-CR-603 (ARR), 2019 WL 5684367, at *3 (E.D.N.Y. Nov. 1, 2019) (finding defendant's allegations that CBP officers took him "to a separate room, questioned him about his travels, searched his luggage, copied his paperwork, took his cell phone, and would not allow him to be alone" amounted to nothing more than a "modern border inspection"); United States v. Wilson, 100 F. Supp. 3d 268, 278-79 (E.D.N.Y. 2015) (questioning in private room and physical pat-down were not custodial); United States v. Tavares, No. 11-CR-610 (NGG), 2012 WL 194974, at *2 (E.D.N.Y. Jan. 23, 2012) (defendant confronted by uniformed government agent and not free to leave CBP interrogation was not in custody and subject only to a "modern border inspection"); cf. Newton, 369 F.3d at 676 ("Handcuffs are generally recognized as a hallmark of a formal arrest.").

Courts have, in particular, found that a request for a person's passcode is part of a lawful border inquiry. See Kamaldoss, No. 19-CR-543 (ARR), 2022 WL 1200776, at *8 (declining to find that asking defendant for multiple passcodes "transformed an otherwise non-custodial environment into a custodial one"); United States v. Vallerius, No. 17-CR-20648 (EGT), 2018 WL 2325729, at *4 (S.D. Fla. May 1, 2018), report and recommendation adopted, No. 17-CR-20648 (RNS), 2018 WL 2324059 (S.D. Fla. May 22, 2018) (explaining that a defendant was not in custody merely because an agent asked for his passcodes at the airport).

B. The Defendant's Passcode Was Obtained Pursuant to a Lawful Border Interview

The initial inquiries made of the defendant when brought for secondary inspection, including the request for his passcode, were part of a lawful border interview that did not require Miranda warnings. Child pornography is contraband, illegal to possess, and cannot lawfully be brought into the United States. See 18 U.S.C. § 2252(a)(1). CBP has been specifically charged, as part of its responsibility in protecting the border, with identifying and preventing the importation of contraband, including child pornography. See Abidor v. Napolitano, 990 F. Supp. 2d 260, 263-64 (E.D.N.Y. 2013) ("Since the founding of the republic, the federal government has held broad authority to conduct searches at the border to prevent the entry of dangerous people and goods" which includes "images of child pornography") (quoting the then-Department of Homeland Security Secretary). A request for the defendant's passcode was made so that the border enforcement officials could determine whether the defendant was entering the United States with contraband. It was therefore logically related to the defendant's border crossing. "It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." United States v. Flores-Montano, 541 U.S. 149, 153 (2004). Such questions would be expected as consistent with "the long-standing right of the sovereign to protect itself by stopping and examining persons

and property crossing into this country," see Ramsey, 431 U.S. at 616. Indeed, the CBP officer provided the defendant with a document specifically advising him that the review of his phone was, in part, to "deter the entry of…a wide variety of other prohibited and restricted items." See Ex. B.

Accordingly, given that the Inspecting CBP Officer's request for the passcode was squarely related to the protection of the border and his duty to prohibit the movement of contraband into the United States, the inquiry was lawful and not subject to the requirements of Miranda. Indeed, as noted above, the Second Circuit has examined similar, and even more onerous circumstances, at the border and found that they were non-custodial border searches. See, e.g., Chertoff, 509 F.3d at 100 (detention of four to six hours was routine in the border context); FNU LNU, 653 F.3d at 155 (finding non-custodial a 90-minute airport interrogation in which defendant was finger-printed and confronted with apparent false statements in an old passport application). And courts have repeatedly found that asking an individual for their passcode does not transform an otherwise non-custodial environment into a custodial one. See Kamaldoss, No. 19-CR-543 (ARR), 2022 WL 1200776, at *8 (declining to find that asking defendant for multiple passcodes "transformed an otherwise non-custodial environment into a custodial one"); Vallerius, No. 17-CR-20648 (EGT), 2018 WL 2325729, at *4 (explaining that a defendant was not in custody merely because an agent asked for his passcodes at the airport).

"In the rare cases where a court has suppressed a defendant's statements to CBP, it was because CBP's conduct went beyond a typical border inspection that an international traveler would expect." Hassan, 2019 WL 5684367, at *3. No such aggravating factors are present here. The defendant's reliance on United States v. Djibo, 151 F. Supp. 3d 297 (E.D.N.Y. 2015), is misplaced. Djibo is a singular case, in which the district court suppressed evidence

obtained from an outbound passenger's cell phone after it was seized at the airport and he disclosed its passcode. The fact that the defendant in Djibo was an outbound passenger leaving the country rather than an inbound passenger entering the country was central to the court's decision. See Kamaldoss, 2022 WL 1200776, at *8 n.8 (defendant's "heavy reliance" on Djibo was "misplaced" because "[w]hile the court in that case concluded that the defendant was in custody, the fact that the defendant was an *outbound*—not inbound—traveler at the time he was stopped by border agents was integral to the court's determination") (emphasis in the original). In addition, in Djibo, the court explained that, in its view, law enforcement "sought to sidestep . . . constitutional guarantees" by subjecting the defendant to a search and coercive interrogation when he reached the border when he should have been arrested outside the airport prior to his arrival. 151 F. Supp. 3d at 306, 309-10. Neither Djibo's facts nor its reasoning apply in the present case.

