DECLARATION OF COREY RANDENBERG

I, Corey Randenberg, do hereby declare and state:

1. I live in the city of Gould City, Gould. This declaration is being submitted in support of Defendant's Motion to Suppress Evidence.

2. I am a thirty-year-old male with a high school diploma. When I was eighteen years old, I joined the International Stewards of Mother Earth ("ISME"), a non-profit, non-governmental organization founded in 1940. I became interested in protecting the environment after I witnessed my high school classmates dispose of their trash on the ground all over our campus. The students' complete disregard for the negative impact that littering has on our environment upset me, so I joined Gould City's local chapter of ISME. By the time I was twenty-two, I was part of the leadership board, and I remain on the board today.

3. ISME is the largest wilderness preservation organization in the world, with over five million members. It depends entirely on private donations and the volunteer efforts of its members. ISME's mission is to conserve nature and reduce the most pressing threats to Earth's biodiversity by focusing its work in six areas: food, climate, freshwater, wildlife, forests, and oceans.

4. Beginning in 2016, the United States government significantly reduced funding for the Environmental Protection Agency ("EPA") and its environmental protection efforts. I believe that humans are killing the earth, and we all have a responsibility to stop it. In my role as an ISME leader, I have arranged several protests outside of the EPA building in downtown Gould City and encouraged our members to march on behalf of our environment. During those protests, some ISME members——who have grown increasingly desperate to protect the environment——have resorted to violent acts of protest, but as an ISME leader, I have publicly denounced such behavior.

5. In February 2017, I was arrested at a demonstration that I had organized to protest the EPA's failure to promulgate rules that would have protected our national parks. I was arrested by a Gould City Police Department ("GCPD") officer for disturbing the peace, resisting arrest, and assault on a peace officer, but I was later released without being charged.

6. On June 25, 2017, I travelled to Mexico for a personal vacation. On July 9, 2017, I was driving home to the United States when I was stopped by United States Customs and Border Protection ("CBP") Agent Elena Gold at the border. After she stopped me, Agent Gold asked me to identify myself, which I did. She entered my personal information into her computer and discovered my arrest from February 2017. She then informed me

that I was being sent to secondary inspection. At the secondary inspection area, Agent Gold told me to exit my vehicle and leave all of my personal belongings inside. She searched my vehicle and retrieved my cell phone. Without my permission, Agent Gold inspected my cell phone, which I had placed in "airplane" mode during my trip to avoid roaming charges. The phone was unlocked at the time, so she was able to immediately see my texts, call log, and photographs. She noticed that I had taken photographs of several historical, federal buildings, including the EPA office building in downtown Gould City and the EPA headquarters in Washington D.C., along with architectural schematics for the same buildings. She asked me why I had those photos. I explained that I like to photograph old buildings and look at their architectural schematics because I am interested in 19th century architecture. After that, Agent Gold told me that she was releasing me and that I was free to enter into the United States, but that she would be keeping my phone. I asked her why she was keeping my phone, but she refused to give me a reason.

7. On August 17, 2017, I was stopped by several GCPD officers while driving my personal truck in downtown Gould City. Before I knew what was happening, I was pulled out of my truck, thrown onto the pavement, handcuffed, and driven to the Gould City Correctional Center.

8. The next day, I was taken to the state courthouse to be arraigned on state charges of murder and attempted murder. I did not have a private attorney at that time, so I asked the court to appoint a Deputy Public Defender to represent me, which the court did.

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 20th day of October, 2017 in Gould City, Gould.

Corey Randenberg
COREY RANDENBERG

DECLARATION OF ANAHIT MURADIAN

I, Anahit Muradian, do hereby declare and state:

1. I am an attorney licensed to practice law in the State of Gould and admitted to practice before the United States District Court for the District of Gould. This declaration is being submitted in support of Defendant's Motion to Suppress Evidence. In September 2017, Corey Randenberg hired me to represent him in the above-captioned federal case.

2. Based on the content of police reports that I have received in discovery in the above-captioned case, I am informed and believe that Mr. Randenberg was arrested on August 17, 2017 by Gould City Police Department ("GCPD") officers after being pulled over in his personal vehicle. I am further informed and believe that he was stopped within a couple miles of the Environmental Protection Agency ("EPA") office building in Gould City, Gould, shortly after a bomb had been detonated in that building.

3. On the morning of August 18, 2017, Mr. Randenberg appeared in Superior Court for the State of Gould. A Gould County Deputy Public Defender, Caroline Wong, was appointed to represent him. At that hearing, Mr. Randenberg was arraigned on six counts of first degree murder in violation of Gould Penal Code, section 187, and twenty-one counts of attempted murder, in violation of Gould Penal Code, sections 187 and 664, in

connection with the Gould City bombing. He pled not guilty, but the court still denied bond, finding that he presented a danger to the community.

4. On or about September 11, 2017, while the state charges were pending, a federal grand jury returned an indictment charging Mr. Randenberg with six counts of first degree murder of federal employees, in violation of 18 U.S.C. §§ 1111, 1114, and twenty-one counts of attempted murder of a federal employee, in violation of 18 U.S.C. § 1113. After the return of the federal indictment, a judge on the United States District Court for the District of Gould issued an arrest warrant for Mr. Randenberg.

5. On or about September 14, 2017, the Gould County District Attorney's Office dropped the state charges against Mr. Randenberg "in the interest of justice." After the state charges were dropped, Mr. Randenberg was immediately transferred from state custody to federal custody.

6. On or about September 15, 2017, Mr. Randenberg was arraigned in the United States District Court for the District of Gould on the federal indictment.

5. On October 10, 2017, in preparation for trial, I received discovery materials from the prosecution, including the following information.

a. According to a Report of Interview written by Department of Homeland Security ("DHS") Special Agent ("SA") Kaitlyn Winkle, Ms. Winkle interviewed Mr. Randenberg on August 27, 2017 while he was in state custody. According to her report, SA Winkle interviewed my client in the presence of two other law enforcement officers, DHS SA Aly Highsmith and GCPD officer Gagan Sandhu. During that interview, Mr. Randenberg allegedly admitted that he had been driving near the EPA building, shortly after it was bombed that day. He also admitted that he had purchased cleaning chemicals in Mexico in late June 2017, before returning to the United States on July 9, 2017, when he was stopped at the border. He also admitted that he had the schematics for the EPA building on his phone when he was stopped at the border. When he was asked why the building schematics on his phone had markings and handwritten notes on them identifying the building's stress points, Mr. Randenberg refused to answer any more questions. Mr. Randenberg's counsel, Gould County Deputy Public Defender Ms. Wong, was not present at the interview.

b. Among the discovery materials, I also received an investigative report written by Officer Sandhu. Officer Sandhu's report detailed the physical evidence that she had gathered, allegedly connection Mr. Randenberg to the Gould City bombing. Specifically, Officer Sandhu obtained digitally

recorded security footage from the EPA building that showed a man in a dark "hoodie" with his face hidden, placing a backpack on the loading dock and drive off in a grey pickup truck. The license on the truck was not visible, but the report stated that the truck appeared to be the same kind of truck as one owned by Mr. Randenberg (the truck in which he was arrested). The report also described her search of the truck, during which she seized samples of what appeared to be chemical residue in an area behind the passenger seat of the truck and a dark "hoodie" jacket that looked similar to the one shown on the security tape of the bomber. Her report states that the residue she recovered was later determined to match chemical residue recovered at the scene of the bombing. That chemical is a highly flammable cleaning chemical that the report claimed can be used to make bombs.

c. Lastly, the discovery materials contained a report written by DHS forensic analyst Julie Gantz, describing her forensic analysis of the cellular phone that was seized from Mr. Randenberg on July 9, 2017 at the U.S. border. During her forensic analysis, Gantz claims that she kept the phone in "airplane mode." On July 11, 2017, she used a software program to extract data from Mr. Randenberg's phone and make a "bitstream" copy of that data to be forensically analyzed. The extracted data included: SMS, contacts, call logs, multimedia,

and applications. Gantz completed her forensic analysis on August 1, 2017. That analysis allegedly revealed previously deleted files and included: (1) a chemical recipe for the type of explosive used in the Gould City bombing; and (2) a schematic of the EPA building with notes identifying crucial, weight-bearing stress points and how much explosive force would need to be applied at those points to cause the building to collapse.

