24-824

To Be Argued By:
ROBERT M. POLLACK

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– against –

EZHIL KAMALDOSS, also known as KAMALDOSS SEZHIAN, also known as KAMAL DOSS, also known as EZHIL CEZHIAN,

Defendant-Appellant

VELAUDAPILLAI NAVARATNARAJAH, also known as RAJAH,

Defendant.

On Appeal From the United States District Court for the Eastern District of New York

BRIEF AND APPENDIX FOR THE UNITED STATES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 2

STATEMENT OF FACTS 4

I. Background 4

II. Offense Conduct and Arrest 4

III. Border Search and Suppression Ruling 9

IV. Subsequent Proceedings 14

SUMMARY OF ARGUMENT 16

ARGUMENT 19

POINT ONE - THE DISTRICT COURT DID NOT ERR BY DECLINING TO SUPPRESS EVIDENCE OBTAINED FROM KAMALDOSS'S ELECTRONIC DEVICES DURING A BORDER SEARCH 19

I. Standard of Review 19

II. The Fifth Amendment Does Not Compel the Suppression of Evidence Obtained from Kamaldoss's Electronic Devices 20

A. Applicable Law 20

B. The District Court Correctly Held that Kamaldoss Was Not in *Miranda* Custody 25

C. Even If Kamaldoss Were in Custody, Suppression Would Not Be Warranted 31

III. The Fourth Amendment Does Not Compel the Suppression of Evidence Obtained from Kamaldoss's Electronic Devices 34

A. Applicable Law 34

B. A Warrant is Not Required for Border Searches and the Border Search Doctrine Extends to Forensic Searches for Evidence of Criminal Offenses 39

C. The Searches of Kamaldoss's Devices Were Supported by Reasonable Suspicion 45

D. The Good-Faith Doctrine Applies 48

IV. The First Amendment Does Not Compel the Suppression of Evidence Obtained from Kamaldoss's Electronic Devices 50

V. Any Error Was Harmless 52

POINT TWO - THE DISTRICT COURT DID NOT ERR BY APPLYING THE GUIDELINES ADJUSTMENT FOR MASS MARKETING BY INTERACTIVE COMPUTER SERVICE 56

I. Standard of Review 56

II. Applicable Law 57

III. The District Court Properly Applied U.S.S.G. § 2D1.1(b)(7) 58

CONCLUSION 63

TABLE OF AUTHORITIES

Page(s)

CASES

Abidor v. Napolitano,
990 F. Supp. 2d 260 (E.D.N.Y. 2013) 46

Alasaad v. Mayorkas,
988 F.3d 8 (1st Cir. 2021) ..... passim

Anibowei v. Mayorkas,
No. 3:16-CV-3495-D,
2024 WL 4887525 (N.D. Tex. Nov. 22, 2024) 52

Berkemer v. McCarty,
468 U.S. 420 (1984) 22, 23, 29

California v. Beheler,
463 U.S. 1121 (1983) 22

Davis v. United States,
564 U.S. 229 (2011) 49

Florida v. Bostick,
501 U.S. 429 (1991) 23, 24

Howes v. Fields,
565 U.S. 499 (2012) 22

Maryland v. Shatzer,
559 U.S. 98 (2010) 21, 22, 28

Miranda v. Arizona,
384 U.S. 436 (1966) ..... passim

New York v. P.J. Video, Inc.,
475 U.S. 868 (1986) 52-53

Rhode Island v. Innis,
446 U.S. 291 (1980) 20

Riley v. California,
573 U.S. 373 ..... 37, 38, 40, 41

Stansbury v. California,
511 U.S. 318 (1994) 23, 29

Tabbaa v. Chertoff,
509 F.3d 89 (2d Cir. 2007) 35, 37, 53

Terry v. Ohio,
392 U.S. 1 (1968) 21, 46

United States v. Aguiar,
737 F.3d 251 (2d Cir. 2013) 49, 53

United States v. Aguilar,
973 F.3d 445 (5th Cir. 2020) 50

United States v. Aigbekaen,
943 F.3d 713 (4th Cir. 2019) 38, 43, 48, 49

United States v. Archambault,
740 F. App'x 195 (2d Cir. 2018) 49

United States v. Arnold,
533 F.3d 1003 (9th Cir. 2008) 52

United States v. Asbury,
586 F.2d 973 (2d Cir. 1978) 46

United States v. Boles,
914 F.3d 95 (2d Cir. 2019) 20

United States v. Broughton,
600 F. App'x 780 (2d Cir. 2015) 26

United States v. Cacace,
796 F.3d 176 (2d Cir. 2015) 53

United States v. Cano,
934 F.3d 1002 (9th Cir. 2019) 38, 40, 42, 43

United States v. Cano,
973 F.3d 966 (9th Cir. 2020) 43

United States v. Carr,
63 F. Supp. 3d 226 (E.D.N.Y. 2014) 27

United States v. Castillo,
70 F.4th 894 (5th Cir. 2023) 37

United States v. Cavera,
550 F.3d 180 (2d Cir. 2008) 57

United States v. Cortez,
449 U.S. 411 (1981) 46

United States v. Dhinsa,
243 F.3d 635 (2d Cir. 2001) 54

United States v. Esteras,
102 F.4th 98 (2d Cir. 2024) 58

United States v. Figueroa,
300 F. App'x 93 (2d Cir. 2008) 21

United States v. Flores-Montano,
541 U.S. 149 (2004) 35, 40, 42

United States v. FNU LNU,
653 F.3d 144 (2d Cir. 2011) ..... passim

United States v. Fridman,
974 F.3d 163 (2d Cir. 2020) 33

United States v. Ghailani,
733 F.3d 29 (2d Cir. 2013) 57

United States v. Gurr,
471 F.3d 144 (D.C. Cir. 2006) 39, 43

United States v. Hassan,
No. 18-cr-603 (ARR),
2019 WL 5684367 (E.D.N.Y. Nov. 1, 2019) 26, 27, 29

United States v. Hernandez,
No. 18-CR-1888-L,
2018 WL 3862017 (S.D. Cal. Aug. 13, 2018) 33-34

United States v. Ickes,
393 F.3d 501 (4th Cir. 2005) 52

United States v. Irving,
452 F.3d 110 (2d Cir. 2006) 35, 36

United States v. Johnson,
994 F.2d 980 (2d Cir. 1993) 45

United States v. Kolsuz,
890 F.3d 133 (9th Cir. 2018) 47, 49

United States v. Levy,
803 F.3d 120 (2d Cir. 2015) ..... passim

United States v. Mendez,
103 F.4th 1303 (7th Cir. 2024) 37, 41

United States v. Molina-Gomez,
781 F.3d 13 (1st Cir. 2015) 43

United States v. Molina-Isidoro,
884 F.3d 287 (5th Cir. 2018) 38

United States v. Montoya de Hernandez,
473 U.S. 531 (1985) 34, 36, 42, 46

United States v. Morales,
788 F.2d 883 (2d Cir. 1986) 33

United States v. Morla,
123 F. Supp. 3d 382 (E.D.N.Y. 2015) 27, 31

United States v. Mulholland,
702 F. App'x 7 (2d Cir. 2017) 45

United States v. Newton,
369 F.3d 659 (2d Cir. 2004) 22, 25, 27

United States v. Odofin,
929 F.2d 56 (2d Cir. 1991) 49

United States v. Patane,
542 U.S. 630 (2004) 33

United States v. Ramsey,
431 U.S. 606 (1977) 35

United States v. Salazar,
489 F.3d 555 (2d Cir. 2007) 59

United States v. Schaffer,
851 F.3d 166 (2d Cir. 2017) 21

United States v. Shvartsman,
722 F. Supp. 3d 276 (S.D.N.Y. 2024) 31

United States v. Singh,
No. 12-CR-121 (DLI),
2012 WL 2501032 (E.D.N.Y. June 27, 2012) 36

United States v. Skaggs,
25 F.4th 494 (7th Cir. 2022) 50

United States v. Smith,
967 F.3d 198 (2d Cir. 2020) 20

United States v. Tavares,
No. 11-CR-610 (NGG),
2012 WL 194974 (E.D.N.Y. Jan. 23, 2012) 27