The defendant's attempt to distinguish this case from others on account of his status as a U.S. citizen, see Def. Mem. at 2, is also without merit. The Second Circuit previously concluded, in Tabbaa, that a "special inspection operation" to screen individuals about terrorist associations, which resulted in U.S. citizens being "detained by CBP officials for several hours, questioned, patted-down, fingerprinted, and photographed" was appropriately within the government's ordinary border search powers and required no reasonable suspicion. 509 F.3d at 92. The Court further noted that even extended detention of these citizens was appropriate because "CBP's ability to threaten with extended detention those who do not comply with lawful screening measures is an important aspect of the longstanding right of the sovereign to protect itself at the border, and therefore is reasonable simply by virtue of the fact that it occurs at the

border....” Id. at 100 (internal citations, quotations and brackets omitted). Thus, the determination does not turn on the defendant’s immigration or citizenship status.

C. The Defendant’s Initial Interview Was Non-Custodial

Even if the questioning of the defendant were not already permitted as part of a routine border interview, a totality of facts would demonstrate that the defendant was not in “custody” for purposes of the Fifth Amendment at the time he provided his passcode to CBP. As the Second Circuit has made clear, a reasonable traveler arriving at an American airport, like JFK Airport, will expect some constraints as well as questions and follow-up about his or her citizenship, authorization to enter the country, destination, baggage and so on. FNU LNU, 653 F.3d at 153–55.

As described in detail above, the defendant was referred to a secondary border enforcement examination, a routine step taken every day at an international airport. A CBP officer asked the defendant for his phone, his passcode to his phone, and his passport, which he voluntarily provided. The defendant was not advised that he was under suspicion or that he was going to be arrested. There is no allegation that he was handcuffed or physically placed under arrest, nor that he was restricted in movement in any manner beyond the ordinary restrictions attendant upon a person traveling across the U.S. border at an international airport. The defendant does not allege that he was threatened or promised anything by CBP officers. He does not allege that he waited in a private area or saw any weapons displayed by law enforcement; indeed, he states that he was in a room “where other individuals were present.” Def. Aff. ¶ 7. The most the defendant claims is that he initially refused to provide the phone and the phone’s password and was handed a flyer. Def. Aff. ¶ 10. The defendant states in his affirmation that he was told he did not have a choice or right to refuse to provide the passcode to his phone, so he felt coerced and provided it. Def. Aff. ¶¶ 11-12. But the defendant’s subjective feeling is not

dispositive; the inquiry is whether a reasonable person in the defendant's position would have felt restrained in a way similar to formal arrest. Yilmaz, 508 F. App'x at 51. Being told that you must provide a customs officer access to a device to perform an inspection, which is essentially the defendant's claim, is not tantamount to restraint equivalent to formal arrest. The defendant provides no facts by which the Court can find that he was in custody when he provided CBP with the passcode to his cell phone. See United States v. Carpenter, No. 18-CR-382 (ADS), 372 F. Supp. 3d 80, 83, (E.D.N.Y. 2019) (finding that defendant's affidavit, supported by vague, conclusory statements, did "not provide the requisite specificity to establish that there was any interrogation that would trigger Miranda's requirements"). After he provided the passcode, the defendant said he was instructed to wait for the CBP officers and was told he could not leave, Def. Aff. ¶ 13, but that does not amount to a restraint of freedom akin to a formal arrest. Therefore, Miranda was not applicable when the defendant provided his passcode to CBP.

For these reasons, the defendant's arguments that his disclosure of his phone's passcode violated Miranda should be rejected.

D. The Defendant Provided His Passcode Voluntarily

The defendant also claims that his Fifth Amendment rights were violated because he was compelled to provide his passcode "under duress." Def. Mem. at 21. "To qualify for the Fifth Amendment privilege [against self-incrimination], a communication must be testimonial, incriminating, and compelled." Hiibel v. Sixth Judicial Dist. Ct. of Nevada, Humboldt Cnty., 542 U.S. 177, 189 (2004). A statement is "compelled" only when, "considering the totality of the circumstances, the free will of the [person making the statement] was overborne." United States v. Washington, 431 U.S. 181, 188 (1977). "Factors to be considered in making a determination of voluntariness include, but are not limited to, the type and length of questioning, the defendant's physical and mental capabilities, and the

government's method of interrogation." United States v. Mast, 735 F. 2d 745, 749 (2d Cir. 1984). "In evaluating whether [a statement] is voluntary, courts must be mindful of a distinction between 'choices which are physically or psychologically coerced and those which are merely difficult. Only the former are void under our law.'" United States v. Zimmerman, 480 F. Supp. 3d 446, 455 (E.D.N.Y. 2020) (quoting United States v. Mullens, 536 F.2d 997, 1000 (2d Cir. 1976)).