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 20th day of October, 2017, in Gould City, Gould.

Anahit Muradian
ANAHIT MURADIAN, ESQ.

DECLARATION OF ELENA GOLD

I, Elena Gold, do hereby declare and state:

1. I am employed as a United States Customs and Border Protection ("CBP") agent and have been so employed for approximately eight years. This declaration is being submitted in support of the Government's Opposition to Defendant Corey Randenberg's Motion to Suppress Evidence.

2. On July 9, 2017, I was on duty at the United States-Mexico border just outside of Gould City, Gould. My main responsibility at the border is to identify and stop suspicious individuals attempting to enter the United States from Mexico, focusing mainly on individuals who may be trying to smuggle drugs, other contraband, or illegal aliens into the United States. That day, I noticed that a man driving a grey Toyota Tacoma (later identified as Corey Randenberg) who appeared to be sweating and repeatedly, nervously glancing around. Based on my training and experience, I know that individuals attempting to smuggle contraband into the United States are often nervous, will sweat excessively, and tend to glance around a lot, looking for law enforcement. I immediately became suspicious that Mr. Randenberg might be involved in illegal activity, so I decided to question him.

3. I approached Mr. Randenberg's vehicle and asked him to state his name and where he was coming from. He replied that

his name was "Corey Randenberg," and that he had been vacationing in Mexico. I asked him to wait a moment. I then used the computer in my vehicle to run his name through the Treasury Enforcement Communication System ("TECS"). TECS is a computerized database used by federal officers at the border to screen people arriving at the border. It includes arrest records and other reports of suspicious activity. The TECS search revealed that Mr. Randenberg had a prior arrest record from February 2017 for disturbing the peace, resisting arrest, and assault on a peace officer, but had never been charged.

4. Because Mr. Randenberg had an arrest record, I decided to send him to secondary inspection. As part of secondary inspection, it is standard procedure for CBP agents to search vehicles crossing into the United States. I therefore asked Mr. Randenberg to step out of his vehicle so I could search it. When I searched his vehicle, I found a cell phone sitting in a cup holder near the driver's seat, so I pulled it out to look at it. When he saw me holding his phone, Mr. Randenberg looked even more nervous, which made me suspicious about us what might be stored on it, so I examined it. The cell phone was unlocked and in "airplane" mode, so I was able to quickly skim through a few immediately visible text messages, call logs, and photos. I noticed that Mr. Randenberg had several photos of old buildings and building schematics on his phone. I did not immediately

recognize the buildings, but I thought it was odd to have photos of building schematics, so I asked Mr. Randenberg why he had these photos on his phone. He told me that he enjoys photographing and studying old historic buildings. However, that explanation did not seem plausible to me. In addition, based on my training and experience, I know that criminals will often "case" a location, including taking photos of it, before they commit crimes at those locations. Given his arrest record, I suspected that Mr. Randenberg might have been "casing" these locations for some criminal purpose. Accordingly, because I am not an expert in conducting thorough, forensic searches of electronic devices, I decided to keep his phone so that a forensic analyst could conduct a more thorough search of its contents for evidence of illegal conduct. However, I did not believe that I had probable cause to arrest Mr. Randenberg at that time, so I gave him a receipt for his phone and then allowed him to enter the United States.

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 23rd day of October, 2017 in Gould City, Gould.

Elena Gold
ELENA GOLD

DECLARATION OF JULIE GANTZ

I, Julie Gantz, do hereby declare and state:

1. I am employed by the Department of Homeland Security ("DHS") as a forensic analyst and have been so employed for approximately fifteen years. This declaration is being submitted in support of the Government's Opposition to Defendant Corey Randenberg's Motion to Suppress Evidence.

2. On or about July 11, 2017, I received an iPhone 8 Plus with a request that I conduct a forensic analysis of its contents. I was informed and believe that the phone was seized on July 9, 2017 at the United States border from a man identified as "Corey Randenberg." I began my analysis of the phone that day, using a software program to extract data from it and make a "bitstream" copy of that data. To ensure that I was getting only data stored on the phone, I kept it in "airplane mode" while I extracted the data from the phone. This kind of extraction is capable of retrieving both undeleted and deleted data from the cell phone, including: text messages, contacts, call logs, applications, and photos. After I made the bitstream copy of the data extracted from Mr. Randenberg's phone, on July 14, 2017, I returned the phone to Mr. Randenberg by mailing it to his last known address.

4. After I made the bitstream copy of the data extracted from Mr. Randenberg's phone, I used a software program called

"Cellebrite UFED Touch" to analyze it, which can take weeks or even months to be completed depending on the volume of data contained in the bitstream copy. The analysis of the data extracted from Mr. Randenberg's phone was completed on August 1, 2017. The resulting report showed that the data on the phone went back to May 1, 2017, meaning that the phone had only been in use from that date forward. Among other things, the extraction report revealed that Mr. Randenberg had deleted several photographs of interest from his phone. (As noted above, because the Cellebrite UFED Touch is able to recover deleted files, I was able to view and analyze the deleted files.) One of the deleted photographs was a photograph of a schematic of the EPA Regional Office in downtown Gould City. The schematic was marked with "x's" on certain spots. I noticed handwritten notes on the schematic and in its margins, indicating several "stress points" within the building and how much explosive force would be needed at each stress point to "bring down" the building. I reported this information to my superiors.

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 23rd day of October, 2017, in Gould City, Gould.

Julie Gantz
JULIE GANTZ

DECLARATION OF KAITLYN WINKLE

I, Kaitlyn Winkle, hereby declare and state:

1. I am employed as a Special Agent ("SA") by the United States Department of Homeland Security ("DHS") and have been so employed for approximately ten years. This declaration is being submitted in support of the Government's Opposition to Defendant Corey Randenberg's Motion to Suppress Evidence.

2. For the past four years, I have been assigned to the Joint Counterterrorism Task Force ("Joint Task Force") which works out of the DHS office in Gould City, Gould. The Joint Task Force is headed by the DHS and includes multiple local and state law enforcement agencies, including the Gould City Police Department ("GCPD") and the Gould County Sheriff's Department. The task force's goal is to prevent and respond to terrorist threats of all kinds in the State of Gould.

3. As part of my duties, I investigate and keep track of certain individuals who are suspected of involvement in plotting domestic terrorist attacks. As of August 2017, I had an open investigation in which Corey Randenberg was a "person of interest," suspected of being involved in several prior eco-terrorism incidents. Randenberg first came to the attention of the Joint Task Force in February 2017 after he was involved in a violent protest outside a federal building. Randenberg was observed at that protest on a loudspeaker urging the crowd to

"take down the corrupt Environmental Protection Agency ("EPA")" and making comments such as "They're killing Mother Earth, so let's give them a taste of their own medicine." After that protest, I received information from a confidential source telling me that Randenberg had been involved in planning a number of violent protests arranged by a group called the International Stewards of Mother Earth ("ISME"). During those protests a number of people were injured, and one statue was blown up. Before August 2017, I had, however, not been able to develop sufficient evidence to arrest Randenberg for any crimes.