United States v. Touset,
890 F.3d 1227 (11th Cir. 2018) 38, 41, 43

United States v. Watkins,
667 F.3d 254 (2d Cir. 2012) 58

United States v. Wilson,
100 F. Supp. 3d 268 (E.D.N.Y. 2015) 31

United States v. Yilmaz,
508 F. App'x 49 (2d Cir. 2013) 26

STATUTES

47 U.S.C. § 230(f)(2) 59

SENTENCING GUIDELINES

U.S.S.G. § 1B1.3 60

U.S.S.G. § 2D1.1, comment. (n.13) 58, 59, 62

U.S.S.G. § 2D1.1(b)(7) 16, 58, 59

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 24-824

UNITED STATES OF AMERICA,

Appellee,

-against-

EZHIL KAMALDOSS also known as KAMALDOSS SEZHIAN, also known as KAMAL DOSS, also known as EZHIL CEZHIAN,

Defendant-Appellant,

VELAUDAPILLAI NAVARATNARAJAH, also known as RAJAH,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Defendant-Appellant Ezhil Kamaldoss appeals from a judgment[1] entered on March 28, 2024, in the United States District Court for the Eastern District of New York (Ross, J.), convicting him, after a jury trial, of one count of conspiracy to distribute and possess with intent to distribute Tramadol, Alprazolam, and Carisoprodol, in violation of 21 U.S.C. §§ 846 and 841(b)(2), four counts of attempted distribution and possession with intent to distribute Tramadol and Alprazolam, in violation of 21 U.S.C. § 841(b)(2), and one count of money laundering conspiracy, in violation of 18 U.S.C. § 1956(h); and sentencing him principally to 27 months' imprisonment. (SPA:45-51).[2]

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[1] The judgment filed by the district court erroneously indicates (by the wrong box being checked on its first page) that Kamaldoss pleaded guilty rather than having been found guilty by a jury. For the reasons discussed herein, the government respectfully submits that the conviction and sentence should be affirmed in their entirety, but the mandate should direct the district court to correct this scrivener's error.

[2] Parenthetical references to "Br.," "A," "SPA," "SA," "GA," "GX," "T," and "DE" are to Kamaldoss's brief, his appendix, his special appendix, his sealed appendix, the government's appendix, the government's trial exhibits, the trial transcript, and entries on the district court's docket, respectively. "DE" refers to entries on the district court docket in *United States v. Ezhil Sezhian Kamaldoss*, No. 19-CR-543 (S-1) (ARR) (E.D.N.Y.). References to the "PSR" are to the Presentence

On appeal, Kamaldoss argues that the district court erred by (1) denying his motion to suppress evidence obtained from his electronic devices during a border search, and (2) applying a two-level increase to his adjusted offense level, pursuant to § 2D1.1(b)(7) of the United States Sentencing Guidelines ("U.S.S.G."), for the online mass-marketing of the drugs he was convicted of distributing throughout the United States. For the reasons that follow, these arguments lack merit and should be rejected.

Investigation Report dated September 30, 2022, filed separately under seal.

STATEMENT OF FACTS

I. Background

For years, Kamaldoss owned and operated an international drug-trafficking enterprise that distributed throughout the United States millions of prescription pills, including misbranded opioids and other drugs, without prescriptions or medical oversight. (PSR ¶¶ 12, 20). On June 27, 2022, following a one-week jury trial, a unanimous jury convicted Kamaldoss on all seven counts with which he was charged, including one count of conspiracy to distribute and possess with intent to distribute Schedule IV controlled substances, in violation of 21 U.S.C. §§ 846 and 841(b)(2); five counts of attempted distribution and attempted possession with intent to distribute Schedule IV controlled substances, in violation of 21 U.S.C. § 841(b)(2); and one count of money laundering conspiracy, in violation of 18 U.S.C. § 1956(h). (PSR ¶¶ 1-8; DE:307).

II. Offense Conduct and Arrest

As established at trial, since at least 2017, Kamaldoss distributed addictive and dangerous drugs, including Tramadol (a Schedule IV synthetic opioid) and Alprazolam (a Schedule IV controlled substance marketed under the brand name Xanax), after importing them

from India, and he conspired to launder the proceeds to keep his criminal business churning. (PSR ¶¶ 18-19, 21; DE:298 at 2).

Kamaldoss's customers purchased the drugs directly from other co-conspirators online and through encrypted chat programs. (PSR ¶¶ 14, 17; DE:298 at 2). Kamaldoss aggregated their orders and fulfilled them from a warehouse in Queens, New York, where he and his co-conspirators re-packaged the drugs that had been smuggled from India and mailed them en masse virtually every day to customers throughout the United States. (PSR ¶¶ 12, 14-17).

Kamaldoss rented a warehouse near John F. Kennedy International Airport ("JFK") specifically for this criminal operation, (PSR ¶ 14), and he arranged for others to import the drugs to keep his warehouse stocked. (DE:298 at 2). Shipments of drugs were routinely smuggled as legitimate cargo through JFK, and Kamaldoss's co-conspirators collected the drugs and brought them to Kamaldoss's warehouse, where other co-conspirators printed postage labels (which Kamaldoss sent them by email) associated with each day's drug purchases, packaged the drugs into Priority Mail envelopes for shipping,

and carried them in laundry bags to nearby post offices for mailing. (PSR ¶¶ 14-15; GA:98; T:730).

In early 2018, the Food and Drug Administration ("FDA") and other federal law enforcement agencies began investigating this scheme. They conducted a series of undercover purchases that resulted in the shipment of hundreds of illegal pills, including Tramadol and Carisoprodol, from Kamaldoss's warehouse to an undercover agent. (PSR ¶¶ 12-14). In the summer of 2018, the FDA intercepted and seized over a million Tramadol pills that were shipped from India and destined for Kamaldoss's warehouse. (PSR ¶ 14). Law enforcement agents subsequently surveilled the warehouse and interviewed confidential informants who had worked there for Kamaldoss—one of whom agreed to wear an audio-recording device and surreptitiously take photographs of the operation from the inside (he later testified at trial and identified Kamaldoss to the jury). (A:45, 599-601).

Running this illegal pill mill was Kamaldoss's full-time job. His electronic communications were replete with examples of his giving instructions and quoting drug prices directly to his co-conspirators. For instance, to one co-conspirator who had been taking online orders at too

low a price per pill, Kamaldoss wrote, "Soma 500 is $0.52. Don't take orders less than this price." (T:334:20-21). He lamented when payment for drugs was late, which forced him to wait to buy new stock: "Balance 24,437. Bro, if I buy stock, they don't give credit even one dollar. How I will get stock? If account is not zero always, I have to stop shipping from next week." (T:335:25-336:2). And he badgered co-conspirators about late payments: "Bro, what happened payment? Why you don't make account zero? Don't do this business on credit. Yesterday my party sold all items to someone from Texas. Valium and new products all sold." (T:338:2-5).

Kamaldoss bought pills by the tens of thousands. When a co-conspirator asked Kamaldoss whether to take an order of 10,000 Valium pills, Kamaldoss responded: "Let me check how much I get today, then you take 10,000 order." (T:343:14-15). Kamaldoss's conduct was deliberate and knowing—indeed, it was plotted to maximize profit. As he wrote in one message, strategizing to ship pills without incurring excess shipping costs, "USPS charges more above 180 pills weight. I can't pay more shipping cost. Don't take orders above 180. If more 180, we will ship two packages, two tracking, two charges, [$]25 and $25."

(T:343:21-24). In another exchange, Kamaldoss sought clarity about a drug order, "What is this? X30? . . . Is it Xanax 60 and Klonopin .5-30? What happened? Tell me fast." (T:342:15-16). His co-conspirator's response was clear: "Pills, bro." (T:342:18).

Kamaldoss's communications demonstrate that he knew his transnational pill mill was illegal. When asked about shipping drugs directly from India to purchasers in the United States, Kamaldoss replied "Not possible. Nobody ship from India. Everyone will go to jail." (T:337:14-15). He then wrote, "You can't send in flight from India. You will be arrested." (T:337:18-19). To keep his criminal business afloat, he tried to be cautious: "I don't use my address for delivery. Too much problem." (T:342:25-343:1). In order to evade detection, he paid cash to ship the pills (GA:100), and used multiple post offices (GA:99-100). Finally, Kamaldoss admitted in text messages that he was risking arrest and prosecution for his drug distribution scheme: "Even this only more few days. After that, I will stop. Many people arrested here. Too much problem and risk. Very soon, all shipping I am going to stop." (T:344:2-4).

Kamaldoss and numerous co-conspirators were arrested on a complaint in September 2019. (DE:2). A grand jury sitting in the Eastern District of New York returned an indictment against them in November 2019, and a superseding indictment (the operative charging instrument at trial) in April 2021. (DE:119).