The evidence demonstrates that the defendant acted voluntarily in providing the passcode to his phone—he provided it. The defendant argues that the "CBP officer, who had provided Mr. Sultanov with printout stating that the traveler is obliged to provide cell phone password, had essentially misled the defendant." Def. Mem. at 13. But the flyer that the Inspecting CBP Officer provided to the defendant says nothing that supports the defendant's own self-serving version of the events: the flyer does not state that the individual being searched has no choice but to provide the phone's passcode. Ex. B. Rather, the flyer states, "Failure to provide information to assist CBP or ICE in the copying of information from the electronic device may result in its detention and/or seizure." Ex. B.

Thus, even on the defendant's own self-serving version of events, these facts are insufficient to conclude that his "free will . . . was overborne." Washington, 431 U.S. at 188. At the point CBP held his phone and asked for the passcode, the defendant was simply faced with a difficult decision: decline to provide the passcode and risk losing his phone for a period of time or provide the passcode. He freely chose to give them the passcode. The defendant does not claim that he was threatened or mentally incapacitated at the time (because he was not). Additionally, he was referred to secondary inspection at 12:17 pm, and by 12:40 pm, he was asked for his passcode; therefore, he was also not subject to prolonged

questioning. Courts within the Second Circuit have routinely rejected voluntariness arguments made under similar, or even more serious, circumstances. See, e.g., Zimmerman, 480 F. Supp. 3d at 458-59 (despite defendant being in custody for nearly 10 hours before interview, statements made during interview were voluntary); Wilson, 100 F. Supp. 3d at 283-84 (even where defendant was handcuffed at time statements made, statements were voluntarily made where the defendant "was not faced with violence or threats of violence," "was not promised anything in exchange" for the statements, "was not tricked or otherwise coerced into making the statements" and no evidence existed that the defendant's "mental capacity was diminished"); United States v. Juvenile Male, 968 F. Supp. 2d 490, 509-510 (E.D.N.Y. 2013) (statements voluntarily made where "no threatening statements were made and no physical force was exerted" and "none of the detectives who interviewed the defendant engaged in 'repeated and prolonged questioning'") (internal alterations omitted); United States v. Rodriguez, No. 18-CR-444 (NGG), 2019 WL 112621, at *7-8 (E.D.N.Y. Jan. 4, 2019) (despite officer's "false" and "arguably misleading" statements to the defendant, defendant's statements made in interview room at JFK were voluntary, in part because "'there is . . . a line separating tolerable deception from unconstitutional coercion'" (quoting United States v. Shehadeh, 940 F. Supp. 2d 66, 74 (E.D.N.Y. 2012)).

For these reasons, the defendant's Fifth Amendment "compulsion" argument should also be rejected.

E. The Defendant's Fruit of the Poisonous Tree Argument Fails

The defendant argues that the evidence obtained from his cell phone should be suppressed as fruit of the poisonous tree because the passcode was obtained as a result of improper questioning. Def. Mem. at 14-15. Assuming without conceding that disclosure of a password—analogous to the production of a physical key—is a "statement" within the

contemplation of Miranda or the Fifth Amendment, and assuming that the defendant could establish that a password was elicited in violation of Miranda (which he cannot do, for the reasons discussed above), the remedy would be suppression of the statement at issue: that is, suppression of the password. That might be desirable for defendants in some cases, where knowledge of the password establishes ownership of an otherwise unclaimed device and where the act of producing the password is therefore testimonial and incriminating; but not where, as here, the defendant's ownership of the device he was carrying is a foregone conclusion. Cf., e.g., United States v. Fridman, 974 F.3d 163, 174–76 (2d Cir. 2020) (discussing the act-of-production doctrine and foregone-conclusion exception). Indeed, it does not appear that the defendant cares to suppress the password, nor does the government seek to introduce the password. Rather, the defendant seeks the suppression of all evidence derived directly or indirectly from the password as fruit of the poisonous tree.

