No. 24-2754

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARK SHOTWELL

Appellant/Plaintiff Below

v.

DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, ROBERT COUPE, DSHS Cabinet Secretary, LEWIS SCHILIRO, Former DSHS Cabinet Secretary, DELAWARE STATE POLICE, NATHANIEL MCQUEEN, DSP Colonel, JASON SAPP, DSP Captain, PETE SAWYER, DSP Captain, ANDREW GATTI, DSP Detective, CHRISTOPHER MARTIN, DSP Sergeant, MATTHEW TAYLOR, DSP Sergeant, UNIDENTIFIED OFFICERS, that participated in the arrest, transportation, and/or search and seizure of Plaintiff/Appellant's residence and/or electronic devices

Appellees/Defendants Below

On Appeal from the United States District Court
For the District of Delaware
(C.A. No. 1:18-cv-00984-SB)
Circuit Judge Stephanos Bibas, Sitting by Designation

BRIEF FOR PLAINTIFF APPELLANT AND JOINT APPENDIX
Volume I of III (Pages JA1 to JA49)

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant Mark Shotwell makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations:

   None.

2) For non-governmental corporate parties please list all publicly held companies that own 10% or more of the party's stock:

   None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

   None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

   Not a Bankruptcy Proceeding.

/s/ Dwayne J. Bensing
Dwayne J. Bensing

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Mark J. Shotwell filed suit pursuant to 42 U.S.C. §1983 claiming that several Delaware State Police officers ("Defendants") had violated his constitutional rights when executing warrants to search and seize weapons, photographs, documents, and devices (the "Warrants"). JA 88-114. Several of the claims and defendants were dismissed from the case. JA 13, JA 36, JA 41. Defendants Andrew Gatti, Christopher Martin, and "Unidentified Officers" are the only defendants remaining in the case. JA 36. Defendants Andrew Gatti and Christopher Martin filed a Motion for Summary Judgment. JA 69. The District Court granted the Motion for Summary Judgment on August 28, 2024. JA 49. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On August 28, 2024, the District Court entered final judgment against Mr. Shotwell. JA 49. Mr. Shotwell timely filed his Notice of Appeal on September 19, 2024. JA1. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err, as a matter of law, in holding that the Warrants were not general warrants? JA 10-11, JA 29, JA 46.
2. Did the District Court err, as a matter of law, in holding that the Warrants contained sufficient probable cause? JA 31.

3. Did the District Court err, as a matter of law, in holding that the Warrants authorized a search of the data on Mr. Shotwell's digital devices? JA 47-48.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case was previously on appeal before this Circuit and was dismissed after the clerk noted a jurisdictional defect. No. 23-2018.

Mark Shotwell pled *nolo contendere* to one count of Disorderly Conduct, an unclassified misdemeanor, for acts related to some of the facts in this case. Sent. Order, *State v. Shotwell*, No. 1607002292 (Del. Super. Ct. May 3, 2017), 1:18-cv-00984-SB.

STATEMENT OF THE CASE

I. Factual Background

The instant dispute is the culmination of a series of encounters between Mark Shotwell and state police officers ranging across multiple years and a variety of issues, stemming from a domestic dispute that resulted in Mr. Shotwell's ex-girlfriend obtaining a Protection From Abuse ("PFA") order against him on August 8, 2015. JA 125-126 As a condition of the order, Mr. Shotwell was not allowed to possess any firearms. JA 125-126.

On May 20, 2016, Detective Geoffrey Biddle was assigned to investigate Plaintiff-Appellant Mr. Shotwell for "harassing remarks" and statements regarding troopers' personal residences. JA 125. Detective Biddle observed that on June 25, 2016, Mr. Shotwell recirculated on Facebook an image of guns that was created and

first displayed by other users along with a statement about upgrading his gun ownership. JA 144-150. Upon further investigation, DSP discovered that Mr. Shotwell's Facebook page included photographs of guns "with comments supporting gun ownership" and that one of Mr. Shotwell's guns was given to his mother instead of being immediately relinquished to authorities. JA 125-126. As a result, DSP believed that Mr. Shotwell "may" possess firearms in violation of the PFA Order. JA 125.