III. Border Search and Suppression Ruling

Over the course of the investigation and during the period of the conspiracy that preceded it, Kamaldoss resided principally with his family in India but traveled several times to the United States, where he sometimes stayed for lengths of time. (PSR ¶ 49). Upon two of his entries into the United States at JFK—on April 23, 2019 and August 15, 2019—he was referred to a secondary inspection area at the airport, and law enforcement agents performed border searches, including forensic searches of his electronic devices. (A:124, 131). Kamaldoss moved in the district court to suppress evidence obtained from these searches.[3] (DE:159).

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[3] Kamaldoss moved to suppress evidence obtained from *three* border searches, the first of which he alleged occurred when he arrived at JFK from India in June 2018. Government records offered at the suppression hearing reflected that he entered uneventfully on that date

On April 12, 2022, the district court held an evidentiary hearing, at which Kamaldoss testified. (DE:178). The court also heard the testimony of, inter alia, the Customs and Border Protection ("CBP") officer (Roy Clark) who encountered Kamaldoss at a secondary inspection area and obtained Kamaldoss's electronic devices and passcodes and the Homeland Security Investigations ("HSI") case agent (Chatchai Chunton) who encountered Kamaldoss during the secondary inspection and was involved in imaging his devices. (A:344, 407-08, 453).

As established at the hearing, on April 23, 2019, Kamaldoss arrived at JFK from India along with his wife and two of their children; while being processed through customs, a CBP officer directed them to a secondary inspection area. (SPA:10). The district court found the testimony of Clark and Chunton about the environment and the events

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without being referred to secondary inspection, and the district court found that no such inspection occurred. (SPA:10). Additionally, the government represented that it would not use at trial any evidence obtained from the August 2019 border search—indeed, the government obtained none, and inferred that Kamaldoss sanitized his devices after the April 2019 search (A:124-25)—and the district court accordingly addressed only the April 2019 search in its suppression ruling (SPA:6 n.2, 12-28).

of the secondary inspection to be credible and consistent, and Kamaldoss's testimony unreliable, and accordingly credited the former and discounted the latter to the extent that they conflicted. (SPA:16).

Specifically, the district court found that "the secondary inspection room to which Mr. Kamaldoss and his family were first brought is 'a big waiting area' that contains twenty to fifty chairs and a counter, behind which the secondary officers sit, not unlike 'the DMV.'" (SPA:15 (quoting Chunton's testimony)). It is "a sky-blue room containing a water fountain, bathroom, and television, which is often turned on to the news or sports," where travelers referred for secondary inspection "may sit in any chair they want" while waiting to be called up to the counter, "and, when their name is called by a secondary inspection officer, they walk themselves up to the counter to answer routine questions." (SPA:15). "Frequently, an agent will *ask* a traveler for their electronic devices and passcodes" at the counter, which is what "Officer Clark did with Mr. Kamaldoss," and individuals so asked "are free to say no." (SPA:15). Kamaldoss provided his passcodes when asked. (SPA:17-18).

After 30 to 40 minutes in the main secondary inspection room with other travelers (SPA:16), during which time Kamaldoss was asked, by his own account, "'many questions' about why he was in the United States" (SPA:14), Kamaldoss and his family "were moved to a smaller, private room—a 'family room'—so that they would be more comfortable" (SPA:15 (quoting Chunton's testimony)). That room "contains toys for children and a couch." (SPA:15). During their time in the family room, Kamaldoss and his family "were left to themselves, although Mr. Kamaldoss occasionally checked in with Agent Chunton about the status of his family's stay in secondary inspection." (SPA:16). At no point was Kamaldoss (or any member of his family) restrained, arrested, or told he was under arrest. (SPA:16-17). "Indeed, at one point, Agent Chunton accompanied Mr. Kamaldoss to the luggage carousel so they could find a missing bag of Mr. Kamaldoss's," after which "and before returning to secondary inspection, Mr. Kamaldoss separated entirely from Agent Chunton and used the restroom." (SPA:16). Agent Chunton "was cordial, respectful, and professional during his interactions with Mr. Kamaldoss," and "[a]t the end of their encounter, Agent Chunton even helped the Kamaldoss family with their bags." (*Id.*). Kamaldoss and his family were

allowed to formally enter the United States after about three hours in secondary inspection. (SPA:15).

During the time that Kamaldoss waited, HSI agents searched his belongings and made forensic copies of his iPhone and laptop. Two days later, on April 25, 2019, HSI agents shared those forensic copies with FDA Special Agent Patrick Connor, who reviewed them on two days in May before obtaining a search warrant on May 24, 2019. (SPA:11).

Kamaldoss argued below that evidence obtained from these devices should be suppressed because he was not given warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), before being asked for his passwords, which he claimed were obtained in violation of his Fifth Amendment rights; and because the warrantless searches of his devices (at the border and during Connor's continuation of that review away from the border) allegedly violated the Fourth Amendment. (A:55-56). The district court correctly rejected these arguments, finding based principally upon the facts set forth above that Kamaldoss was not in custody for *Miranda* purposes when he was asked for his passwords (SPA:18), and ruling both that the border search was lawful and performed in good faith, and that the search warrant that Connor

obtained was supported by probable cause independent of his earlier review, even assuming *arguendo* that his earlier review was improper (SPA:31-32).

IV. Subsequent Proceedings

Kamaldoss was tried by a jury beginning on June 21, 2022. (DE:263). On June 27, 2022, the jury reached a unanimous verdict convicting him of all counts with which he was charged. (DE:269).

Kamaldoss was sentenced on March 26, 2024. At sentencing, the district court applied—and rejected Kamaldoss's argument against the application of—a two-level increase to the Guidelines offense level pursuant to U.S.S.G. § 2D1.1(b)(7) for the mass marketing of controlled substances by interactive computer service. (A:896). Specifically, the court found by a preponderance of the evidence, based upon the trial record, that it was reasonably foreseeable and in fact well known to Kamaldoss that his co-conspirators used the internet to mass market the drugs he distributed, which was essential to their common scheme. (A:893-95).

The district court determined that the applicable advisory Sentencing Guidelines range was 37 to 46 months of imprisonment,

which was based on a total offense level of 21 and a Criminal History Category of I. (A:898). The court imposed a downward variance and sentenced Kamaldoss principally to 27 months' imprisonment. (A:907). He filed a timely notice of appeal on March 28, 2024. (DE:309).

Kamaldoss, who had been at liberty, surrendered for service of his sentence. He moved in this Court for bail pending appeal on the purported basis that the forensic border searches of his electronic devices were unlawful and presented a substantial question under 18 U.S.C. § 3143(b). (*United States v. Kamaldoss*, No. 24-824, Dkt. 33.1 (2d Cir. July 22, 2024)). This Court denied his motion. (*United States v. Kamaldoss*, No. 24-824, Dkt. 46.1 (2d Cir. Sept. 6, 2024)).

SUMMARY OF ARGUMENT

Kamaldoss argues that the district court erred by refusing to suppress evidence obtained from his cellphone and laptop computer during a border search, because (1) he was not given *Miranda* warnings before being asked for his device passwords, which were therefore obtained in violation of his Fifth Amendment rights; and (2) his Fourth Amendment rights were violated by the warrantless forensic search of his electronic devices at the border and subsequent review of the device images, notwithstanding that a warrant was later obtained for the devices. *Amici Curiae* argue (for the first time in this case) that warrantless border searches of electronic devices also violate the First Amendment. Additionally, Kamaldoss argues that the district court erred at sentencing by increasing the Sentencing Guidelines offense level pursuant to U.S.S.G. § 2D1.1(b)(7) for the mass marketing of controlled substances by interactive computer service.

All of these arguments fail. First, the circumstances of the border search were—in the words of a witness whose testimony the district court credited—akin to a DMV, and not at all akin to a formal arrest. Accordingly, Kamaldoss was not in custody and no *Miranda*

warnings were necessary. Moreover, even if he had been in *Miranda* custody and were illegally compelled to surrender his passwords, suppression of derivative evidence (rather than just the passwords) would be improper.