4. On August 20, 2017, I received a call from GCPD officer Gagan Sandhu. I knew Officer Sandhu because she was a member of the Joint Task Force until April 2017, and we had worked on cases together. From her time on the Joint Task Force, Officer Sandhu knew that I had an open domestic eco-terrorism investigation and had been looking at Randenberg as a possible suspect in connection with past environmental protests that had turned violent. She told me that he had been arrested by GCPD three days earlier, while he was driving away from the Gould City bombing that had just occurred. Officer Sandhu asked if I would like to interview him. I agreed, and we arranged for me to interview him the following week at the state detention facility.

5. On August 27, 2017, I drove to the Gould City Correctional Center with DHS SA Aly Highsmith to interview Randenberg. Officer Sandhu greeted us at the facility and escorted us to the interview room where Randenberg was waiting. I read Randenberg his Miranda rights. He said he understood his rights and waived them. I began the interview of Randenberg while SA Highsmith and Officer Sandhu stood in the corner. During the interview, I asked Randenberg if he had been driving near the EPA building in a grey truck on the day of his arrest. He admitted that he had been near the EPA building. I confronted Randenberg with credit card records DHS had recovered showing that while he was in Mexico in June 2017, he had purchased industrial-grade, highly flammable, ammonia-based cleaners——which State of Gould police had matched to the chemicals used in the bombing. He admitted to purchasing the chemicals, but indicated that because of ISME's limited resources, it was much cheaper to buy large quantities industrial cleaners while he was on his annual vacations to Mexico than to purchase them state-side. He claimed that he would use the chemicals to clean ISME offices. I then questioned Randenberg further regarding the building schematics recovered from his cell phone. Randenberg admitted that he had seen the photos. I then asked Randenberg what the significance of the "x's" and handwritten notes on the images was.

Randenberg declined to tell me what they meant and refused to answer any more questions.

6. Immediately thereafter, I prepared a Report of Interview reflecting the information above.

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 23rd day of October, 2017, in Gould City, Gould.

Kaitlyn Winkle
KAITLYN WINKLE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

UNITED STATES OF AMERICA,	)	CR No. 17-389-JC
	)	
Plaintiff,	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO SUPPRESS EVIDENCE
v.	)	
	)	
COREY RANDENBERG,	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court on Defendant Corey Randenberg's motion to suppress: (1) statements he made to federal agents while in state custody; and (2) any and all evidence derived from his cell phone, which was seized on July 9, 2017 at the United States-Mexico border.

I. Factual Background

On Friday, July 9, 2017, Defendant drove his personal vehicle to the United States-Mexico border checkpoint near Gould City, Gould. At the time, he was re-entering the United States following a two-week vacation in Mexico. United States Customs and Border Protection ("CBP") Agent Elena Gold was on duty at the checkpoint, and she stopped Defendant after noticing that he appeared nervous. Agent Gold subsequently checked his name in a computerized database known as the Treasury Enforcement Communication System ("TECS"). She discovered Defendant had

been arrested earlier that year for disturbing the peace, resisting arrest, and assault on a police officer, but had never been charged. Because of his arrest record and nervous demeanor, Agent Gold sent Defendant to secondary inspection.

At secondary inspection, Agent Gold asked Defendant to step out of his vehicle and searched it. She discovered a cell phone sitting in a cup holder near the driver's seat of the vehicle. The cell phone was unlocked and in the "airplane mode," so Agent Gold was able to immediately see the text messages, call log, and photographs that were saved on Defendant's phone. She noticed that Defendant had saved photographs of several old buildings, including the Environmental Protection Agency ("EPA") Regional Office located in Gould City, Gould, along with photographs of what appeared to be building schematics. Defendant claimed that he had the photographs of the buildings and schematics because he was interested in historical architecture, but Agent Gold did not believe that explanation was plausible. Given his nervous demeanor and her belief that his possession of the photographs was suspicious, she decided to retain his phone for further analysis, but not to arrest him. She therefore told him that he was free to leave and enter the United States, but she kept his phone.

A subsequent forensic analysis of data extracted from Defendant's cell phone, conducted by Department of Homeland

Security ("DHS") forensic analyst Julie Gantz, revealed that the phone also contained suspicious deleted files, including a different version of the building schematics for the Gould City EPA building. This version had handwritten markings on it showing the building's stress points and how much explosive force would be needed to bring down the building.

As alleged in the Indictment in the above-captioned case, on August 17, 2017, the EPA building in downtown Gould City was bombed, using a chemical bomb and resulting in the death of six federal employees, as well as wounding twenty-one other federal employees. In the immediate aftermath of the bombing, local authorities recovered security footage of a man in a "hoodie" leaving a backpack on the loading dock of the building and immediately fleeing in a pickup truck. Shortly after the bombing, the local police arrested Defendant in his truck within a few blocks of the bombing.

On August 18, 2017, Defendant was arraigned in Gould Superior Court on six counts of murder and twenty-one counts of attempted murder in violation of Gould Penal Code, sections 187 and 664. At that hearing, a Deputy Federal Public Defender from the Gould County Public Defender's Office was appointed to represent him.

On August 20, 2017, while Defendant was in state custody, Gould City Police Department ("GCPD") officer Gagan Sandhu

called DHS Special Agent ("SA") Kaitlyn Winkle to inform her that the state had Defendant in custody. Officer Sandhu had previously been assigned to a Joint Counterterrorism Task Force, where she had worked with SA Winkle. Officer Sandhu knew that SA Winkle had an open domestic eco-terrorism investigation concerning Defendant's possible involvement with several past violent environmental protests. Officer Sandhu asked if SA Winkle would like to interview Defendant, and SA Winkle responded affirmatively.

On August 27, 2017, SA Winkle went to the Gould City jail to question Defendant. With another DHS SA and Officer Sandhu in the room, SA Winkle read Defendant his Miranda rights, which he waived, and then questioned him. Defendant's state counsel was not present. During the interview, when he was confronted with credit card receipts showing he had purchased large quantities of the chemicals in Mexico, Defendant admitted to buying and possessing large quantities of certain cleaning products (which can be used to create the type of bomb that was used in the bombing of the EPA building). However, he claimed that he bought the chemicals so he could clean the offices of an environmental advocacy group, the International Stewards of Mother Earth ("ISME"), of which he was a board member. He further admitted to having seen the schematics recovered from the forensic analysis of his cell phone, but denied any

knowledge of the meaning of the annotations and refused to answer any additional questions.

On or about September 11, 2017, a federal grand jury issued the Indictment in the above-captioned case, charging Defendant with six counts of murder of federal employees, in violation of 18 U.S.C. §§ 1111 and 1114, and twenty-one counts of attempted murder of a federal employee, in violation of 18 U.S.C. §§ 1113.

On or about September 14, 2017, the Gould District Attorney dismissed the state charges against Defendant. Defendant was then transferred from state custody to federal custody pending trial.

II. Legal Analysis

Defendant's suppression motion raises two legal issues. First, did SA Winkle's interrogation of Defendant violate his Sixth Amendment right to counsel?[1] Second, does the Government's traditional authority to search persons and property at the border without a warrant——and typically without any degree of individualized suspicion——extend to manual and forensic searches of travelers' cellular phones? As explained in more detail below, this Court answers the first question in the negative, and the second question in the affirmative. First, Defendant's

[1] This Court assumes that the Sixth Amendment right to counsel does not attach pre-indictment. Further, Defendant did not argue that issue. Accordingly, this opinion will not address that separate and different issue.

Sixth Amendment rights were not violated by SA Winkle's interrogation because she was a federal agent working for a separate sovereign, not for the State of Gould. Second, the Government's authority to perform border searches extends to both manual and forensic searches of cellular telephones. Defendant's motion is therefore DENIED in its entirety.