On June 28, 2016, Detective Biddle left a voicemail on Mr. Shotwell's cell phone advising him that an investigation was being conducted and requesting that he not further contact any state troopers. JA 125. Mr. Shotwell returned Detective Biddle's call to tell him that he had a right to contact the police and then insulted Biddle.[1] JA 125. A few days later, on July 3, 2016, Mr. Shotwell posted further insults directed at Biddle on Facebook and stated, "I'm coming for you . . . and your family . . . let's see how you like it." JA 125.[2]

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[1] On the phone call, Mr. Shotwell stated: "I don't give a f**k who you think you are, I will tell you my rights and you're barking up the wrong tree. And quit being a p***y because I know you are a little b***h. How about you get on your knees, and I will put my d**k in your mouth, and you can go f**k yourself." JA 125

[2] Relatedly, Mr. Shotwell initiated a separate legal case against DSP only a few days before the events in question. *See Shotwell v. Stafford*, No. 1:16-cv-00441-RGA (D. Del. filed June 15, 2016). As such, Mr. Shotwell's "threat" that he was "coming for" Detective Biddle and his family referred to the legal case brought against DSP officers.

As a result, later that day, DSP officers obtained and executed two warrants on Mr. Shotwell's home to search for and seize guns and other weapons, all electronic and media storage devices, and all documents and related photographs, for the purpose of finding "evidence that would assist with this investigation and also prevent any weapons or items that would assist Mark Shotwell in carrying out any type of threats." JA 121-133. The first warrant authorized the search for and seizure of:

- Any handguns, firearms, ammunition, shot guns or shot gun ammunition.
- Any and all assault style rifles or replicas of same, specifically but not limited to any type of AR-14 rifle, AR-15 rifle, M-14 rifle, M-15 rifle or any assault style rifle ammunition.
- Any suppressors, homemade or bought or any replicas of said suppressors.
- Black, gray, or dark colored handgun(s) or replica gun.
- Black and/or silver revolver handgun or replica guns.
- Any and all knives, swords, or similar style edged weapons or anything similar that could be used as a deadly weapon.
- Any and all photos depicting any of these aforementioned items.

JA 121. The warrant referenced Del. Code Ann. tit. 11, § 1271 (West), criminal contempt of a domestic violence protective order, which is a Class A misdemeanor, related to possession of a weapon in violation of the 2015 PFA Order. JA 121 ("Contempt Warrant"). The second warrant authorized the following categories of items to be searched for and seized:

- Any and all electronic devices to include but not limited to computers, laptop computers, notebooks, tablets, iPads, smart TV's, hard drives and cellular phones.
- Any and all media [storage] devices, to include but not limited, [sic] to thumb drives, memory sticks, cd's, dvd's, external storage

devices, hard drives and other devices used to save or record data related to internet searches and internet postings.

- Any and all documents to include, but not limited to, photographic images, video images, printouts from Facebook or other social media venues.
- Any and all photos depicting any of these aforementioned items.

JA 128 ("Documents and Devices Warrant" or "D&D Warrant"). This warrant referenced Del. Code Ann. tit. 11, § 1240 (West), terroristic threatening of public officials or public servants likely to result in death or in serious injury, a class G felony. JA 128.

Sergeant Matthew Taylor submitted two nearly identical affidavits in support of the warrants, only substituting a few of the paragraphs, most notably Paragraph 7. JA 125-126, JA 131-132. The affidavits referenced information regarding Mr. Shotwell's Facebook posts and prior crimes. JA 125-126, JA 131-132. For the D&D Warrant, Paragraph 7 of the affidavit stated that, "[t]hrough training and experience," Sgt. Taylor was aware that people use electronic devices like those listed in the warrant to conduct Internet searches "for such purposes as locating individuals as well as to obtain names and other identifying information including photographs of family members as well as to post messages to be viewed on the internet." JA 132. It also stated that he was aware that people use media storage devices to save internet searches, to save information from searches, and to "save or record internet postings." JA 132.