Second, warrantless searches at the international border, even invasive searches of property with no suspicion whatsoever, have long been established as reasonable under the Fourth Amendment because of the heightened interest of the sovereign to safeguard the integrity of its borders. Thus, the highest standard ever applied by this Court for a border search is reasonable suspicion, which is necessary for invasive searches of the body. Even if reasonable suspicion of a border-related crime, which would be an extension beyond this Court's jurisprudence in *United States v. Levy*, 803 F.3d 120, 124 (2d Cir. 2015) (holding that Customs officials are authorized to seize evidence of any crime, not just those that they are authorized to investigate, that they observe during a border search), is necessary to justify a forensic search of electronic devices at the border, as some courts have held, that standard is easily met here. Moreover, law enforcement agents acted in good-faith reliance on the state of the law when performing the border

search—and subsequently obtained a warrant supported by probable cause independent of the border search. For all of these reasons, the district court was correct not to suppress the evidence on Fourth Amendment grounds.

Nor does the First Amendment counsel in favor of suppression. *Amici*'s argument makes conclusory (and implausible) claims of burden to First Amendment interests and fails to grapple with the actual scope of the border search doctrine, or with the critical government interest at issue.

Lastly, the district court correctly applied the two-level increase to Kamaldoss's offense level for the use of online mass-marketing. The trial record provided ample evidentiary support for the court's finding by a preponderance of the evidence, including the massive geographic breadth of the drug distribution, the testimony of a co-conspirator, and Kamaldoss's own description of his "online business."

For all of these reasons, the judgment of the district court should be affirmed in its entirety.

ARGUMENT

POINT ONE

THE DISTRICT COURT DID NOT ERR BY DECLINING TO SUPPRESS EVIDENCE OBTAINED FROM KAMALDOSS'S ELECTRONIC DEVICES DURING A BORDER SEARCH

Kamaldoss argues that the district court should have suppressed evidence obtained from his electronic devices because the passcodes were obtained without *Miranda* warnings, and thus in violation of the Fifth Amendment; and because the warrantless border searches purportedly violated the Fourth Amendment. Additionally, although Kamaldoss does not raise this argument on appeal and it was never considered by the district court, *amici curiae*, the Knight First Amendment Institute and Reporters Committee for Freedom of the Press, argue that the border searches of Kamaldoss's electronic devices also violate the First Amendment. For the reasons that follow, all of these arguments should be rejected.

I. Standard of Review

When reviewing the grant or denial of a motion to suppress, this Court "applies a de novo standard of review of the district court's conclusions of law, and a deferential, clear-error standard of review of the

district court's findings of fact." *United States v. Smith*, 967 F.3d 198, 205 (2d Cir. 2020); *United States v. Boles*, 914 F.3d 95, 102 (2d Cir. 2019).[4]

II. The Fifth Amendment Does Not Compel the Suppression of Evidence Obtained from Kamaldoss's Electronic Devices

A. Applicable Law

Generally, a person must be advised of certain rights before being subject to a "custodial interrogation." *Miranda*, 384 U.S. at 444. 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 he was in "custody." *United States v. FNU LNU*, 653 F.3d 144, 148 (2d Cir. 2011).

"Interrogation" includes express questioning of the suspect and its "functional equivalent . . . words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). Statements made by law enforcement agents as they fulfill their

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[4] When quoting cases, unless otherwise noted, citations, internal quotation marks, and footnotes are omitted, and all alterations are adopted.

employment responsibilities do not qualify as interrogation. *United States v. Figueroa*, 300 F. App'x 93, 95 (2d Cir. 2008) (statements made "while the officers were going about their routine tasks in conducting a search, securing a crime scene, and making an arrest" were not "reasonably likely to elicit an incriminating response").

The meaning of "custody" under *Miranda* is narrower than the meaning of a "seizure" under the Fourth Amendment, and thus "not every seizure constitutes custody for purposes of *Miranda*." *United States v. Schaffer*, 851 F.3d 166, 175-76 (2d Cir. 2017) (holding that defendant was not in custody even though he was denied permission to leave). Indeed, individuals are not free to leave during routine traffic stops, nor in investigative *Terry* stops, *see Terry v. Ohio*, 392 U.S. 1 (1968), and those forms of detention are therefore seizures under the Fourth Amendment; yet they do not generally constitute *Miranda* custody. *Maryland v. Shatzer*, 559 U.S. 98, 113 (2010) ("[T]he temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop . . . does not constitute *Miranda* custody."). The Supreme Court has "[made] clear . . . that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody," which is

not accorded "'talismanic power,' because *Miranda* is to be enforced 'only in those types of situations in which the concerns that powered the decision are implicated.'" *Shatzer*, 559 U.S. at 112.

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); *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*.") This Court, interpreting the Supreme Court in *Berkemer v. McCarty*, 468 U.S. 420 (1984), has indicated that two "particularly relevant" factors when 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 437-38). The test is objective,

based upon the perspective of a reasonable person in the suspect's position. *See Berkemer*, 468 U.S. at 442. Thus, an officer's subjective intention to arrest a suspect does not necessarily render the suspect in custody for *Miranda* purposes, *see id.*, nor does an officer's subjective belief that an individual is not a suspect preclude a finding of *Miranda* custody, *see Stansbury v. California*, 511 U.S. 318, 324-25 (1994). "[T]he inquiry remains a holistic one in which the nature and context of the questions asked, together with the nature and degree of restraints placed on the person questioned, are relevant." *FNU LNU*, 653 F.3d at 154. This inquiry "necessarily involves considering the circumstances surrounding the encounter with authorities," including:

> the interrogation's duration; its location (*e.g.*, at the suspect's home, in public, in a police station, or at the border); whether the suspect volunteered for the interview; whether the officers used restraints; whether weapons were present and especially whether they were drawn; [and] whether officers told the suspect he was free to leave or under suspicion . . .

Id. at 153. Notably, the reasonable person from whose perspective "custody" is defined is a reasonable innocent person. *Florida v. Bostick*,

501 U.S. 429, 437-38 (1991). Whether a person knows he is guilty and believes incriminating evidence will soon be discovered is irrelevant. *Id.*

This Court has clarified that questioning at the border presents unique factors that must be considered in the foregoing analysis. When arriving at an American airport, "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 both 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.

B. The District Court Correctly Held that Kamaldoss Was Not in *Miranda* Custody

The district court's factual findings about the circumstances of Kamaldoss's secondary inspection at JFK, based upon the court's credibility assessments of the testimony of multiple live witnesses, including Kamaldoss,[5] reflect a condition dramatically unlike the "restraints generally associated with a formal arrest." *Newton*, 369 F.3d at 675. Rather, as it was characterized by a witness whose testimony the district court credited, it was "not unlike 'the DMV.'" (SPA:15).

Kamaldoss was ushered (with his wife and children) into a large waiting area with capacity for many other travelers, where he could sit wherever he liked, and where there was "a water fountain, bathroom, and television," which is typically "turned on to the news or sports." (SPA:15-16). Kamaldoss, like other travelers, was summoned to a counter where he was questioned by a CBP officer in full view of other travelers, and the officer collected his electronic devices and asked for his passwords, which he gave. (*Id.*). After 30 to 40 minutes in the main

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[5] The district court found Kamaldoss's "version of events incredible" and discounted his testimony where it conflicted with the testimony by the government's witnesses. (SPA:15-16).

secondary inspection room with other travelers (SPA:16), during which time Kamaldoss was asked questions about why he was traveling to the United States (SPA:14), Kamaldoss and his family were taken to wait in a private "family room" with toys and a couch, where they were left to themselves and not questioned. (SPA:15-16).

This was nothing at all like an arrest. Indeed, this Court and numerous district courts in this Circuit have frequently found that similar and even more onerous circumstances amount to nothing more than a routine, non-custodial border search. *See, e.g.*, *FNU LNU*, 653 F.3d at 155 (finding non-custodial a 90-minute airport interrogation in a private room, during which defendant was finger-printed and confronted with apparent false statements in an old passport application); *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 officers 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); *United States v. Hassan*, No. 18-cr-603 (ARR), 2019 WL 5684367, at *3 (E.D.N.Y. Nov. 1, 2019) (defendant

affidavit alleging 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. 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.").

"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 (citing *United States v. Morla*, 123 F. Supp. 3d 382, 384 (E.D.N.Y. 2015), in which defendant was handcuffed to a bench, and *United States v. Carr*, 63 F. Supp. 3d 226, 236 (E.D.N.Y. 2014), in which defendant was escorted to pat-down room by four armed officers and repeatedly questioned about drug smuggling). No conduct of this type by law enforcement agents is at issue here.

Kamaldoss argues that he was in *Miranda* custody—that is, that his circumstances should be regarded as akin to formal arrest—because he was not free to leave, he was the target of an ongoing criminal investigation (a fact that was not communicated to him (SPA:10-11, 16-17)), he was questioned (he says now, erroneously) about things unrelated to admissibility to the United States "for approximately two hours" (Br. 22-23), and "most importantly," he was asked for his passwords (Br. 23).