A. Defendant's Motion to Suppress his Incriminating Statements Is Denied Because his Sixth Amendment Right to Counsel Had Not Attached in the Federal Case

Both the United States Supreme Court and the Twelfth Circuit have yet to directly address whether a defendant's invocation of his Sixth Amendment right to counsel in a state case automatically invokes his right to counsel in an ensuing federal case when the federal case arises from the same underlying facts. However, other circuit courts have addressed this issue. This Court is persuaded by the reasoning of the First, Fourth, Fifth, Sixth, and Eleventh circuits, which have held that even if the same conduct gives rise to both the state and federal offenses, they are not the same offense for Sixth Amendment purposes because the charges are being brought by separate sovereigns. Thus, the defendant's invocation of his right to counsel in the state case does not automatically invoke his right to counsel in the successive federal case. See Turner v. United States, 885 F.3d 949, 955 (6th Cir. 2018); United

States v. Burgest, 519 F.3d 1307, 1310-11 (11th Cir. 2008); United States v. Alvarado, 440 F.3d 191, 194 (4th Cir. 2006); United States v. Coker, 433 F.3d 39, 44 (1st Cir. 2005); United States v. Avants, 278 F.3d 510, 517 (5th Cir. 2002). As the Fifth Circuit stated in Avants, the Sixth Amendment right to counsel is "offense-specific" and attaches only once a defendant has been charged with a violation of the law. 278 F.3d at 517.

Although the Supreme Court has never explicitly held that the dual sovereignty doctrine[2] should be incorporated into Sixth Amendment jurisprudence, it impliedly incorporated its double jeopardy jurisprudence into its Sixth Amendment jurisprudence in Texas v. Cobb, 532 U.S. 162, 173 (2001). In Cobb, the Court held that "no constitutional difference" exists "between the meaning of the term 'offense' in the context of double jeopardy and of the right to counsel." Id. at 173. Therefore, the Sixth Amendment right to counsel attaches only to offenses that qualify as the same offense under the test announced in Blockburger v. United States, 284 U.S. 299, 304 (1932), even if the offenses have not been formally charged. Cobb, 532 U.S. at 173.

[2] The dual sovereignty doctrine essentially dictates that when a defendant contravenes the "peace and dignity" of two sovereigns by breaking the laws of each in a single act, he has committed two discrete offenses for double jeopardy purposes. Heath v. Alabama, 474 U.S. 82, 88 (1985).

This Court is aware that the Second, Seventh, and Eighth circuits have held otherwise, relying on the fact that the Supreme Court has never explicitly incorporated the dual sovereignty doctrine into its Sixth Amendment jurisprudence. See United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005); United States v. Krueger, 415 F.3d 766, 768 (7th Cir. 2005); United States v. Moore, 822 F.3d 35, 37-38 (8th Cir. 1987). For example, in Mills, the Second Circuit declined to incorporate the dual sovereignty doctrine in the Sixth Amendment context because it would allow two sovereigns to jointly abrogate a defendant's Sixth Amendment right to counsel. 412 F.3d at 330. The Second Circuit imagined a scenario in which a defendant was charged and appointed counsel by one sovereign, and a second sovereign subsequently interrogated the defendant outside the presence of counsel and shared the resulting statements, improperly yielding an uncounseled confession for the first sovereign to use. Id.

However, this Court believes the danger of that kind of scenario is minimized by the exception to the dual sovereignty doctrine that was carved out by the Supreme Court in Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959). The Bartkus exception "bars a second prosecution where one prosecuting sovereign can be said to be acting as a 'tool' of the other." United States v. Aboumoussallem, 726 F.2d 906, 910 (2d Cir. 1984) (citing

Bartkus, 359 U.S. at 123-24). The exception applies when "one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." United States v. Dowdell, 595 F.3d 50, 63 (1st Cir. 2010) (quoting United States v. Guzmán, 85 F.3d 823, 827 (1st Cir. 1996)). Mere collaborative efforts, without more, do not trigger the Bartkus exception. Alvarado, 440 F.3d at 198.

In this case, no violation of Defendant's Sixth Amendment right to counsel occurred because SA Winkle was working for a different sovereign when she interviewed Defendant outside the presence of his state-appointed counsel. Nor is the federal government's prosecution of Defendant precluded by the Bartkus exception because there is no evidence indicating that the cooperation between Officer Sandhu and SA Winkle was motivated by any desire to circumvent his Sixth Amendment right to counsel. The communication between Officer Sandhu and SA Winkle constituted exactly the kind of routine collaboration between state and federal law enforcement which should be encouraged. If dual sovereigns were rendered unable to collaborate in such a routine way to investigate crime, law enforcement's effective pursuit of justice would be irreparably damaged. Accordingly, the Court finds the Bartkus exception to be inapplicable.

B. Defendant's Motion to Suppress the Evidence Obtained from His Cell Phone Is Denied Because No Suspicion is Required to Search a Cell Phone at the Border

Neither the United States Supreme Court nor the Twelfth Circuit has directly addressed whether routine border searches of cellular devices must be justified by at least reasonable suspicion. And, like the issue discussed above, this issue has also divided the circuit courts, with the Eleventh Circuit allowing border searches of electronic devices without any suspicion, see United States v. Touset, 890 F.3d 1227, 1234 (11th Cir. 2018), while the Fourth and Ninth circuits have held to the contrary, see United States v. Kolsuz, 890 F.3d 133, 148 (4th Cir. 2018); United States v. Cotterman, 709 F.3d 952, 968 (9th Cir. 2013)(en banc). For the reasons discussed in more detail below, this Court agrees with the Eleventh Circuit and hereby holds that suspicionless searches of cell phones at the border, including both manual and forensic searches, do not violate the Fourth Amendment.

The analysis of this issue must begin with the Supreme Court's general jurisprudence regarding warrantless border searches. Forty years ago, in United States v. Ramsey, 431 U.S. 606, 616 (1977), the Supreme Court suggested that no suspicion is required for a border search to be constitutionally reasonable under the Fourth Amendment and adopted the border

search exception. It held that border searches are reasonable "by the single fact that the person or item in question had entered into our country from outside." Id. at 619. Part of the justification for the border search exception comes from history, beginning with the First Congress——which proposed the Fourth Amendment but also empowered customs officials to stop and search without a warrant any vessel or cargo illegally entering our nation. See Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (1789).

More recently, the Court has identified only three situations in which warrantless border searches may not be reasonable, therefore possibly triggering a reasonable suspicion requirement: (1) "highly intrusive searches of the person;" (2) destructive searches of property; and (3) searches conducted in a "particularly offensive" manner. United States v. Flores-Montano, 541 U.S. 149, 152-156 (2004). As discussed in more detail below, none of those situations is present here.

Consistent with this Supreme Court jurisprudence, the circuit courts generally agree that searches of non-electronic items at the border are permitted without any particularized suspicion. See United States v. Arnold, 533 F.3d. 1003, 1007 (9th Cir. 2008)(citing cases upholding suspicionless searches of travelers' luggage, purses, pockets, and graphic materials).

The Eleventh Circuit has applied this same reasoning to border searches of electronic devices. Touset, 890 F.3d at 1231. In Touset, the court differentiated "intrusive searches of a person's body"——defined "in terms of the indignity that will be suffered by the person being searched"——from searches of personal property, including electronic devices. Id. at 1234. Although the latter may intrude on the privacy of the owner, these searches do not require border agents to touch a traveler's body or expose intimate body parts, and, therefore, reasonable suspicion is not required for searches of electronic devices at the border. Id.