Neither Warrant nor affidavit included any statement concerning the search of data on the devices listed or limitations on a search of the data. JA 121-133. Pursuant to the Warrants, DSP seized eighteen electronic and media storage devices from Mr. Shotwell's home. JA 134. No firearms or weapons were found. JA 134.

Following the seizure, Detective Gatti extracted all the data from Mr. Shotwell's devices. JA 178-182. According to the Cellebrite UFED Extractions summary, nearly 10,000 files were extracted from Mr. Shotwell's cell phones alone, including more than 7,000 files from before the investigation began, and many dated even years before the events that gave rise to the investigation. JA 178-182. The extraction data included every call, text message, photo, calendar entry, Internet search history, etc., that Mr. Shotwell had ever entered on these devices, and even previously deleted entries. JA 178-182.

DSP officers created and used a keywords list of sixteen words or phrases to search through all the files that had been extracted, including vague and generalized phrases such as "coming for" and "will get." JA 169. There were thirty-four hits for the keywords, many of which were completely unrelated to the investigation and instead identified records pertaining to Freedom of Information Act requests, other lawsuits, and personal essays, among other items. JA 166. These keywords were not included in either Warrant or their affidavits. JA 121-133.

II. Procedural History

On July 2, 2018, Mark J. Shotwell initially filed this *pro se* action against various DSP officers who participated in the search of his home and devices, including Andrew Gatti, Christopher Martin, Matthew Taylor, and other "Unnamed Officers" that participated in the search. JA 73. His Complaint included several allegations and claims for relief, including that the Warrants used to search his home were general warrants, containing no limitations on the search of his personal data, and that the Warrants were not supported by adequate probable cause. JA 82-83.

On August 27, 2018, the Defendants moved to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(6). JA 59. After briefing, the District Court granted the motion as to all claims and all defendants and gave Mr. Shotwell leave to amend some of his claims against some of the defendants. JA 13. The Court did not grant Mr. Shotwell leave to amend his claims relating to general warrants and probable cause. JA 11. Mr. Shotwell filed his Amended Complaint on April 1, 2019, against the same defendants, new individual defendants, and state defendants. JA 88. The Defendants collectively moved to dismiss the Complaint again, which the court granted for all Defendants except for Andrew Gatti, Christopher Martin, and the "Unidentified Officers." JA 36. Mr. Shotwell was again given leave to amend a claim unrelated to

this appeal, and he subsequently filed his Third[3] Amended Complaint on October 14, 2020. JA 115. The Defendants subsequently moved to dismiss a separate claim unrelated to this instant appeal, which was granted. JA 41.

After discovery, the remaining Defendants filed a Motion for Summary Judgment on the two remaining claims: the excessive force claim against Defendant Martin and the illegal search claim against Defendant Gatti JA 69. The court then scheduled a limited summary judgment hearing,[4] JA 70, and subsequently granted the Defendants' Motion on August 28, 2024. JA 49. Mr. Shotwell timely filed a Notice of Appeal on September 19, 2024. JA 1.

III. Ruling Presented for Review

Appellant Mark J. Shotwell appeals to the United States Court of Appeals for the Third Circuit from the Order and Memorandum Opinion of the United States District Court for the District of Delaware, entered in this action on August 28, 2024 as it pertains to his unlawful search claim. JA 42-49. Mr. Shotwell does not appeal the portion of that order and opinion that dealt with his excessive force claim. JA

[3] The Second *Amended* Complaint, third filed version of the complaint, was mislabeled by *pro se* Plaintiff. For the Avoidance of doubt, the operative complaint begins at JA 115.

[4] Defendants Martin and Gatti filed a notice of appeal regarding whether the scheduling of a summary judgment hearing constituted an implicit denial of their qualified immunity claims on June 2, 2023. JA 70. This Court terminated the appeal on June 11, 2024, after the clerk noted a jurisdictional defect. *See Shotwell v. Del. Dep't of Homeland Sec.*, No. 23-2018 (3d Cir. June 11, 2018).

45-46. In addition, Mr. Shotwell also appeals the District Court's dismissal of his claims regarding whether Defendant-Appellees unconstitutionally searched his home pursuant to a general warrant and otherwise lacked probable cause to search for and seize personal items. JA 9-12.