But the law does not permit such a novel claim. The Fifth Amendment "cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements." United States v. Patane, 542 U.S. 630, 631 (2004). The Fifth Amendment proscribes "extract[ing] from the person's own lips an admission of guilt, which would thus take the place of other evidence." Id. at 637 (emphasis in the original, internal citation omitted); see also id. at 639, 642 (holding that "[t]here is . . . no reason to apply the 'fruit of the poisonous tree' doctrine" to evidence obtained derivatively from statements elicited without Miranda warnings because the rationale of deterring unlawful searches does not apply to failures to give Miranda warnings). "The Miranda presumption of coercion has not barred the use of unwarned, voluntary statements . . . to locate non-testimonial evidence[.]" United States v. Morales, 788 F.2d 883, 886 (2d Cir. 1986); see also United States v. Hernandez, No. 18-CR-1888, 2018 WL 3862017, at *4

(S.D. Cal. Aug. 13, 2018) (denying motion to suppress evidence from cell phone where passcode was obtained after defendant invoked her right to counsel after her arrest at the border for narcotics offenses because there was no evidence of coercion or a denial of due process in elicitation of the statements).

Consequently, even if the border search doctrine did not apply, and the defendant was in custody when he disclosed his passcode, and the passcode itself should be suppressed, the derivative evidence obtained from his electronic devices (pursuant to a lawful search warrant) should not be suppressed.

II. THE MANUAL BORDER SEARCH OF THE DEFENDANT'S PHONE CONDUCTED BY CBP DID NOT VIOLATE THE FOURTH AMENDMENT

Relying primarily on Riley v. California, 573 U.S. 373 (2014), the defendant argues that the CBP's manual search of his cell phone at JFK Airport falls outside of the border search exception because it lacked reasonable suspicion. Def. Mem. 2-8. This argument is meritless. Reasonable suspicion is not required for manual searches of devices at the U.S. border in these circumstances, and, in any event, the government had reasonable suspicion to conduct a search of the defendant's phone.

A. The Border Search Doctrine and the Fourth Amendment

As with the Fifth Amendment,[3] the Second Circuit has "recognize[d] the Federal Government's broad plenary powers to conduct so-called 'routine' searches at the border even without 'reasonable suspicion that the prospective entrant has committed a crime.'" United States v. Levy, 803 F.3d 120, 122 (2d Cir. 2015) (quoting Tabbaa, 509 F.3d at 97–98). "[T]he Fourth Amendment's balance of reasonableness is qualitatively different at the international

[3] While most cases involving the border search doctrine involve the Fourth Amendment, as reflected above, that a subject is at the border impacts the analysis of an interview under the Fifth Amendment. See United States v. FNU LNU, 653 F.3d 144, 148 (2d Cir. 2011).

border than in the interior" due to the government's broad and comprehensive "power to protect the Nation by stopping and examining persons entering this country." United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985); see also Ramsey, 431 U.S. at 616 ("searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border"); United States v. Nieves, 609 F.2d 642, 645 (2d Cir. 1979) (same). And, as noted above, it is "well established that the Customs area of an international airport is the functional equivalent of a border for purposes of the border search doctrine." Levy, 803 F.3d at 122 (citing United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006)).

Though neither the Supreme Court nor the Second Circuit has squarely addressed the issue of border searches of electronic devices, see Kamaldoss, 2022 WL 1200776, at *10, "no court has ever required a warrant for any border search or seizure," United States v. Wanjiku, 919 F.3d 472, 485 (7th Cir. 2019), either pre- or post-Riley. "Riley does not command a warrant requirement for border searches of electronic devices nor does the logic behind Riley compel . . . one." Alasaad v. Mayorkas, 988 F.3d 8, 17, 18-19 (1st Cir. 2021); see also United States v. Cano, 934 F.3d 1002, 1015-1016 (9th Cir. 2019) (rejecting application of Riley and warrant requirement to manual searches of cell phones at the border); United States v. Molina-Isidoro, 884 F.3d 287, 292 (5th Cir. 2018) ("[N]ot a single court addressing border searches of computers since Riley has read it to require a warrant.") (collecting cases); United States v. Vergara, 884 F.3d 1309, 1312 (11th Cir. 2018) ("Border searches never require probable cause or a warrant").

Similarly, no court has held, even post-Riley, that reasonable suspicion is required to conduct a manual search of a cell phone for contraband at the border. Indeed, numerous courts have explicitly held, post-Riley, that law enforcement officers may conduct manual searches of cell phones absent any reasonable suspicion. See, e.g., Alasaad, 988 F.3d at 18-19 ("basic border

searches," including those that "require an officer to manually traverse the contents of the traveler's electronic device . . . need not be supported by reasonable suspicion"); Cano, 934 F.3d at 1007 ("manual cell phone searches may be conducted by border officials without reasonable suspicion") (emphasis in the original); United States v. Touset, 890 F.3d 1227, 1229 (11th Cir. 2018) ("our precedents about border searches of property make clear that no suspicion is necessary to search electronic devices at the border"); United States v. Almadaoji, 567 F. Supp. 3d 834, 839-40 (S.D. Ohio 2021) ("A manual search, whereby an officer simply scrolls through the device to view its contents, is classified as [a] 'routine' border search for which no warrant, reasonable suspicion or probable cause is required."); United States v. Kolsuz, 185 F. Supp. 3d 843, 860 (E.D. Va. 2016) (holding that manual search at airport of iPhone "was a routine border search that did not require any level of individualized suspicion");[4] see also Abidor v. Napolitano, 990 F. Supp. 2d 260, 277 (E.D.N.Y. 2013) (holding, pre-Riley, that "reasonable suspicion is not required to conduct a cursory manual search of an electronic device at the border").