Although the Fourth and the Ninth Circuits have held, to the contrary, that at least reasonable suspicion is needed to search electronic devices such as cell phones even at the border, see Kolsuz, 890 F.3d at 148; Cotterman, 709 F.3d at 968, this Court is not persuaded by their reasoning. In Cotterman, the Ninth Circuit analogized a forensic search of a cell phone to a "computer strip search" that invades "the most intimate details of one's life." Id. at 966, 968. That seems like a vast overstatement given, unlike a strip search, a forensic search of an electronic devices does not involve, let alone expose, any intimate body parts.

Additionally, the Fourth and Ninth Circuits inappropriately rely on the Supreme Court's reasoning in Riley v. California,

134 S Ct. 2473 (2014), which held that police officers cannot, without a warrant, search digital information on cell phones seized incident to a defendant's arrest. Id. at 2493. That reliance is inappropriate because in Riley, the Supreme Court "expressly limited its holding to the search-incident-to-arrest exception." United States v. Vergara, 884 F.3d 1309, 1312 (11th Cir. 2018).

Here, the search of Defendant's cell phone was constitutional because no suspicion is needed to justify the search of a cell phone seized from someone who is crossing our borders. At the border, government agents, like Agent Gold, are charged with preventing suspects from smuggling contraband, illegal aliens, and any other illicit materials into the United States. That interest in protecting our borders outweighs any privacy interest that persons entering this country might have. Accordingly, agents should be allowed to conduct suspicionless searches——both immediate manual searches and subsequent forensic searches——of cell phones seized from suspects at the border.[3]

[3] Although the Court did not need to reach the issue, it should be noted that Agent Gold likely had reasonable suspicion to search Randenberg's phone, even though she did not need it. He was nervous, sweating, and glancing around——behavior that she knew was typical of criminals who are attempting to smuggle something illegal across the border. Plus, when she checked his record in TECS, she saw that he had prior arrests for disturbing the peace, resisting arrest, and assault on an officer. Those facts were enough to justify her looking at his phone for evidence of illegality.

III. Conclusion

In sum, the Sixth Amendment right to counsel is offense specific, and the fact that a defendant's right to counsel has attached in a state case does not automatically result in attachment of that same right in a subsequent federal case. Additionally, the government's authority to perform suspicionless manual and forensic searches of individuals' electronic devices at the border stems from the government's interest in national security and must be recognized.

Based on the foregoing, Defendant's motion to suppress evidence is hereby DENIED in its entirety.

Dated: October 30, 2017

Michael Mottweiler
MICHAEL MOTTWEILER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE

TWELFTH CIRCUIT

Case No. 18-163

Decided Jan. 29, 2018

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

COREY RANDENBERG,

Defendant/Appellant.

APPEAL from a judgment of the United States District Court for the District of Gould. Before McPherson, Moscrop, and Lindholm. Opinion by Lindholm, J.

Defendant-Appellant Corey Randenberg timely appeals from a guilty plea that he entered, conditioned on the right to appeal the district court's denial of his motion to suppress evidence. Randenberg argues that the district court erred in denying his motion to suppress: (1) incriminating statements that he made to a federal agent while in state custody; and (2) certain incriminating photographs and schematic drawings that were

discovered during manual and forensic searches of his cellular telephone that federal agents conducted as warrantless border searches. He further argues that the district court's error was not harmless because both his statements and the evidence discovered on his cell phone were crucial to the prosecution's case, and he would not have pled guilty absent the admission of that evidence.

More specifically as to the first issue, Randenberg argues that Department of Homeland Security ("DHS") Special Agent ("SA") Kaitlyn Winkle violated his Sixth Amendment right to counsel by interrogating him without counsel present after counsel had been appointed for him in a pending state prosecution involving the same underlying facts as the federal case.[1] He argues that the dual sovereignty doctrine should not be imported from the Fifth Amendment context into the Sixth Amendment context, meaning that once his state counsel had been appointed, his Sixth Amendment right to counsel had attached for all offenses based on the same underlying facts, and SA Winkle's interrogation violated the Sixth Amendment. Alternatively, Randenberg argues that even if the dual sovereignty doctrine

[1] Randenberg has conceded that he waived his Fifth Amendment right to counsel. In addition, he never raised the issue of whether the Sixth Amendment right to counsel attaches pre-indictment. For the purposes of this appeal, this Court assumes, as did the district court below, that the Sixth Amendment right to counsel does not attach pre-indictment. Accordingly, this opinion will not address either of those separate and distinct issues.

should be normally be applied in the Sixth Amendment context, in this particular case, the collusion between the state and federal authorities rendered that doctrine inapplicable, and the use of his confession was therefore still illegal.

Deciding an issue of first impression in this circuit, we hereby hold that the dual sovereignty doctrine does not apply in the Sixth Amendment context, and Randenberg's Sixth Amendment right to counsel had therefore attached in the federal case. In the alternative, we find that even if the dual sovereignty doctrine would normally apply, Randenberg's confession should have been suppressed because improper collusion occurred between the state and federal officers involved in this case, meaning this case falls under the exception announced in Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959), rendering the dual sovereignty doctrine inapplicable.

As to the second issue, Randenberg contends that his Fourth Amendment right against unreasonable search and seizure was violated by the manual and forensic searches performed by United States Customs and Border Protection ("CBP") agents. During both searches, incriminating evidence, including photographs and schematic diagrams of the Environmental Protection Agency ("EPA") building, were discovered. Randenberg claims that border searches of electronic devices, such as cell phones, must

be justified by at least reasonable suspicion, if not, probable cause, neither of which existed in this case.

Once again, this Court agrees with Randenberg. As explained in detail below, because they involve heightened privacy interests, warrantless searches of cell phones at the border must be justified by at least a reasonable suspicion. In this case, facts justifying such a reasonable suspicion did not exist, meaning the district court erred in denying Randenberg's motion to suppress the evidence discovered on his cell phone. That error was almost certainly not harmless because the evidence was highly incriminating, making it quite likely that he would not have pled guilty absent the court's denial of his suppression motion. Therefore, the case must be remanded, and Randenberg must be given the opportunity to withdraw his guilty plea.

I. FACTUAL AND PROCEDURAL SUMMARY

A. Pre-Bombing Facts

Defendant-Appellant Corey Randenberg is on the leadership board of the Gould City chapter of the International Stewards of Mother Earth ("ISME"). ISME is a wilderness-preservation organization whose members frequently participate in protests against the government's environmental policies. As an ISME leader, Randenberg has organized and participated in those protests. In February 2017, he was arrested for disturbing the

peace, resisting arrest, and assaulting a peace officer during one such protest outside the EPA Regional Office in Gould City, Gould, but was never charged.

Several months later, on June 25, 2017, Randenberg departed for a vacation in Mexico. As he was returning the United States on July 9, 2017, he was stopped at the border checkpoint near Gould City, Gould. At the checkpoint, CBP Agent Elena Gold approached Randenberg's vehicle, asked for his name and identification. She then checked his name in the Treasury Enforcement Communication System ("TECS") and learned of his February 2017 arrest. In addition, Agent Gold claims that Randenberg seemed nervous at the time, which made her suspect that he might be smuggling contraband into the United States, despite the fact that his prior arrest had nothing to do with smuggling. So, Agent Gold sent Randenberg to secondary inspection, where his vehicle was searched and his cell phone was seized from a cup holder next to the driver's seat.

After she seized the cell phone, Agent Gold performed a brief non-forensic search of the files stored on it. The phone was unlocked and in "airplane mode" at the time it was seized. Agent Gold's search yielded some text messages, his recent call log, and photographs, including several images of historic buildings, as well as photographs and a schematic diagram of the EPA building in downtown Gould City. Agent Gold asked

Randenberg about the images, to which Randenberg responded that he likes historical architecture. Agent Gold did not believe Randenberg's explanation was plausible, so she decided to retain his phone for further review. However, she did not believe that she had probable cause to arrest him, so she told him that he was free to enter the United States.