SUMMARY OF THE ARGUMENT

The central concern underlying the Fourth Amendment is to avoid giving police officers unbridled discretion to rummage at will among a person's private effects. Yet, the District Court's finding in this case—that the police were authorized to seize "any and all" of Mr. Shotwell's documents, electronic devices, and media storage devices and to search all his documents and data without content or time limitations, along with a list of any possible weapon a person could own, approved precisely the type of general, exploratory rummaging abhorred by the founders and prohibited by the Fourth Amendment.

First, the Warrants were general warrants that granted police *carte blanche* to search Mr. Shotwell's home and are therefore *per se* unconstitutional. The D&D Warrant on its face was a general warrant that used broad, general "any and all" and "including but not limited to" language, listed generic categories of items that could be found in anyone's home, and lacked relevant temporal limitations. The District Court erroneously relied upon an unincorporated affidavit to find that the Warrant was not a general warrant; however, an affidavit cannot "cure" a general warrant.

Further, because neither Warrant contained the express, clear language required by this Court to incorporate the affidavit, any attempt to cure the Warrants' lack of particularity failed. Because of these deficiencies, the D&D Warrant was an unconstitutional general warrant that authorized police to engage in general rummaging prohibited by the Fourth Amendment. In addition, the Contempt Warrant was a general warrant because it authorized seizures of items without the constitutionally requisite particularity.

Second, the Warrants lacked the constitutionally requisite probable cause to conduct the searches and seizures because the magistrate impermissibly "rubber-stamped" the warrant applications. The Defendant-Appellees intended to search for and seize evidence sufficient to demonstrate that Mr. Shotwell was (1) violating the PFA against him and (2) making terroristic threats against public officials. However, no nexus existed between these offenses and the expansive search of Mr. Shotwell's home, devices, and data, much less did Defendant-Appellees provide adequate justification for the seizure of items for which there was no reason to suspect even existed (and which, in fact, did not exist).

Further, the search of Mr. Shotwell's data and electronic files exceeded the scope of the D&D Warrant. Because the warrant authorized only a "search *for* and seizure of" devices but did not explicitly authorize a "search *of*" those devices, much

less mention data in any capacity, the search of the data exceeded the scope of the D&D Warrant.

Because the Warrants were general warrants that relied upon unincorporated affidavits, lacked sufficient probable cause, and did not include a search of data, this Court should rule that the District Court opinions erred as a matter of law, that the warrants were unconstitutionally deficient, and reverse and remand for further proceedings.

STANDARD OF REVIEW

Plaintiff-Appellant appeals from orders granting two Motions to Dismiss and an order granting Summary Judgment. This Court's review of all three orders "is plenary, meaning [it] review[s] anew the District Court's . . . decision[ ], applying the same standard it must apply." *Ellis v. Westinghouse Elec. Co., LLC*, 11 F.4th 221, 229 (3d Cir. 2021); *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 367 (3d Cir. 2011) (internal citations omitted). A motion to dismiss should be granted only if, accepting the well-pleaded allegations in the complaint as true, a court concludes that those allegations "could not raise a claim of entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550. U.S. 544, 558 (2007). Although the plaintiff must set forth allegations sufficient to survive a motion to dismiss, *pro se* pleadings are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Zilich v. Lucht*, 981 F.2d 694, 694 (3d

Cir. 1992). Thus, complaints filed *pro se* "should be construed liberally.'" *Durham v. Kelley*, 82 F.4th 217, 223 (3d Cir. 2023). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

The Fourth Amendment protects "against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Fourth Amendment is enforced against the states under the Due Process Clause of the Fourteenth Amendment. *Aguilar v. Texas*, 378 U.S. 108, 110 (1964), *overruled in part on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983).

"At the very core" of the Fourth Amendment is the right to "retreat into [one's] own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) *(*quoting *Silverman v. United States,* 365 U.S. 505, 511 (1961)). Thus, it is a "'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (quoting *Payton v. New York,* 445 U.S. 573, 586 (1980) (footnote omitted)). One of the "specific evil[s]" that the Framers encountered were general warrants that authorize "a general exploratory

rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). These general warrants, utilized by the British in the colonial era, were one of the driving forces behind the Revolution itself and the adoption of Fourth Amendment protections. *Riley v. California*, 573 U.S. 373, 403 (2014). As such, a general warrant is *per se* unconstitutional. *United States v. Yusuf*, 461 F.3d 374, 393 (3d Cir. 2006) (observing that "[g]eneral warrants violate the Fourth Amendment").