B. The Defendant's Phone Was Lawfully Searched Pursuant to the Border Search Doctrine

As discussed above in the context of the initial questioning of the defendant, the search of the defendant's phone was well-within the scope of a lawful border examination. The examination was done at JFK Airport, a location that has been squarely found to be the national

[4] The defendant did not challenge this portion of the ruling on appeal, focusing only on the subsequent forensic search of the device, see United States v. Kolsuz, 890 F.3d 133, 146 (4th Cir. 2018), as amended (May 18, 2018), which is not at issue in the present case. The panel noted, in dicta, that a prior pre-Riley decision in the Fourth Circuit also held that a manual search of a computer at the border required no individualized suspicion. See id. at 146 n.5 (citing United States v. Ickes, 393 F.3d 501 (4th Cir. 2005)).

border. The examination was conducted by the Inspecting CBP Officer, who is specifically charged with conducting border enforcement activities. The examination was done for the purpose of looking for contraband—child pornography—that could not lawfully be brought into the United States from outside the country. And the examination was limited to a routine and manual review of the phone, relying upon no forensic applications nor any prolonged detention and removal of the device to some other location. The facts of this case are the same as those that courts have repeatedly held are a valid border search that requires neither a warrant nor reasonable suspicion. See, e.g., Alasaad, 988 F.3d at 18-19; Kolsuz, 185 F. Supp. 3d at 860; Cano, 934 F.3d at 1007; Touset, 890 F.3d at 1229; Almadaoji, 567 F. Supp. 3d at 839-40; Napolitano, 990 F. Supp. 2d at 277. The reasoning behind the rationale of permitting border officials to conduct inspections of property at the border for contraband was captured by Judge Kaplan of the Southern District, who explained in a similar case:

> The opening of luggage, itself a closed container, is the paradigmatic routine border search. Hence, the agents were entitled to inspect the contents of the diskettes even absent reasonable suspicion. Indeed, any other decision effectively would allow individuals to render graphic contraband, such as child pornography, largely immune to border search simply by scanning images onto a computer disk before arriving at the border.

United States v. Irving, No. S3 03 CR.0633 (LAK), 2003 WL 22127913, at *5 (S.D.N.Y. Sept. 15, 2003) (internal quotations, footnotes and citations omitted)[5]. That logic applies with equal force here.

The defendant cites United States v. Bongiovanni, No. 19-CR-227, 2022 WL 17481884, at *11 (W.D.N.Y. Aug. 5, 2022), in support of his argument that search of a cell

[5] On appeal, the Second Circuit concluded that the border officials in Irving had reasonable suspicion to search the diskettes at issue, and so did not need to reach the question of whether such a search was routine or non-routine. See 452 F3d. at 124.

phone can be a nonroutine border search requiring reasonable suspicion. Def. Mem. at 7. As an initial matter, the evidence in that case was not suppressed. Additionally, in that case, law enforcement officers attempted to complete a forensic copy of the defendant's phone, were unable to, proceeded to manually search the phone, but then "went further" by taking pictures of the phone's contents. Id. at *11. The court specifically distinguished from those facts a situation, like this one, where there is "contraband or obvious evidence of criminal activity." Id.; see id. at *12 ("the Court finds that the nonroutine nature of the search makes this case analogous to others where courts have required reasonable suspicion for searches that went beyond a brief manual search for contraband or obvious evidence of a crime." (emphasis added)). Here, however, the Inspecting CBP Officer conducted only a brief manual search while the phone was in airplane mode for child pornography—digital contraband—which he quickly located, and then ended the search. He did not go "further" by copying any of the contents of the phone. See id. The decision is inapposite.

C. The Government Had Reasonable Suspicion to Search the Defendant's Phone

Even assuming, arguendo, that the Inspecting CBP Officer needed reasonable suspicion to conduct a cursory, manual search of the defendant's cell phone while at JFK Airport, the facts make clear that he had such reasonable suspicion.