Three and a half weeks later, on August 1, 2017, DHS forensic analyst Julie Gantz completed a forensic search of data extracted from Randenberg's cell phone. Gantz was able to recover a trove of deleted information from the device, including another architectural schematic of the EPA Regional Office in Gould City, Gould. Unlike the schematics that had not been deleted, this schematic contained notes written in the margins showing structural stress points and indicating the force that would be required to bring down the building.

B. Bombing and Arrest Facts

On August 17, 2017, the EPA Regional Office in Gould City was bombed. Many EPA employees were injured in the attack, and six individuals tragically lost their lives. Shortly after the incident, local authorities stopped Randenberg as he was driving away from the scene in a grey pickup truck. Randenberg matched the general description of an individual seen on security footage walking into the loading dock area of the EPA building,

dropping a backpack, getting into a grey truck, and driving away, so he was arrested.

After his arrest, his truck was impounded and searched by Gould City Police Department ("GCPD") officer Gagan Sandhu. Inside, she discovered residue from industrial-grade cleaning products. Later analysis revealed that this residue matched chemical residue that was found at the scene of the EPA Regional Office bombing.

On August 18, 2017, Randenberg was arraigned in a Gould Superior Court on six counts of first degree murder in violation of Gould Penal Code, section 187, and twenty-one counts of attempted murder, in violation of Gould Penal Code, sections 1887 and 664. Upon Randenberg's request, a Deputy Public Defender was appointed to represent him at that hearing. He was denied bail.

Two days later, Officer Sandhu reached out to DHS SA Kaitlyn Winkle. Officer Sandhu knew SA Winkle because, in addition to her duties with the State police department, Officer Sandhu had previously worked with SA Winkle while she was a member of a Joint Counterterrorism Task Force ("Joint Task Force"), which was staffed by state and federal law enforcement officers. Although she had rotated off of the Joint Task Force in April 2017, from her time on the Joint Task Force, Officer Sandhu knew that SA Winkle considered Randenberg to be a person

of interest in relation to a prior eco-terrorism incident. Accordingly, after Randenberg was arrested, she called SA Winkle and asked if she wished to question him. SA Winkle stated that she did want to question Randenberg and arranged to do so the next week at the state detention facility.

On August 27, 2017, in an interview room at the Gould City Jail, SA Winkle interviewed Randenberg in the presence of DHS SA Aly Highsmith and Officer Sandhu. SA Winkle read Randenberg his Miranda rights, which Randenberg waived. Randenberg's state-appointed counsel was not notified of the interview and was not present. During the interview, Randenberg admitted that he had been driving near the scene of the bombing the week before. He also admitted that he had photographs of the EPA building on his cell phone when he was stopped at the border in June 2017. When confronted with credit card records, he also admitted to having purchased a large amount of highly flammable cleaning chemicals during his trip to Mexico, but claimed that he needed them to clean the ISME offices. Further, Randenberg vehemently denied involvement in the bombing. And when he was asked about the photographs of the architecture schematics of the EPA building bearing the handwritten notes about the stress points and the force needed to take down the building, he refused to answer.

C. Dismissal of the State Charges and Filing of Federal Charges

Shortly after SA Winkle's interview, on September 11, 2017, while he was still in state custody, a federal grand jury indicted Randenberg, charging him with six counts of murder in violation of 18 U.S.C. §§ 1114, 1111, and twenty-one counts of attempted murder of federal employees in violation of 18 U.S.C. § 1113, stemming from the bombing of the Gould City EPA building.[2] Soon thereafter, on September 14, 2017, the Gould County District Attorney dismissed the state charges, and Randenberg was immediately transferred to federal custody and arraigned on the federal charges. After the state charges were dismissed, Officer Sandhu turned over all of the state's evidence to SA Winkle to be used in the federal case.

On October 20, 2017, Randenberg filed a motion to suppress the statements he made to SA Winkle while in state custody and

[2] Section 1111 of Title 18, United States Code defines murder as "the unlawful killing of a human being with malice aforethought." Section 1114 provides: "Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished--(1) in the case of murder, as provided under section 1111." Section 1113 provides in relevant part: "whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, shall, for an attempt to commit murder be imprisoned not more than twenty years or fined under this title, or both, and for an attempt to commit manslaughter be imprisoned not more than seven years or fined under this title, or both."

all the evidence derived from both searches of his cell phone. He argued that SA Winkle's interrogation violated his Sixth Amendment right to counsel, and that the manual and forensic searches of his cell phone violated his Fourth Amendment right against unreasonable searches. The district court denied the motion, holding that SA Winkle's interrogation did not violate Randenberg's Sixth Amendment rights because the appointment of state council did not automatically trigger his Sixth Amendment right to counsel in the federal case, even though the state and federal charges were based on the same underlying facts. The district court further held that Randenberg's Fourth Amendment rights were not violated because the border-search exception is broad enough to apply to searches of individuals' cell phones, both at the border and subsequent forensic searches.

After his suppression motion was denied, Randenberg entered a conditional guilty plea, reserving his right to appeal denial of his suppression motion. He then filed a timely appeal of his conviction, arguing that the district court erred when it denied his suppression motion and that the error was not harmless.

II. DISCUSSION

A district court's denial of a suppression motion is a legal question that is reviewed de novo, but the trial court's underlying factual findings are reviewed for clear error. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948

(1995) (appellate courts should "accept findings of fact that are not 'clearly erroneous' but decid[e] questions of law de novo").

A. The District Court Erred by Denying Randenberg's Motion to Suppress His Confession

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Sixth Amendment right to counsel attaches at or after the initiation of adversarial proceedings. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). Adversarial proceedings are initiated by the filing of formal charges, or by holding a preliminary hearing or arraignment. Id. The right is "offense specific" and does not attach to "factually related" offenses. Texas v. Cobb, 532 U.S. 162, 168 (2002).

Both the Fifth and Sixth amendments provide accused persons with a right to counsel, but the rights are distinct. McNeil, 501 U.S. at 177-78. Each right to counsel embodies a separate protection and commands its own jurisprudence. The Fifth Amendment right to counsel guards accused persons when dealing with the police, while the Sixth Amendment right to counsel "'protects the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of the government and defendant have solidified' with

respect to a particular alleged crime." Id. (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

Nevertheless, the Supreme Court incorporated the Blockburger test from its Fifth Amendment jurisprudence into its Sixth Amendment jurisprudence, stating that under the Sixth Amendment, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one, is whether each provision requires proof of a fact which the other does not." Texas v. Cobb, 532 U.S. at 173.

In adopting this test, the Court noted that no constitutionally significant reason exists for disparate definitions of "offense" within Sixth and Fifth Amendment jurisprudence. Id. However, the Court did not reach the question of whether the dual sovereign exception should be applied in the Sixth Amendment arena, meaning that the attachment of the right to counsel in a state prosecution would not automatically invoke the same right in a successive federal prosecution for the same offense.

1. *Texas v. Cobb* Does Not Incorporate the Dual Sovereignty Doctrine into Sixth Amendment Jurisprudence

This is a question of first impression in this circuit and the subject of disagreement among our sister circuits. The

First, Fourth, Fifth, Sixth, and Eleventh circuits have interpreted Cobb to impliedly require the incorporation of both the Blockburger test and the dual sovereignty doctrine into the Sixth Amendment context. See Turner v. United States, 885 F.3d 949, 955 (6th Cir. 2018); United States v. Burgest, 519 F.3d 1307, 1310-11 (11th Cir. 2008); United States v. Alvarado, 440 F.3d 191, 194 (4th Cir. 2006); United States v. Coker, 433 F.3d 39, 44 (1st Cir. 2005); United States v. Avants, 278 F.3d 510, 517 (5th Cir. 2002). On the other hand, the Second, Seventh, and Eighth circuits disagree with that conclusion. See United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005); United States v. Krueger, 415 F.3d 766, 768 (7th Cir. 2005); United States v. Red Bird, 287 F.3d 709, 715 (8th Cir. 2002).