The Fourth Amendment requires that all warrants contain a "particular description" of the things to be seized. This particularity requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). In order to secure a search warrant that comports with the requirements of the Fourth Amendment, an officer seeking a warrant must demonstrate to a neutral magistrate that probable cause exists to believe that a crime was committed and that evidence of the crime will be found in the place to be searched or the items to be seized. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Probable cause exists only when there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*

In the context of a data search, the U.S. Supreme Court has acknowledged that the digital age requires re-evaluation of Fourth Amendment doctrine to ensure that

privacy survives the advent of new surveillance technologies. These cases generally require law enforcement officers to get a warrant before they search a cell phone, track someone's physical location, or obtain vast, sensitive, and revealing records from service providers. *See generally Riley*, 573 U.S. 373; *United States v. Jones*, 565 U.S. 400 (2012); *Carpenter v. United States*, 585 U.S. 296 (2018). As the Supreme Court recently reiterated, judges are "obligated—as 'subtler and more far-reaching means of invading privacy have become available to the Government'—to ensure that the 'progress of science' does not erode Fourth Amendment protections." *Carpenter*, 585 U.S. at 320 (quoting *Olmstead v. United States*, 277 U.S. 438, 473-74 (1928) (Brandeis, J., dissenting)).

This Court should find that the District Court improperly granted Defendant-Appellees first and second Motions to Dismiss and their Motion for Summary Judgment and reverse those decisions. The D&D Warrant was a general warrant, lacked sufficient probable cause, and did not authorize a search of the data on Mr. Shotwell's devices. The Contempt Warrant also lacked sufficient probable cause and was a general warrant.

I. The D&D Warrant was Unconstitutional Because it was a General Warrant, Lacked Sufficient Probable Cause, and Did Not Authorize a Search of the Data on the Devices Seized.

A. The D&D Warrant was a General Warrant.

The District Court granted Defendant-Appellees' motion to dismiss, holding that the D&D Warrant was not a general warrant. JA 10-11, JA 29, JA 46. When a district court grants a motion to dismiss, this Court subjects that order to plenary review. *See Allen ex rel. Martin*, 629 F.3d at 367. Furthermore, as a *pro se* plaintiff, the allegations in Mr. Shotwell's complaint should be construed liberally. *See Durham*, 83 F. 4th at 223. This Court should rule that the D&D Warrant is an unconstitutional general warrant that granted police *carte blanche* to search every file on Mr. Shotwell's devices without limitations as to content or time.

i. The D&D Warrant Granted Police Carte Blanche to Search "Any and All" Documents and Files Without Constitutional Limitations.

"A general warrant is a warrant that authorizes a 'general exploratory rummaging in a person's belongings.'" *United States v. Christine*, 687 F.2d 749, 752 (3d Cir. 1982) (quoting *Coolidge*, 403 U.S. at 467). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Stanford v. State of Tex.*, 379 U.S. 476, 485-86 (1965) (citing *Marron*, 275 U.S. at 196). The Supreme Court has explained that "a particular warrant insures that the officer's discretion is limited both by interposing the judgment of a neutral magistrate and by alerting the individual whose person or property is being searched of the boundaries of that officer's legal authority." *Baranski v. Fifteen Unknown*

Agents of Bureau of Alcohol, Tobacco & Firearms, 452 F.3d 433, 452 (6th Cir. 2006) (citing *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 533 (1967)).

In the context of a computer, this Court has held that "granting the Government a *carte blanche* to search *every* file . . . impermissibly transforms a 'limited search into a general one.'" *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011) (quoting *Marron,* 275 U.S. at 196). That is, a search warrant does not conform to the Fourth Amendment when it broadly lists all possible devices that could be found in someone's home or uses generic categories. *See, e.g.*, *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995) (finding that warrant containing "no limitations on which documents within each category could be seized or suggested how they related to specific criminal activity" was "indistinguishable from the general warrants repeatedly held by this court to be unconstitutional"). Instead, the warrant must guide officers in their search by limiting the search by, for example, file types, files and documents related to particular events, specific information from social media or Internet sites, and relevant dates.