First, although it is true in a qualified sense that Kamaldoss was not free to leave, in the context of a border search, being "free to leave" necessarily means something very different than in, for instance, a police detention on the street—which difference vividly illustrates why the Supreme Court has cautioned that the "freedom-of-movement test" does not carry "talismanic power." *Shatzer*, 559 U.S. at 112. Kamaldoss, a foreign national (PSR at 2), chose to present himself at the nation's border, seeking entry. When he sat in secondary inspection waiting to be admitted, he was not "free to leave" only in the sense that he had not been cleared to cross the border and *enter the United States*. Indeed, the district court found that he *did* leave the secondary inspection area to

retrieve a missing bag from a luggage carousel, accompanied by a law enforcement agent, and then separated from that agent to use the restroom alone before returning, so his movement was not altogether restrained. (SPA:16). Nor is there any basis in the record to doubt that Kamaldoss would have been free to leave onto a flight back to India—as he would have had to do if he had not been admitted. In short, *waiting* at the border to be cleared to enter is not akin to arrest and cannot, by itself, constitute *Miranda* custody.

Second, the fact that Kamaldoss was the target of an ongoing investigation cannot convert his wait at the border into *Miranda* custody because the test for *Miranda* custody is objective, based upon the perspective of a reasonable person in the interviewee's position. *See Berkemer*, 468 U.S. at 442. The subjective intention of law enforcement officers is immaterial as a matter of law. *See, e.g.*, *Stansbury*, 511 U.S. at 323 ("[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."); *see also Hassan*, 2019 WL 5684367, at *4 ("But the possibility that the questioning may have been coordinated with the FBI does not change the

analysis. Unless the officers objectively acted in a way that would make a person think that he was under arrest, there is no custody for *Miranda* purposes."). Moreover, it would be an absurd result if the questioning of travelers during border searches based upon suspicions that arose upon their arrival or based upon no suspicion at all were regarded by this Court as non-custodial while the questioning of other travelers in precisely the same conditions were regarded by this Court as custodial only because of the existence of a prior investigation. The meaning of "custody" cannot reasonably be so stretched.

Third, Kamaldoss is mistaken when he suggests in conclusory fashion that he was questioned about matters unrelated to admissibility and was questioned for hours. The district court ruled (based in part on Kamaldoss's own testimony) that he was questioned for no more than 30 to 40 minutes in total, in a large room in full view of other passengers (SPA:16), and that Kamaldoss spent the rest of his time in secondary inspection sitting and waiting with his family, in conditions akin to a DMV (SPA:15). And other than asking for his password, he does not specify any questions—not now and not in his testimony in the district court—that supposedly did not relate to admissibility. Indeed, even in

the self-serving declaration that Kamaldoss submitted with his suppression motion in order to establish entitlement to an evidentiary hearing, the only questions he specified that anyone asked him were "about [his] trip to the United States, about a previous trip that [he] had taken to the country, and about [his] current and previous employment." (DE:159-2 ¶ 11).

Thus, the reasons that supposedly establish *Miranda* custody here are reducible to one: that CBP asked Kamaldoss for his device passwords. Yet it cannot be that merely *asking* for his passwords, without more, escalates a non-custodial, routine border inspection into a custodial interrogation, equivalent to handcuffing him to a bench. *FNU LNU*, 653 F.3d at 153-55; *United States v. Shvartsman*, 722 F. Supp. 3d 276, 323-24 (S.D.N.Y. 2024); *Morla*, 123 F. Supp. 3d at 384; *United States v. Wilson*, 100 F. Supp. 3d 268, 280 (E.D.N.Y. 2015). The district court was right to reject this implausible proposition.

C. Even If Kamaldoss Were in Custody, Suppression Would Not Be Warranted

Even if Kamaldoss could establish that he was in *Miranda* custody and subject to a custodial interrogation without being advised of

his rights, he has never claimed to have made any statements during such interrogation, inculpatory or otherwise, that he sought to suppress, and the government did not offer any at trial. Rather, the only non-testimonial "statement" that has concerned him is the disclosure of his passwords. Even assuming *arguendo* 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 Kamaldoss 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, Kamaldoss never sought to suppress the passwords, nor did the government seek to introduce them.

Rather, Kamaldoss sought the suppression of all evidence derived directly or indirectly from the passwords as fruit of the poisonous tree. (A:42).

But suppression of such derivative evidence would be improper. That is because the Fifth Amendment only proscribes "extract[ing] from the person's own lips an admission of guilt, which would thus take the place of other evidence." *United States v. Patane*, 542 U.S. 630, 637 (2004); *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," therefore, "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-L, 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 following 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 Kamaldoss were in *Miranda* custody when he disclosed his passwords, and the passwords themselves should therefore be suppressed, the derivative evidence obtained from his electronic devices should not be.

III. The Fourth Amendment Does Not Compel the Suppression of Evidence Obtained from Kamaldoss's Electronic Devices

A. Applicable Law

"[T]he Fourth Amendment's balance of reasonableness is qualitatively different at the international 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). Thus, "[i]t is well established that the government has broad powers to conduct searches at the border even where . . . there is no reasonable suspicion that the prospective entrant has committed a crime." *Tabbaa v. Chertoff*, 509 F.3d 89, 97-98 (2d Cir. 2007) (collecting cases); *see also United States v. Ramsey*, 431 U.S. 606, 616-17 (1977) ("That searches made at the border, pursuant to the long-standing right of the sovereign to protect

itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration;" explaining that the same Congress that had proposed the Bill of Rights had already enacted the first customs statute, showing that members of that Congress did not regard border searches as unreasonable "and they are not embraced within the prohibition of the [Fourth] [A]mendment"); *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) ("Border searches[,] from before the adoption of the Fourth Amendment, have been considered reasonable by the single fact that the person or item in question had entered our country from outside.").

Indeed, the Supreme Court has emphasized that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). "[A]irports such as JFK are functionally equivalent to international borders, and 'since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to

prevent the introduction of contraband into this country.'" *United States v. Singh*, No. 12-CR-121 (DLI), 2012 WL 2501032, at *3 (E.D.N.Y. June 27, 2012) (quoting *Montoya de Hernandez*, 473 U.S. at 537 (internal alterations omitted)); *see also Irving*, 452 F.3d at 123 ("An airport is considered the functional equivalent of a border and thus a search there may fit within the border search exception.").

It is thus well-settled that warrantless searches upon entry to the United States, including invasive searches of property, are lawful and require no suspicion whatsoever. While there is broad authority to conduct routine, suspicionless searches at the border, this Court has recognized that more invasive searches, like strip searches, require reasonable suspicion. *See, e.g.*, *United States v. Levy*, 803 F.3d 120, 123 n.3 (2d Cir. 2015) (noting that "non-routine" searches require reasonable suspicion and that the Supreme Court and this Court "have suggested that the label 'non-routine' should generally be reserved for intrusive border searches of the person (such as body-cavity searches or strip searches), not belongings")). The precise line, however, between what is and is not a routine search has not been clearly delineated. *Tabbaa*, 509 F.3d at 98.

This Court and the Supreme Court have not yet addressed what level of suspicion, if any, is required to search electronic devices at the border. CBP search policies require no suspicion to conduct a basic, manual search of an electronic device, and they require reasonable suspicion to conduct an advanced or forensic search of an electronic device. (GA:22 n.9). Notably, no circuit court has held that a manual search of electronic devices at the border requires *any* level of suspicion, and circuit courts have held that even forensic searches of electronic devices require at most reasonable suspicion. *See, e.g.*, *United States v. Mendez*, 103 F.4th 1303, 1309 (7th Cir. 2024) ("No circuit court has read *Riley* [*v. California*, 573 U.S. 373 (2014)] to require more than reasonable suspicion to support even the most intrusive electronics search at the border"; holding that manual phone searches require no individualized suspicion); *United States v. Castillo*, 70 F.4th 894, 897-98 (5th Cir. 2023) (same); *Alasaad v. Mayorkas*, 988 F.3d 8, 16-18 (1st Cir. 2021) (collecting cases); *United States v. Cano*, 934 F.3d 1002, 1019 (9th Cir. 2019) (manual searches require no suspicion "whatsoever"); *United States v. Aigbekaen*, 943 F.3d 713, 723 (4th Cir. 2019) (requiring reasonable suspicion with a nexus to the purposes behind the border search

exception for forensic border searches of electronic devices); *United States v. Touset*, 890 F.3d 1227, 1233 (11th Cir. 2018) (requiring no suspicion for forensic border search of electronic device); *United States v. Molina-Isidoro*, 884 F.3d 287, 292 (5th Cir. 2018) (declining to import *Riley*'s warrant requirement to border search of a cellphone).