The circuits that favor incorporation of the dual sovereignty doctrine interpret Cobb as "impliedly" requiring it, see, e.g., Turner, 885 F.3d at 955, despite the fact that in Cobb, the Court explicitly stated that "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." 532 U.S. at 169. In Cobb, the Supreme Court did not expressly address whether the dual sovereignty doctrine applied to the Sixth Amendment, but instead held that an invocation of the Sixth Amendment right to counsel in one offense does not extend to invoke the right in another "factually related" or "inextricably intertwined" offense. See

id. at 173. Taken together with the Court's admonition in Cobb that constitutional rights should not be defined by mere inferences, this weighs heavily against incorporation in this case.

Therefore, this Court cannot follow the reasoning of the circuits interpreting Cobb to require application of the dual sovereignty doctrine and chooses instead to join the Second, Seventh, and Eighth circuits in rejecting its incorporation. See Mills, 412 F.3d at 330; Krueger, 415 F.3d at 778; Red Bird, 287 F.3d at 715. In Mills, the Second Circuit explained why the dual sovereignty doctrine should not be incorporated. 412 F.3d at 330. The defendant was arrested, questioned, and charged with possession of a firearm by a convicted felon, in violation of a Connecticut statute. 412 F.3d at 327. Eight months later, the defendant was indicted in a federal case, charging the same offense conduct. Id. at 328. The government conceded that the Connecticut and federal statutes required proof of the same "factual elements," except for the additional federal requirement that the gun travelled in interstate commerce. Id. However, the government argued that the dual sovereignty doctrine applied so that defendant's Sixth Amendment rights had not attached in the uncharged federal offense. Id. The Mills court found that "[n]owhere in Cobb, either explicitly or by imputation, is there support for a dual sovereign exception to

its holding that when the Sixth Amendment right to counsel attaches, it extends to offenses not yet charged that would be considered the same offense under Blockburger." Id. at 330. The court reasoned that Cobb's incorporation of the Blockburger test simply borrowed the definition of the term "offense" and did not show that the Court intended to incorporate anything more from double jeopardy jurisprudence. Id. Applying the Blockburger test, the Mills court found the state and federal offenses were effectively the same offense, meaning the defendant's Sixth Amendment right to counsel had attached simultaneously in both cases. Id.

Here, when Randenberg's Sixth Amendment right attached in the state case, it also attached in the federal case because prosecution of the state and federal murder and attempted murder charges required proof of the same basic elements.[3] The only difference between the state and federal charges is the requirement in the federal statutes that the victims are federal employees. Thus, as in Mills, the offenses are essentially

[3] Gould Penal Code § 187(a) defines first degree murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Gould Penal Code § 664 provides for punishment of attempted crimes: "[e]very person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows: (a) If the crime attempted is punishable by imprisonment in the state prison [...] for one-half the term of imprisonment prescribed by upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder [...] the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole."

identical. Because the offenses are the same, the Sixth Amendment right to counsel attached in both cases when the state filed formal charges and counsel was then appointed to represent Randenberg. Thus, Randenberg's Sixth Amendment right was violated when SA Winkle interrogated him without his state-appointed counsel present. The district court therefore erred when it denied Randenberg's motion to suppress his statements.

2. The *Bartkus* Exception also Applies

Alternatively, even if the dual sovereignty doctrine does apply to Sixth Amendment jurisprudence, the district court erred because this case falls squarely within the Bartkus exception to that doctrine. In Bartkus, the defendant was charged in federal court and acquitted of robbing a federally insured bank. Bartkus v. Illinois, 359 U.S. 121, 122 (1959). Following the acquittal, a federal agent turned over the evidence he had collected against the defendant to Illinois state law enforcement. Id. The federal sentencing of the defendant's accomplices was strategically continued until after they had testified against the defendant in state court. Id. at 123-24. The Supreme Court noted that cooperation between state and federal authorities was commendable, but also held that when a subsequent state prosecution is merely a "tool" of the federal authorities, the successive prosecution is unconstitutional. Id. Despite the Court ultimately finding that the cooperation

between state and federal law enforcement in Bartkus did not warrant application of the exception, courts have since interpreted this discussion as creating an exception to the dual sovereignty doctrine, designed to protect against improper collusion between state and federal authorities. See Mills, 412 F.3d at 330.

The Bartkus exception applies when "one sovereign so thoroughly dominates or manipulates the prosecution machinery of another that the latter retains little or no volition in its own proceedings." United States v. Dowdell, 595 F.3d 50, 63 (1st Cir. 2010) (quoting United States v. Guzman, 85 F.3d 823, 827 (1st Cir. 1996). Like the Blockburger test, the Bartkus exception originates within double jeopardy jurisprudence. All of the circuits holding that the Supreme Court intended to incorporate the dual sovereignty doctrine into its Sixth Amendment jurisprudence have also recognized that such incorporation includes the Bartkus exception. See Coker, 433 F.3d at 45-46; Alvarado, 440 F.3d at 198; Burgest, 519 F.3d at 1311, fn. 5.

Likewise, although the circuits that refused to incorporate the dual sovereignty doctrine in the Sixth Amendment context do not discuss the Bartkus exception by name, they have developed similar rules to protect against improper collusion between state and federal law enforcement. See Krueger, 415 F.3d at

778. In Krueger, the state charged the defendant with marijuana trafficking, the defendant was interviewed by federal agents, and the state dismissed its charges immediately after a federal indictment was returned charging the same drug offense. 415 F.3d at 769. A state agent was present for the federal questioning. Id. The Krueger court explicitly noted than an argument could be made for the application of an exception to the dual sovereignty doctrine based on the seamlessness of the transfer from state to federal authorities, potentially making the charges appear as one.

In this case, the evidence shows a sufficient level of collusion between the state and federal agents to fall within the Bartkus exception. Significant similarities exist between Randenberg's situation and that in Krueger, including the state authorities' involvement in the federal interrogation, and the lack of time between the dismissal of the state charges and the filing of federal charges. This kind of seamless transfer warrants an exception to the dual sovereignty doctrine.

If this Court were to uphold the district court's denial of Randenberg's motion to suppress his statements, it would allow Randenberg to be deprived of the full benefit of his Sixth Amendment right to counsel at a critical moment in his prosecution. The Supreme Court has recognized that the time between a defendant's arraignment and the beginning of trial is

perhaps the most critical stage of the proceedings, making it absolutely crucial that defendants not be deprived of the help of counsel during this time period. Massiah v. United States, 377 U.S. 201, 205 (1964).

B. The District Court Erred by Holding that No Level of Suspicion is Required to Search a Cell Phone at the Border

The Fourth Amendment guarantees individuals the right against "unreasonable searches and seizures" by the government. U.S. Const. amend. IV. To be reasonable, a search must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 19-20 (1968). Generally, the Fourth Amendment requires that a search be based on a warrant justified by probable cause, with the warrant particularly describing the place to be searched and the people or things to be seized. U.S. Const. amend. IV.

Fourth Amendment jurisprudence applies everywhere that a person has a "reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 360 (1967)(Harlan, J., concurring). A "reasonable expectation of privacy" exists when two requirements are met: "first[,] that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as

'reasonable.'" Id. at 361. Once an individual establishes this expectation of privacy, the burden shifts to the government to justify a warrantless search. Id. at 357-59.