Carte blanche to search every file on fourteen different electronic and digital devices was exactly what the D&D Warrant granted the police in the instant case. *Stabile,* 63 F.3d at 237; JA 128. In this case, the Defendant-Appellees unconstitutionally over-seized data by seizing "any and all" of Mr. Shotwell's

devices and then searched the digital data on them without any limitations. As such, the D&D Warrant permitted the government to search all of Mr. Shotwell's data, including every document and file he had ever created at any time as well as every Internet search he had ever undertaken, every message he had sent and received, and more.

Other courts have rejected search warrants almost identical to the one in the instant case. In *Kow*, "[t]he warrant authorized the seizure of virtually every document and computer file at [the defendant's business]." *Kow*, 58 F.3d at 427. "To the extent that it provided any guidance to the officers executing the warrant, the warrant apparently sought to describe every document on the premises and direct that everything be seized." *Id*. Because "the warrant contained no limitations on which documents within each category could be seized or suggested how they related to specific criminal activity," the Ninth Circuit concluded that "the warrant is indistinguishable from the general warrants repeatedly held by this court to be unconstitutional." *Id.* (citing *Center Art Galleries–Hawaii, Inc. v. United States,* 875 F.2d 747, 750 (9th Cir. 1989); *United States v. Stubbs,* 873 F.2d 210, 211 (9th Cir. 1989)); *see also United States v. Fleet Mgmt. Ltd.*, 521 F. Supp. 2d 436, 444 (E.D. Pa. 2007). (finding that a warrant authorized officers to conduct general, exploratory rummaging when it "authorized the seizure of '*any and all data*' from the three

seized computers, 'including, *but not limited to*" certain types of data related to [six delineated topics and] placed absolutely no limitation on the data to be seized").

Like the warrant found unconstitutional in *Kow*, the D&D Warrant sought to describe every electronic device and media storage device that could possibly be found in Mr. Shotwell's—or anyone's—home and direct that all fourteen categories of devices be seized. JA 128; *Kow*, 58 F.3d at 427. The Ninth Circuit rejected the argument that merely naming separate categories of records was sufficiently particularized, instead holding that the warrant was unconstitutional and "indistinguishable from the general warrants repeatedly held by this court to be unconstitutional" because it "contained no limitations on which documents within each category could be seized or suggested how they related to specific criminal activity." *Kow*, 58 F.3d at 427 (citing *Center Art Galleries–Hawaii, Inc.,* 875 F.2d at 750; *Stubbs,* 873 F.2d at 211). This is precisely the situation created by the D&D Warrant, which neither attempted to limit which documents or files were to be seized nor connected any of the listed items to any specific criminal activity or the relevant time period. Without such limitations, the D&D Warrant was an unconstitutional general warrant.

ii. Failure to Include Temporal Restrictions and Keywords in the D&D Warrant Further Demonstrates that It Is Unconstitutionally Overbroad.

In addition, the D&D Warrant is unconstitutional because it easily could have limited the search to data related to the three specific events in the affidavit but did

not. *See, e.g.*, *United States v. Blake*, 868 F.3d 960, 974 (11th Cir. 2017) (finding that Facebook warrants "unnecessarily" "required disclosure to the government of virtually every kind of data that could be found in a social media account" instead of "limit[ing] the request to messages sent to or from persons suspected" of participating in the conspiracy and "request[ing] data only from the period of time during which [defendant] was suspected of taking part in the . . . conspiracy."). Sgt. Taylor's unincorporated affidavit, *see* Part I.A.iii, *infra*, referred to three events over an approximately six-week time period, and the D&D Warrant should have limited the search to evidence of these events. The affidavit demonstrated that Sgt. Taylor knew precisely what information related to the charged crime: (1) "harassing remarks" to officers that led to an investigation beginning in May 2016; (2) a phone call on June 28, 2016; and (3) a Facebook post on July 3, 2016. JA 131-132. The D&D Warrant should have focused on these three events but instead authorized a broad search encompassing every file in Mr. Shotwell's home, with no limitations on content or date.