When finding reasonable suspicion, this Court has held that border agents are entitled to rely on information provided by other law enforcement officers from separate agencies to justify a border search. *See Levy*, 803 F.3d at 123-24 (finding Customs officer's border inspection and copying of notebook belonging to individual suspected of financial crimes was justified by reasonable suspicion and declining to reach whether suspicion was necessary to do the same). As this Court observed,

> Whether a Customs official's reasonable suspicion arises entirely from her own investigation or is prompted by another federal agency is irrelevant to the validity of a border search, which we have held does not depend on whether it is prompted by a criminal investigative motive. . . . We see no constitutional reason to prevent . . . federal law enforcement agents from also supplying information to Customs officials in aid of a border search. Nor are Customs officials prevented by the Fourth Amendment from conducting such a search merely because it furthers another federal agency's criminal investigation.

Id. at 123-24. Further, this Court rejected the argument that Customs officials should be limited to crimes that CBP is authorized to investigate: "But (like other federal law enforcement officers) CBP officers are neither expected nor required to ignore tangible or documentary evidence of a federal crime." *Levy*, 803 F.3d at 124. Several circuit courts have similarly held that border agents may search for evidence of crimes, not just contraband. *See, e.g.*, *Alasaad*, 988 F.3d at 20 ("Searching for evidence is vital to achieving the border search exception's purposes of controlling who and what may enter the country."); *United States v. Gurr*, 471 F.3d 144, 149 (D.C. Cir. 2006) ("The distinction that [defendant] would draw between contraband and documentary evidence of a crime is without legal basis").

B. A Warrant is Not Required for Border Searches and the Border Search Doctrine Extends to Forensic Searches for Evidence of Criminal Offenses

Kamaldoss advocates for the narrowest version of border search authority, relying on the Ninth Circuit's *Cano* decision, 934 F.3d at 1018, which permits warrantless forensic searches of electronic devices at the border only with reasonable suspicion that the device contains digital contraband. (Br. 36). But that cramped view of the law is not the

natural extension of Supreme Court and this Court's precedent regarding the scope of the border search exception.

As discussed above, this Court and the Supreme Court have recognized that persons at an international border have lower privacy interests and the government's "interest in preventing the entry of unwanted persons and effects is at its zenith." *Flores-Montano*, 541 U.S. at 152. While the Supreme Court in *Riley* recognized that people have a heightened privacy interest in the content of their cellphones due to the quantity of personal information that they sometimes possess, 573 U.S. at 386,

> *Riley* does not command a warrant requirement for border searches of electronic devices nor does the logic behind *Riley* compel us to impose one. . . . Nor does *Riley* by its own terms apply to border searches, which are entirely separate from the search incident to arrest searches discussed in *Riley*. . . . Further, given the volume of travelers passing through our nation's borders, warrantless electronic device searches are essential to the border search exception's purpose of ensuring that the executive branch can adequately protect the border.

Alasaad, 988 F.3d at 17; *Touset*, 890 F.3d at 1235 ("Nothing in *Riley* undermines this interest [in preventing unwanted persons and effects

from entering the country]."); *Mendez*, 103 F.4th at 1308 ("What is unreasonable after arrest may be perfectly reasonable at customs, as *Riley* itself anticipated."). In light of the government's strong interest in protecting the border, detecting contraband, preventing crime, economic espionage, and terrorism, and otherwise protecting national security at the border, *Riley* does not compel a conclusion that a warrant or even heightened suspicion is required. Here, Kamaldoss's devices were forensically reviewed pursuant to agency policies that require border agents to have reasonable suspicion such that this Court need only address whether, assuming the reasonable suspicion standard applies, the district court erroneously found the relevant standard was met.

Despite Kamaldoss's arguments to the contrary, the government's interest reflected in the border search exception is not limited to detecting contraband. As this Court has already found, border agents may rely on information from other law enforcement officers to provide reasonable suspicion to search for evidence of a crime. *See Levy*, 803 F.3d at 124. The *Levy* Court also declined to limit border agents from searching for only those crimes that CBP is authorized to investigate. *Id.* "Searching for evidence is vital to achieving the border search exception's

purposes of controlling who and what may enter the country." *Alasaad*, 988 F.3d at 20.

The Ninth Circuit's holding in *Cano* is thus inconsistent with this Court's analysis and is not supported by the weight of relevant precedent or the principles underlying the border search exception, which are grounded in "the longstanding right of the sovereign" to "prevent[] the entry of unwanted persons and effects," *Flores-Montano*, 541 U.S. at 152, and "to prevent the introduction of contraband into this country," *Montoya de Hernandez*, 473 U.S. at 537. *Cano*'s rationale "fails to appreciate the full range of justifications for the border search exception beyond the prevention of contraband itself entering the country." *Alasaad*, 988 F.3d at 21 (rejecting *Cano*, 934 F.3d 1002, explaining that Supreme Court precedent clarifies that the border search exception's purpose is not limited to interdicting contraband); *see also Aigbekaen*, 943 F.3d at 721 (purposes of the border search exception include "disrupting efforts to export or import contraband"); *Touset*, 890 F.3d at 1233; *United States v. Molina-Gomez*, 781 F.3d 13, 20 (1st Cir. 2015) (text messages found on the defendant's phone contributed to reasonable suspicion he was smuggling drugs); *Gurr*, 471 F.3d at 149 (border search doctrine

permits searches of non-contraband evidence of border-related offenses); *see also United States v. Cano*, 973 F.3d 966, 967 (9th Cir. 2020) (Bennett, J., dissenting from denial of rehearing en banc).

Indeed, *Cano*'s definition of "digital contraband," 934 F.3d at 1014, should be rejected as untenable given its practical limitations. *Cano* distinguishes between "digital contraband," the "best example [of which] is child pornography," and "searches for evidence of a crime" which would exceed, in its view, the proper scope of a border search. *Id.* at 1014, 1016. Under this reasoning, the government is hard pressed to discern what, *other* than child pornography, would satisfy Cano's definition of "digital contraband." This exceptionally narrow standard starkly contrasts to the border search exception's historic purposes, which include protection of this country from crimes, including crimes like Kamaldoss's prolific opioid trafficking.

Similarly unavailing is Kamaldoss's suggestion that evidence should be suppressed because Connor reviewed the forensic images obtained from his devices after the devices were returned to him. Kamaldoss does not dispute that the detention of electronic devices or forensic copies of data stored on electronic devices occurred at the border,

upon entry to the United States, pursuant to a border search. The subsequent review of those detained devices or copies, in continuation of the border search, is inherent in any forensic search—and as noted above, forensic searches have been ruled permissible at least at some level of individualized suspicion by nearly every court to have addressed the issue, and the Eleventh Circuit requires no suspicion. Indeed, the First Circuit has expressly rejected constitutional challenges to internal CBP and Immigration and Customs Enforcement ("ICE") policies that permit detention of devices for extendable periods of time (30 days under ICE policy, five days under CBP policy, both extendable with supervisory approval) for thorough review pursuant to border searches. *Alasaad*, 988 F.3d at 21.

The essence of a border search is that it is a search upon entry to the United States; law enforcement agents' review of forensic copies of data detained upon entry to the United States is such a search. Such forensic review is a continuation of the search initiated at the moment of detention. And, in any event, the district court was correct that even if one assumes *arguendo* that Connor's review was unlawful, he thereafter obtained a search warrant that was supported by probable cause

independent of the border search. Suppression would therefore be improper pursuant to the independent source doctrine. (SPA:31-32). *See generally United States v. Mulholland*, 702 F. App'x 7, 10 (2d Cir. 2017) (quoting *United States v. Johnson*, 994 F.2d 980, 987 (2d Cir. 1993)).

C. The Searches of Kamaldoss's Devices Were Supported by Reasonable Suspicion

Kamaldoss does not appear to contest that at the time of the border searches, law enforcement agents had reasonable suspicion that he was committing border-related crimes; rather, he argues that reasonable suspicion could only justify searches for contraband, not searches for evidence—an argument that should be rejected for the reasons discussed above. Assuming, as some other courts have held, that reasonable suspicion is necessary to justify a forensic search, that standard is easily met here.