However, there are certain exceptions to the warrant requirement, including the "border search" exception. United States v. Ramsey, 431 U.S. 606, 616 (1977) (holding that "searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border.") Since Ramsey, the border search exception has been expanded to include the "functional equivalent" of a border, such as an international airport. See Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973). A three-part test, established by the Eleventh Circuit, determines whether a search occurs at the border's functional equivalent by evaluating the circumstances around the search, as opposed to its location. United States v. Hill, 939 F.2d 934, 936-37 (11th Cir. 1991). Thus, a functional equivalent border search occurs when: (1) "reasonable certainty that the border was crossed"; (2) "no opportunity for the object of the search to have changed materially since the crossing"; and (3) "the search must have occurred at the earliest practicable point after the border crossing." Id.

Courts have often recognized two categories of border searches: "manual" and "forensic." Cotterman, 709 F.3d at 967. A manual search requires that border agents access individual

files by hand. See generally United States v. Arnold, 533 F.3d 1003, 1005 (9th Cir. 2008). A forensic search of electronic devices, such as cell phones and laptop computers, are considered by some courts to "essentially [be] a computer strip search," and require the use of complex technology that copies and searches an electronic device's hard drive. Cotterman, 709 F.3d at 958, 966. Because both kinds of searches occurred, this Court needs to decide what level of suspicion is needed for both manual and forensic border searches of cell phones.

1. The District Court Should Have Required At Least Reasonable Suspicion for Both the Manual and Forensic Searches of Randenberg's Cell Phone

Although it is an issue of first impression in this circuit, other circuits disagree as to whether searches of electronic devices at the border——manual or forensic——require any level of individualized suspicion. Compare United States v. Vergara, 884 F.3d 1309, 1312 (11th Cir. 2018)(holding that border searches never require a warrant or probable cause), with Cotterman, 709 F.3d at 968 (concluding that border patrol agents need at least reasonable suspicion to conduct forensic searches of electronic devices because of the heightened privacy interests at stake), and United States v. Kolsuz, 890 F.3d 133, 137, 148 (finding that it is unconstitutional for U.S. border

agents to perform forensic searches without individualized suspicion of criminal wrongdoing).

For example, the Eleventh Circuit held that suspicion is never required to search an electronic device at the border, regardless of whether the search was manual or forensic. United States v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018). The court was not persuaded by arguments that travelers' rights to privacy should be given greater weight than the "paramount interest [of the sovereign] in protecting . . . its territorial integrity." Id. at 1235 (quoting United States v. Flores-Montano, 541 U.S. 149, 153 (2004)). Additionally, the court relied on the historical importance of protecting U.S. borders to conclude that the government's interest outweighs that of individuals. Touset, 890 F.3d at 1233-34.

Taking a more nuanced position, the Ninth Circuit distinguished between manual and forensic searches, holding that the suspicionless manual border searches of computers do not violate the Fourth Amendment, but that government agents must have at least reasonable suspicion before conducting a "thorough and detailed [forensic] search of the most intimate details of one's life" contained within electronic devices. Cotterman, 709 F.3d at 967-68.

Although they disagree as to the ultimate rules about the level of suspicion required for border searches of electronic

devices, all of these courts, including the Fourth, Ninth, and Eleventh circuits, acknowledge the importance of Riley v. California, 134 S. Ct. 2473 (2014), in determining the level of individualized suspicion required to perform border searches of electronic devices. In Riley, the Supreme Court held that police officers cannot, without a warrant, search digital information on the cell phones seized from defendants as incident to the defendant's arrest. Id. at 2485. Cell phones are distinct from other objects that might be searched by law enforcement officers because they have an immense storage capacity and typically contain many types of private information, including addresses, bank accounts, videos——vastly more information than a typical physical record. Id. at 2489. As a result, an individual has a higher expectation of privacy in their cell phone and the content on that phone. Id.

The Fourth and Ninth Circuits concluded that the reasoning in Riley is broad enough to apply to the cell phones of travelers as well as those of arrestees'. The privacy interests involved do not change when a person happens to be at the border, and that privacy interest is great enough to require that law enforcement officers have at least reasonable suspicion to perform any search on an electronic device, wherever it may be seized.

This Court therefore holds that, due to the nature of electronic devices and the vast amount of information that they commonly contain, at least reasonable suspicion is required to perform a manual or forensic border search. The court further finds that reasonable suspicion to justify the search of Randenberg's cell phone did not exist in this case. Although reasonable suspicion is a lower threshold than probable cause, to have reasonable suspicion, a law enforcement officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968). Here, no "specific" or "articulable" facts justified the border agents' manual or forensic searches of Randenberg's cell phone. The only indication that Randenberg might have been involved in criminal activity was his prior arrest for protesting outside of the EPA building in February 2017. However, it would not have been reasonable for the CBP Agent to believe that she would find evidence related to that protest, which had occurred months before he was stopped at the border, on his cell phone. Therefore, the CBP Agent would have needed additional "specific and articulable facts" to justify the search of Randenberg's cell phone.[4]

[4] Although the district court did not need to reach the issue of whether probable cause should be required to search cell phones at the

C. The District Court's Errors Were Not Harmless

Harmless error review should be applied in the context of a conditional guilty plea made pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. United States v. Lustig, 830 F.3d 1075, 1091 (9th Cir. 2016). In that context, an error is not harmless unless the appellate court finds "beyond a reasonable doubt that the error did not contribute to the [defendant's] decision to plead guilty." Id. If the court cannot make that finding, it must remand the matter to provide an opportunity for the defendant to vacate the guilty plea. Id.

Here, the Government conceded that Randenberg's incriminating statements and the evidence obtained from his cell phone provided crucial evidence for its case, making it quite likely that the denial of his suppression motion affected Randenberg's decision to enter a guilty plea. Therefore, the district court's order must be vacated, and the case remanded to allow Randenberg the opportunity to withdraw his guilty plea.

III. CONCLUSION

The Sixth Amendment right to counsel is not subject to the dual sovereignty doctrine. As such, the interview of Randenberg

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border because the agents in this case did not even have reasonable suspicion, the Court notes that, given the reasoning in Riley, it would be reasonable to require a warrant before allowing cell phones seized at the border to be forensically searched, thereby revealing all the intensely private records that are stored cell phones, including even records that may be encrypted or deleted, as occurred in this case.

by a federal agent outside the presence of his state-appointed counsel violated his Sixth Amendment right to counsel. Additionally, the Fourth Amendment right against unreasonable searches is intended to protect an individual's privacy interests. A manual or forensic search of an electronic device without any degree of suspicion violates that right even if it occurs at the border. Thus, the searches performed on Randenberg's cell phone violated his Fourth Amendment right to privacy, and the information retrieved as a result of those searches should have been suppressed. For the foregoing reasons, the decision of the district court is VACATED and the matter is REMANDED for further proceedings consistent with this opinion.

Dated: January 29, 2018

Shelby Lindholm
SHELBY LINDHOLM
United States Circuit Judge

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

No. 18-63

UNITED STATES OF AMERICA,

Petitioner,

v.

COREY RANDENBERG,

Respondent.

The petition for writ of certiorari is granted, limited to consideration of the following questions presented:

1. Does a federal agent who is investigating an uncharged federal offense violate a defendant's Sixth Amendment right to counsel by interrogating the defendant without counsel after the defendant has had counsel appointed in a state case charging the same underlying offense conduct?

2. Is a defendant's Fourth Amendment right against unreasonable searches violated by manual and forensic searches of his cellular telephone at the border when those searches are not justified by any degree of individualized suspicion?