The Supreme Court has defined reasonable suspicion as "a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417–18 (1981). The standard is met when law enforcement can point to "specific and articulable facts" that lead to the inference that criminal activity "may be afoot." Terry v. Ohio, 392 U.S. 1, 21, 30 (1968). "Reasonable suspicion is a relatively low standard and border officials are afforded deference due to their training and experience." Abidor, 990 F. Supp. 2d at 282 (citing Montoya de Hernandez, 473 U.S. at 542). An analysis of whether

reasonable suspicion exists also considers an officer's background and training, and the context of the situation as a whole. United States v. Ruiz, 785 F.3d 1134, 1141 (7th Cir. 2015). In the border search context, the Second Circuit has provided a number of factors that can support a finding of reasonable suspicion, including computerized information showing pertinent criminal propensity, tips from informants, travel itinerary, discovery of incriminating matter during routine searches, nervous or unusual conduct, inadequate luggage and evasive or contradictory answers. United States v. Asbury, 586 F.2d 973, 976 (2d Cir. 1978); Irving, 452 F.3d at 124 (applying Asbury factors to border search of diskettes). Generally, an alert in a law enforcement database suggesting that a traveler is involved in criminal activity provides reasonable suspicion. See, e.g., United States v. Cotterman, 709 F.3d 952, 967 (9th Cir. 2013) (reasonable suspicion existed where border agents relied on TECS hit related to the defendant's potential involvement in child pornography in making decision to search defendant's belongings), United States v. Ramirez, No. EP-18-CR-3530-PRM, 2019 WL 3502913, at *15 (W.D. Tex. Aug. 1, 2019) (officers had reasonable suspicion to search the defendant's cell phone where a TECS record informed them that the defendant was linked to the purchase of child pornography); United States v. Bunty, 617 F. Supp. 2d 359, 365 & n.7 (E.D. Pa. 2008) (reasonable suspicion existed where agents referred defendant for a secondary inspection based on their knowledge from a law enforcement database of his arrest for the sexual abuse of a child and the resulting conviction for corrupting the morals of a minor).

Here, the Inspecting CBP Officer had reasonable suspicion because the defendant had been flagged as a potential purchaser of child pornography, which is digital contraband, and there was an entry in the TECS system to that effect. This alert is sufficient for reasonable suspicion. See, e.g., Cotterman, 709 F.3d at 967 (officers had reasonable suspicion to search

defendant's belongings where border agents relied on TECS hit related to the defendant's potential involvement in child pornography), Ramirez, 2019 WL 3502913, at *15 (officers had reasonable suspicion to search the defendant's cell phone where a TECS record informed them that the defendant was linked to the purchase of child pornography). Indeed, as the defendant recognizes, the border search exception is "designed to prevent entry of contraband" into the country, Def. Mem. at 2, which is precisely what the defendant was carrying on his cell phone. Accordingly, even if the Court was to require reasonable suspicion for the manual search of the defendant's cell phone, it existed here, and suppression is not warranted.

III. SUPPRESSION OF EVIDENCE FROM THE FORENSIC SEARCH OF THE DEFENDANT'S CELL PHONE IS NOT WARRANTED

On March 17, 2022, the Honorable James R. Cho signed a search warrant authorizing HSI to forensically examine the contents of two of the defendant's cell phones—the cell phone which CBP initially manually reviewed—and another cell phone that was on the defendant's person at the time of his arrest, but which was powered down at that time (22-MJ-319). Even if the Court found that evidence from the manual border search of the defendant's cell phone was illegally obtained (which it was not), and that the resulting search warrant affidavit including that evidence lacked probable cause to support its issuance (which it did not),[6] exclusion is not warranted because the government relied in good faith on the issued warrant. See United States v. Leon, 468 U.S. 897, 922 (1984).

A. Applicable Law Regarding Good Faith Exception

In Leon, the Supreme Court held that the exclusionary rule "does not apply to evidence seized 'in objectively reasonable reliance on' a warrant issued by a detached and neutral magistrate judge, even where the warrant is subsequently deemed invalid." United

[6] The defendant has not argued that the search warrant affidavit lacks probable cause.

States v. Falso, 544 F.3d 110, 125 (2d Cir. 2008) (quoting Leon, 468 U.S. at 922). The Leon Court explained that, "assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement." Leon, 468 U.S. at 919.

Under the good faith exception, evidence collected pursuant to an invalid search warrant will be suppressed only if the issuing judge was knowingly misled, the issuing judge wholly abandoned her judicial role, the application was so lacking in indicia of probable cause as to render reliance upon it unreasonable or the warrant is so facially deficient that reliance upon it is unreasonable. Falso, 544 F.3d at 125. If the officer's reliance on the warrant was objectively reasonable, suppression is not warranted. Leon, 468 U.S. at 922. To trigger the exclusionary rule, law enforcement conduct "must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." United States v. Herring, 555 U.S. 135, 144 (2009).