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 agents can point to "specific and articulable facts" that lead to the inference that criminal

activity "may be afoot." *Terry*, 392 U.S. at 21, 30. In the border-search context, this Court has instructed that "the issue is simply whether the border official has a reasonable basis on which to conduct the search," and that "what is reasonable will depend on all the facts of a particular case." *United States v. Asbury*, 586 F.2d 973, 976 (2d Cir. 1978). "Reasonable suspicion is a relatively low standard and border officials are afforded deference due to their training and experience." *Abidor v. Napolitano*, 990 F. Supp. 2d 260, 282 (E.D.N.Y. 2013) (citing *Montoya de Hernandez*, 473 U.S. at 542).

Here, law enforcement agents clearly had reasonable suspicion that Kamaldoss was engaged in an international drug trafficking conspiracy. As described in the background section above, the underlying investigation began in early 2018, involved undercover purchases of controlled substances sent through the mail, and by approximately July 2018 involved physical surveillance and interviews of confidential informants who said that Kamaldoss (together with others) was importing millions of pills of foreign unapproved medications from India through a facility at JFK and mailing them to people throughout the United States. This far exceeds the standard of a

reasonable basis to suspect that Kamaldoss possessed contraband or evidence of contraband when he entered the United States from India, and it was information that law enforcement agents possessed prior to the contested border search in April 2019—which is sufficient to justify a forensic search of electronic devices as part of a border search. *See, e.g.*, *Alasaad*, 988 F.3d at 21 (holding that "advanced border searches of electronic devices may be used to search for . . . evidence of contraband, or for evidence of activity in violation of the laws enforced or administered by CBP or ICE"); *United States v. Kolsuz*, 890 F.3d 133, 143 (9th Cir. 2018) ("[t]he justification behind the border search exception is broad enough to accommodate . . . the prevention and disruption of ongoing efforts to export contraband illegally"); *Aigbekaen*, 943 F.3d at 721 (purposes of the border search exception include "disrupting efforts to export or import contraband").

Accordingly, even assuming that reasonable suspicion is necessary for forensic searches of electronic devices upon entry to the United States, it was clearly present here, and for that reason, too, the district court was correct not to suppress the evidence.

D. The Good-Faith Doctrine Applies

There is no serious question regarding the application of the good-faith doctrine to the border search of Kamaldoss's electronic devices under controlling precedent at the time, rendering the exclusion of evidence improper here. As the district court found, the agents had reasonable suspicion that evidence of a crime was on Kamaldoss's electronic devices. (GA:26). Even if this Court now were to decide under the most restrictive standard that reasonable suspicion that devices contained contraband was required, "[b]ased on the governing law in this [C]ircuit, then, the border agents who searched Mr. Kamaldoss's devices had no reason to think that they could do so only if they had reasonable suspicion that the devices contained digital contraband." (GA:28); *accord Kolsuz*, 890 F.3d at 148; *United States v. Odofin*, 929 F.2d 56, 58 (2d Cir. 1991).

Kamaldoss feebly attempts to discredit the district court's reliance upon the good-faith doctrine by claiming that there was not specific precedent governing how to address the border search of an electronic device at the time of the search. (Br. 37-42). This is of no moment. As the district court properly explained, the "fruits of a search

conducted in reasonable reliance on binding appellate precedent are not subject to the exclusionary rule, as that rule is designed to deter future Fourth Amendment violations." (GA:26-27 (citing *Aigbekaen*, 943 F.3d at 725 (quoting *Davis v. United States*, 564 U.S. 229, 249-50 (2011) ("[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply."))); *United States v. Aguiar*, 737 F.3d 251, 261 (2d Cir. 2013) ("binding [appellate] precedent refers to the precedent of this Circuit and the Supreme Court" existing at the time of the search); *see also United States v. Archambault*, 740 F. App'x 195, 203 (2d Cir. 2018).

While at the time of the search, "there was neither Supreme Court nor Second Circuit precedent limiting warrantless forensic searches to digital contraband," "caselaw existed from both courts making clear that, in the context of border searches in general, at most reasonable suspicion was required for some more intrusive searches." (GA:28). Thus, because the agents had reasonable suspicion that evidence of Kamaldoss's international drug trafficking was on his electronic devices and relied in good faith on existing precedent, suppression of the evidence was unwarranted. *See, e.g.*, *United States v.*

Skaggs, 25 F.4th 494, 499-500 (7th Cir. 2022); *United States v. Aguilar*, 973 F.3d 445, 449-50 (5th Cir. 2020).

IV. The First Amendment Does Not Compel the Suppression of Evidence Obtained from Kamaldoss's Electronic Devices

Kamaldoss has not raised a First Amendment argument and the district court therefore did not address it below, but *amici curiae* now argue that so much information (including associational and expressive information) is contained in electronic devices that border searches of those devices chill protected speech and impermissibly burden the First Amendment. This argument, too, fails.

Amici's argument cites the large number of border searches and simply posits, in conclusory terms, that such searches chill speech and burden the First Amendment. But *amici* fail to acknowledge, and their argument therefore fails to grapple with, the narrowness of the applicability of the border search doctrine—that is, that it applies only to objects that are voluntarily brought to the border when seeking entrance to the United States. Accordingly, such searches would chill, at most, the carrying of electronic devices with sensitive information over an international border, but they would not chill speech to any perceptible

degree. On the record of this case—in which the district court found following an evidentiary hearing that Kamaldoss was asked for his passwords and voluntarily gave them to law enforcement agents—Kamaldoss could have avoided the search of his devices by declining to bring them across the border or even by declining to provide his passwords when asked. Neither path would burden his First Amendment interests.

The First Circuit in *Alasaad* squarely rejected a facial First Amendment challenge to the CBP policies that permit border searches of electronic devices on the basis that the content-neutral policies "have a plainly legitimate sweep and serve the government's paramount interests in protecting the border." 988 F.3d at 22; *see also United States v. Arnold*, 533 F.3d 1003, 1008-10 (9th Cir. 2008) ("case law does not support a finding that a search which occurs in an otherwise ordinary manner, is 'particularly offensive' simply due to the storage capacity of the object being searched;" upholding border search without reasonable suspicion of passenger's laptop computer); *United States v. Ickes*, 393 F.3d 501, 506 (4th Cir. 2005) (rejecting argument advocating for First Amendment carve out to the border search doctrine; "Particularly in

today's world, national security interests may require uncovering terrorist communications, which are inherently 'expressive.' Following Ickes's logic would create a sanctuary at the border for all expressive material—even for terrorist plans. This would undermine the compelling reasons that lie at the very heart of the border search doctrine."); *Anibowei v. Mayorkas*, No. 3:16-CV-3495-D, 2024 WL 4887525, at * 7 (N.D. Tex. Nov. 22, 2024) ("warrantless border search of an electronic device without probable cause does not violate the First Amendment merely because the device may contain expressive or associational context"); *cf. New York v. P.J. Video, Inc.*, 475 U.S. 868, 874 (1986) (refusing to require a higher standard of probable cause for warrant applications involving expressive material); *Tabbaa*, 509 F.3d at 101 ("Mere incidental burdens on the right to associate do not violate the First Amendment."). The *Alasaad* decision is correct, and *amici*'s First Amendment argument fares no better than Kamaldoss's arguments as a justification for suppression.

V. Any Error Was Harmless

For all of the reasons discussed above, there was no error in the district court's denial of Kamaldoss's suppression motion and its

admission at trial of evidence obtained from the challenged border search. But even assuming *arguendo* that the district court erred, the judgment should be affirmed because such error would have been harmless beyond a reasonable doubt. *See United States v. Cacace*, 796 F.3d 176, 188 (2d Cir. 2015) (per curiam) ("We review the erroneous admission of evidence obtained in violation of a defendant's constitutional right for harmless error, affirming the judgment if we conclude beyond a reasonable doubt that a rational jury would have rendered a verdict of guilty absent the alleged error."); *Aguiar*, 737 F.3d at 263 (harmlessness standard satisfied where "the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury"); *United States v. Dhinsa*, 243 F.3d 635, 650 (2d Cir. 2001) ("The strength of the government's case against the defendant is probably the most critical factor in determining whether an error affected the verdict.").