Other Circuit Courts also have specified that a search warrant's failure to limit a search and seizure by relevant dates known to the affiant renders the warrant unconstitutional. *See, e.g.*, *United States v. Ford*, 184 F.3d 566, 576 (6th Cir. 1999) ("Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad."); *Kow*, 58 F.3d at 427

(finding a warrant not sufficiently particular in part because the "government did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place"); *United States v. Abrams*, 615 F.2d 541, 545 (1st Cir. 1980) (finding that a warrant lacked meaningful limitations and noting, among other things, that "[a] time frame should also have been incorporated into the warrant").

It is true that the officers used keywords in an effort to limit their search instead of searching through every individual file. JA 166, JA 169. However, post-hoc keywords created by the searching officers that were not contained anywhere within the D&D Warrant cannot save the deficiencies contained within it. *See Riley*, 573 U.S. at 382 (observing that a search warrant "ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime'") (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Furthermore, the keywords utilized by the officers here were over-inclusive. For example, common phrases like "coming for" and "will get" were included in the keyword list. JA 169. Unsurprisingly, these broad keywords led officers to search documents that were entirely unrelated to the charges at hand, such as FOIA requests that Mr. Shotwell submitted to other municipalities and a "Personal Intro" that Mr. Shotwell had written. JA 166. Such broad keywords are the exact reason the Fourth

Amendment requires warrants to limit officers' discretion. Because the warrants here did not do so, they violated Mr. Shotwell's Fourth Amendment rights.

iii. The Affidavit Could Not Cure The D&D Warrant Without "Express" And "Clear" Language of Incorporation.

The District Court improperly used an unincorporated affidavit to cure the unconstitutional general warrant. JA 11. Because this Court requires that words of incorporation in a warrant be "express" and "clear"—but the warrant in Mr. Shotwell's case failed to include any words of incorporation at all—the District Court erred when it considered the attached affidavit as part of the D&D Warrants' particularity.

"The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents . . . . A court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Groh*, 540 U.S. at 557-58 (2004); *see also United States v. Johnson*, 690 F.2d 60, 64 (3d Cir. 1982) ("When a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used in construing the scope of the warrant."). An affidavit submitted in support of an application for a search warrant can cure a warrant's lack of particularity *only when* the warrant expressly incorporates the affidavit, and the incorporation is clear. *Doe v. Groody*, 361 F.3d 232, 239 (3d Cir. 2004). It is insufficient to "[m]erely referenc[e] the attached affidavit somewhere in

the warrant without expressly incorporating it." *United States v. Tracey*, 597 F.3d 140, 149 (3d Cir. 2010). Instead, "the words of incorporation in the warrant must make clear that the section lacking particularity is to be read in conjunction with the attached affidavit." *Id.*

This "Court requires clear words of incorporation to cure a warrant lacking particularity." *Id.* at 148. In *Tracey*, the Court held that the warrant did not adequately incorporate the affidavit because there were no "explicit words of incorporation" in the application and warrant, and "[m]ore importantly, the description of the items to be searched for and seized does not incorporate the affidavit." *Id*. The Court noted that the warrant could have included language such as "'see affidavit,' 'as further described in the affidavit,' or any other words of incorporation," but did not. *Id.* at 148. Accordingly, the Court concluded that "a reader of the warrant would know that an affidavit is attached, but would have no indication that the attached affidavit limits the officers in their search." *Id.* at 149.

In the instant case, the affidavit of probable cause was not adequately incorporated into the D&D Warrant. The Warrant's general introduction included only the generic language "[u]pon the annexed affidavit and application or complaint for search warrant." JA 128. This language "[m]erely referenc[ed]" the affidavit but did not incorporate it. *See Tracey*, 597 F.3d at 149. It also failed to provide any indication that the list of items to be seized was "to be read with reference to the

affidavit." *See Tracey*, 597 F.3d at 148 (citing *Groh*, 540 U.S. at 555; *Curry*, 911 F.2d at 76-77). As this Court observed about the unconstitutional warrant in *Tracey*, the D&D Warrant could have included language such as "'see affidavit,' 'as further described in the affidavit,' or any other words of incorporation," but did not. *See Tracey*, 597 F.3d at 148.