B. The Good Faith Exception Applies

Here, law enforcement agents had every reason to believe that the routine search of the defendant's cell phone was lawful, and their reliance on the resulting search warrant was more than reasonable. At the time of the search (and now), no court had required any level of suspicion for the manual search of a cell phone for contraband at the border. See United States v. Raymonda, 780 F.3d 105, 119 (2d Cir. 2015) ("a prior holding by a district court cannot establish a binding principle of law sufficient to undermine an agent's good faith reliance on a later warrant").

Law enforcement agents further had no basis to believe that the search warrant issued by Judge Cho was invalid, as none of the Leon factors supporting suppression are

present here. See United States v. Aigbekaen, 943 F.3d 713, 725 (4th Cir. 2019) (applying the good faith exception in the context of warrantless forensic searches of electronic devices given the permissive "uniform body of precedent" that existed at the time of the search); Molina-Isidoro, 884 F.3d at 291-92 (reasonable for law enforcement to think that warrantless, manual search of defendant's cell phone at the border was lawful); Bongiovanni, 2022 WL 17481884, at *14 (W.D.N.Y. Aug. 5, 2022) (denying motion to suppress evidence from border search of a cell phone pursuant to good faith exception where law enforcement did not act contrary to binding appellate precedent when they conducted search). Where law enforcement acted in good faith reliance on existing law, no meaningful deterrent effect would be achieved through suppression of evidence.

Finally, if the Court finds that the evidence from the manual search was illegally obtained, the good faith exception would still prevent suppression, as it is applicable even where a search warrant affidavit contains illegally obtained evidence. See United States v. Ganias, 824 F.3d 199, 225 (2d Cir. 2016) (en banc) (affirming district court and applying the good-faith doctrine to the subsequent warrant-authorized search, even though the affidavit contained evidence obtained in violation of the Fourth Amendment, because the officer was acting in good faith and had no reason to believe that his actions were unlawful); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir.1985) (same).

Accordingly, even if the Court determines that the affidavit lacked probable cause, the good faith exception applies, and suppression is not warranted.

IV. THE DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT SHOULD NOT BE SUPPRESSED

The defendant argues that his subsequent statements to HSI agents should also be suppressed, because they were not made voluntarily, he did not understand the Miranda warnings

given, and he only made statements because he believed he would not be arrested. Def. Mem. at 13; Def. Aff. ¶¶ 18-25. The defendant's argument fails.

A. The Defendant Did Not Clearly and Unambiguously Invoke His *Miranda* Rights

"Consistent with Miranda, all criminal defendants must be apprised of certain rights before a custodial interrogation may begin, including, of course, the right to remain silent and be afforded the assistance of counsel." United States v. Plugh, 648 F.3d 118, 125 (2d Cir. 2011). "But once those warnings are properly administered . . . a defendant is left to make his own choice as to how best to proceed." Id. "Without question, the most legally remarkable and distinct choices a defendant can make are to (1) unambiguously invoke those rights and thereby cut off further questioning or (2) knowingly and voluntarily waive those rights and cooperate fully." Id. As the Supreme Court held in Berghuis v. Thompkins, 560 U.S. 370 (2010), a defendant must assert his rights "through a clear, unambiguous affirmative action or statement." Plugh, 648 F.3d at 124 (emphasis added). "[A] refusal to waive rights, however unequivocal, is not necessarily equivalent to an unambiguous decision to invoke them." Id. at 125 (emphasis in original).

In United States v. Plugh, 648 F.3d at 125, for example, a defendant's refusal to sign a Miranda waiver-of-rights form, however unequivocal, was held not to be equivalent to a decision to invoke his rights. See id. ("While his refusal to sign the form presented to him upon arrest may have unequivocally established that he did not wish to waive his rights at that time, his concurrent statements made equally clear he was also not seeking to invoke his rights and thus cut off all further questioning at that point." (emphasis in original)). "[A]bsent an unambiguous invocation, custodial officers have no obligation to stop questioning or to ask only questions intended at clarifying an ambiguous statement." Id. at 126 (emphasis in original) (citing Berghuis, 130 S. Ct. at 2259-60).

Indeed, "[t]here is good reason to require an accused who wants to invoke his or her right[s] . . . to do so unambiguously." Berghuis, 560 U.S. at 381. "A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." Id. at 381-82 (quoting Davis v. United States, 512 U.S. 452, 458-459 (1994)).