The government presented to the jury overwhelming evidence—separate and apart from the communications obtained from Kamaldoss's electronic devices—that proved Kamaldoss committed the crimes charged. The trial evidence included, inter alia, the testimony of

a confidential informant whom Kamaldoss had employed in his warehouse to package pills into mailing envelopes, and who identified Kamaldoss in the courtroom (GA:46, 48, 52); photographs that the informant had surreptitiously taken of operations inside the warehouse, including photographs of drugs and photographs of emails sent from Kamaldoss's email address with drug orders and mailing labels for packages (GA:53-57); and audio recordings the informant surreptitiously made of himself and Kamaldoss discussing, inter alia, the late receipt of drug orders and packing of illegal pills (GA:58-62, 66). This evidence was further corroborated by years' worth of similar emails of drug orders and mailing labels in Kamaldoss's email account obtained pursuant to search warrant directly from a third-party email provider. In addition, a co-conspirator who operated an import business that smuggled drugs through JFK for Kamaldoss testified as a cooperating witness. He identified Kamaldoss in the courtroom and testified about Kamaldoss's role in the conspiracy, including the financial aspects of the scheme and its online nature. (GA:79, 81-123). Moreover, a law enforcement witness testified that he observed Kamaldoss personally deliver packages to the

United States Post Office, which packages were seized and found to contain drugs. (GA:67-71).

The evidence from Kamaldoss's electronic devices primarily revealed Kamaldoss's communications about his criminal enterprise over WhatsApp. These communications, although compelling because they were in his own voice and obtained from his phone, were largely duplicative of evidence obtained from email search warrants and adduced through the testimony of the confidential informant, cooperating witness, and law enforcement agent. Thus, it is clear beyond a reasonable doubt that the jury would have convicted Kamaldoss even without evidence obtained from his electronic devices, and that any error in denying his suppression motion and admitting the evidence was harmless.

* * *

For all the reasons above, the district court was right to reject Kamaldoss's motion to suppress evidence obtained from his electronic devices, and, even if the court erred, any error was harmless. The judgment should accordingly be affirmed.

POINT TWO

THE DISTRICT COURT DID NOT ERR BY APPLYING THE GUIDELINES ADJUSTMENT FOR MASS MARKETING BY INTERACTIVE COMPUTER SERVICE

Kamaldoss argues that the district court erred by applying a two-level increase to his Guidelines offense level for the use of online mass-marketing in his drug distribution offense. Kamaldoss is wrong, and the evidentiary record established at trial provided ample basis for the district court's ruling.

I. Standard of Review

In evaluating whether a sentence is procedurally unreasonable, the Court must examine "the procedure employed in arriving at the sentence." *United States v. Ghailani*, 733 F.3d 29, 54 (2d Cir. 2013). "A district court errs *procedurally* when it fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the [18 U.S.C.] § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails to adequately explain the chosen sentence." *Id.*; *see also United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc).

Although the district court's application of the Guidelines is reviewed de novo on appeal, the factual determinations that underpin its Guidelines calculation are reviewed for clear error. *See United States v. Watkins*, 667 F.3d 254, 261 (2d Cir. 2012). This Court will find clear error "only where the record as a whole leaves [it] with the definite and firm conviction that a mistake has been committed." *United States v. Esteras*, 102 F.4th 98, 104 (2d Cir. 2024).

II. Applicable Law

The Sentencing Guidelines provide for a two-level increase in the offense level for a defendant convicted of a controlled substance offense when "the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service." U.S.S.G. § 2D1.1(b)(7). The Guidelines define "mass-marketing by means of an interactive computer service" to mean "the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance," such as, for example, "operat[ing] a web site to promote the sale of [a controlled substance]." U.S.S.G. § 2D1.1, comment. (n.13). "Interactive computer

service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet." 47 U.S.C. § 230(f)(2); U.S.S.G § 2D1.1, comment. (n.13).

The standard for finding facts relevant to a Guidelines calculation is preponderance of the evidence. *United States v. Salazar*, 489 F.3d 555, 557-58 (2d Cir. 2007) (per curiam). Accordingly, applying the two-level increase to the Guidelines offense level pursuant to U.S.S.G. §2D1.1(b)(7) required the district court to determine that the defendant, or a person for whose conduct the defendant is accountable, more likely than not distributed a controlled substance through mass-marketing by means of an interactive computer service.

III. The District Court Properly Applied U.S.S.G. § 2D1.1(b)(7)

The district court properly applied the two-point increase pursuant to U.S.S.G. § 2D1.1(b)(7) because the trial evidence overwhelmingly demonstrated that Kamaldoss engaged in a joint criminal venture that distributed narcotics through mass-marketing by

means of an interactive computing service. Kamaldoss fails to establish clear error.

In analyzing the applicability of the enhancement at sentencing, the district court properly noted that "the enhancement does not require the defendant personally use a computer to mass[-]market a controlled substance," and thus rested its determination on the activity of persons "for whose conduct [the] defendant is accountable under the relevant conduct guideline." (A:891). There is no dispute that under U.S.S.G. § 1B1.3, in the case of a jointly undertaken criminal activity, "a defendant is accountable for all aspects of others that were within the scope of the jointly[ ]undertaken criminal activity, in furtherance of that activity, and reasonably foreseeable in connection with that criminal activity" (A:892), nor is there any dispute that the district court engaged in a three-step analysis under the relevant conduct guideline in reaching its determination (A:892-96; Br. 46).

Indeed, Kamaldoss concedes that the court's analysis that the enhancement applies here "would hold if there were evidence that in fact established that Mr. Kamaldoss's co-conspirators had engaged in mass

marketing via an interactive computer service," but he submits that the "record is silent on this point." (Br. 47). This is false.

As proved at trial, Kamaldoss's criminal conspiracy sold enormous volumes of illegal pills—numbering in the millions—that Kamaldoss imported from India and distributed daily throughout the United States by mail. (GA:82). The scope of this operation alone, without more, would strongly suggest that Kamaldoss's pill mill was an online enterprise. But there is more: as Kamaldoss said himself in a message to a co-conspirator, "[t]his is online business." (GA:78). Specifically, orders for pills were placed online. As described by a co-conspirator who testified at trial pursuant to a cooperation agreement with the government, "the orders were placed online. . . . [O]rders were received in Mumbai or some part of India and they were then sent here to [the] U.S." (GA:88). The consolidated orders were sent to Kamaldoss (*id.*), and Kamaldoss then communicated those orders to his co-conspirators for packaging and distribution.

The district court was thus able to rely at sentencing on evidence adduced at trial, including Kamaldoss's own admission that the nature of his drug-trafficking enterprise was an "online business"

(GA:78), witness testimony given by Kamaldoss's co-conspirator, which explained that customers placed orders online that were received internationally and communicated to United States-based distributors to be fulfilled and shipped (GA:88), and enormous quantities of mailing labels and drug ledgers showing daily shipments throughout the United States. (*E.g.*, GA:124-32). This was plainly sufficient to establish by a preponderance of the evidence that Kamaldoss's co-conspirators, with his knowledge, used the internet to mass-market the drugs he distributed.

The government agrees that mere use by co-conspirators of an online platform to communicate with each other would not suffice to apply the enhancement, *see* U.S.S.G. § 2D1.1, comment. (n.13) (enhancement does not apply to co-conspirators who use an interactive computer service only to communicate with one another in furtherance of the offense), but Kamaldoss's description of his criminal enterprise as an "online business" was not a directive to his accomplices to continue to use encrypted applications to communicate. Rather, it was a plain acknowledgment of the nature of his criminal enterprise—soliciting and receiving online drug orders in India, aggregating them, and sending them to the United States for fulfillment by mail throughout the United

States. (GA:88) ("Q: [H]ow did customers place orders for [T]ramadol? A: Ma'am, the orders were placed online, do no[t] know exactly how online, but they were placed online and orders were received in Mumbai or some part of India and they were then sent here to U.S.").

The clear result of the "online" nature of Kamaldoss's business was its extraordinary geographic reach. Just a selection of five packages of drugs that he placed into the mail on one day—which were seized from the mail and offered as trial exhibits, underlying the attempted distribution Counts Two through Six—were addressed to people in Texas, Alaska, Minnesota, Florida, and Georgia. (GA:73-76). Kamaldoss contends that the district court "drew an unsubstantiated leap" to conclude that the drugs were marketed online, but the court correctly recognized that "the enormous quantity and geographic reach of the drugs [the] defendant distributed were explicable only if customers ordered drugs online." (Br. 47; A:896).

CONCLUSION

For the reasons stated above, the judgment should be affirmed in all respects.

Dated: Brooklyn, New York
January 24, 2025

Respectfully submitted,

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Dated: Brooklyn, New York
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