Here, the defendant did not "unambiguously" invoke his Miranda rights. While he initially said he understood the Miranda warnings "50/50," when Special Agent 1 offered to explain them more fully, the defendant immediately began to discuss a video he had that CBP officers found on his phone, clearly referencing one of the videos containing child pornography. Critically, the defendant did not unambiguously state that he wanted to remain silent or did not want to speak with law enforcement, and he did not ask for counsel. His statements were therefore insufficient to invoke his rights. See Plugh, 648 F.3d at 126 ("Critically, at no point did Plugh unambiguously inform the custodial officers that he wished to invoke his right to remain silent or his right to speak with an attorney, nor was his course of conduct such that the officers should reasonably have been put on notice that . . . no further questioning could occur."); see also Berghuis, 560 U.S. at 382 ("Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his right to cut off questioning.") (internal quotation omitted)). Therefore, the Special Agents had every right to continue the interrogation. See Berghuis, 560 U.S. at 381 ("If an accused makes a statement concerning [his rights] that is ambiguous or equivocal or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her Miranda rights." (internal quotations omitted)).

B. The Defendant Knowingly and Voluntarily Waived His *Miranda* Rights

"Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived Miranda rights when making the statement." Berghuis, 560 U.S. at 382 (internal quotation omitted). The waiver inquiry has two components. Id. First, the waiver of rights must be "knowing," i.e., "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Plugh, 648 F.3d at 127 (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). Second, the waiver must be "voluntary," i.e., "that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." Id. (quoting Moran, 475 U.S. at 421).

"The question of waiver must be determined on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." Id. (quoting United States v. Spencer, 995 F.2d 10, 11 (2d Cir. 1993)). The government bears the burden of demonstrating a knowing and voluntary waiver. Id. "[L]imited English language proficiency [does not] necessarily prevent[] a defendant from making a knowing and intelligent waiver of his rights." United States v. Zeng, 804 F App'x 18, 20 (2d Cir. 2020) (citing United States v. Male Juvenile (95-CR-1074), 121 F.3d 34, 40 (2d Cir. 1997)); Yilmaz, 508 F. App'x at 53 (defendant understood English sufficiently well to comprehend Miranda warnings when he spoke in English throughout his interaction with law enforcement); Campaneria v. Reid, 891 F.2d 1014, 1020 (2d Cir. 1989) (holding that defendant possessed the required understanding to waive his Miranda rights even though his proficiency in the English language was limited). "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has

made a deliberate choice to relinquish the protection those rights afford." Berghuis, 560 U.S. at 385.

Here, the defendant knowingly and voluntarily waived his Miranda rights. Prior to beginning the interview, Special Agent 1 asked the defendant if he was comfortable speaking in English, to which the defendant responded, "If you're talking slowly." Ex. A. Special Agent 1 said he would "keep it slow then." Ex. A. After Special Agent 1 read the defendant Miranda warnings, the defendant said that he understood them "50/50," to which Special Agent 1 offered to "explain anything." Ex. A. The defendant did not ask for further clarification, and instead decided to speak about matters of substance—that he had a video, but that he did not know it was illegal to have it. Ex. A. The defendant clarified that he wanted to understand what is "happening to right now" and whether "I am not gonna arrest," see Def. Aff. ¶ 23; Ex. A, indicating that he wanted to speak to law enforcement to understand what was happening. Special Agent 1 responded "yeah." Id. Special Agent 1 later repeated that the defendant was not currently under arrest, but he did not state that the defendant would not be arrested in the future. Special Agent 1 also told the defendant he did not have to sign the Miranda waiver form, and the defendant did not sign the form, but he continued speaking to law enforcement. Ex. A.

The defendant spoke with the Special Agents in English during the entirety of the interview, and Exhibit A makes clear that he was able to understand and answer their questions. See Campaneria, 891 F.2d at 1020 ("Nonetheless, the record, and in particular the transcript of the recorded interview, reveals that, although he spoke in broken English with an accent and occasionally lapsed into Spanish, his command of English was sufficient for him to have understood the Miranda warnings given to him."). Indeed, the defendant asked the agents to clarify certain things at various points, indicating he understood what the agents were saying and

was comfortable asking them to clarify or repeat themselves when necessary for him to understand them. The defendant did not ask for an interpreter at any point during the interview. While the defendant says he believed he would not be arrested, the agents never clearly stated that during the interview. See Ex. A.

The defendant does not claim that the officers threatened him in any way, and Exhibit A makes clear that the interrogation was not coercive; to the contrary, the Special Agents were calm, respectful, and courteous throughout the entirety of their interaction with the defendant. See Plugh, 648 F.3d at 128 (finding no waiver where the defendant "was never threatened physically or psychologically abused in any manner, or made any types of promises such that his will was overborne."). Throughout the interview, the defendant entered the passcode into his phone himself, offered to show the agents various items on his cell phone and navigated to certain parts of his phone himself, again indicating that he was acting voluntarily. Therefore, the defendant's statements were not made involuntarily, and he knowingly and voluntarily waived his Miranda rights.

CONCLUSION

For the reasons described above, the defendant's motion to suppress should be denied.

Dated: Brooklyn, New York
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Respectfully submitted,

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