As a result, the D&D Warrant did not incorporate the attached affidavit and, thus, the Warrant's unconstitutional lack of particularity is not cured by incorporation. The District Court erred when it assumed the affidavit could cure the D&D Warrant and used the affidavit to conclude that the Warrant was not a general warrant. The District Court, after admitting that the "[D&D] warrant could have been written more clearly" decided, "[c]ontrary to Plaintiff's position, the warrants speak with particularity as to the place to be searched and the items to be seized including weapons and electronic devices." JA 11. In a footnote, the district court explained this finding by stating that the D&D Warrant was to be read in conjunction with the affidavit's paragraph seven. JA 11.

The District Court improperly considered the unincorporated affidavit when reaching its finding. The D&D Warrant should not "be read in conjunction with the affidavit's paragraph seven" because the affidavit was not clearly, expressly incorporated into the warrant. *Tracey*, 597 F.3d at 149. Accordingly, the District Court improperly considered the unincorporated affidavit despite this Court's

precedent that only express, clear incorporation is sufficient. The District Court was wrong, to use the affidavit to support the District Court's conclusion that "[t]hough the 'warrant could have been written more clearly, it [] is not a general warrant.'" JA 11; *Tracey*, 597 F.3d at 149. Because the affidavit was not incorporated as a matter of law, this Court should reverse and remand the District Court's decision. Even if the affidavit was incorporated, the Warrant was still a general warrant because it gave officers *carte blanche* to search every item on Mr. Shotwell's devices.

B. The D&D Warrant Lacked Sufficient Probable Cause

The District Court granted Defendant-Appellees' motion to dismiss, holding that the D&D Warrant was supported by probable cause. JA 31. When a district court grants a motion to dismiss, this Court subjects that order to plenary review. *See Allen ex rel. Martin*, 629 F.3d at 367. Furthermore, as a *pro se* plaintiff, the allegations in Mr. Shotwell's complaint should be construed liberally. *See Durham*, 83 F. 4th at 223.

There is an additional standard in place when a court reviews a magistrate's determination that probable cause existed to issue a warrant. While a reviewing court must pay deference to a magistrate judge's determination of probable cause, this Court still plays an important role in determining whether probable cause existed. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Gates*, 462 U.S. at 236 (quoting *Spinelli v. United States*, 393 U.S.

410, 419). "Deference to the magistrate, however, is not boundless." *United States v. Leon*, 468 U.S. 897, 914 (1984). The courts must "insist that the magistrate purport to 'perform his neutral and detached function and not serve merely as a rubber stamp for the police.'" *Id.* (quoting *Aguilar*, 378 U.S. at 111). "[R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" *Leon*, 468 U.S. at 915 (quoting *Gates*, 462 U.S. at 239).

This Court has previously held that the nexus between the items to be seized and the criminal behavior in question requires a showing that each individual act constituting a search or seizure under the Fourth Amendment is reasonable. *United States v. Ritter*, 416 F.3d 256, 261 (3d Cir. 2005) (citing *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995)). This means that a warrant must establish probable cause for every individual item listed in the warrant to be searched or seized, i.e., that evidence is likely to be found in the place to be searched. *Groh*, 540 U.S. at 568. To be constitutional, a warrant must provide an explanation as to why evidence will likely be found in the specific place to be searched rather than in some other place. *United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016).

To establish this nexus, a court must first examine the alleged criminal behavior. The D&D Warrant listed suspicion of terroristic threatening of a police officer, 11 *Del. C.* § 1240. JA 128. A person violates this provision when they

"threaten[] to commit any crime likely to result in death or in serious injury to a public official." § 1240.

i. The D&D Warrant Authorized Seizures of Documents and Devices Without Probable Cause to Believe that they Existed

The D&D Warrant contained no assertion that Mr. Shotwell engaged in conduct sufficient to establish probable cause for a violation of the terroristic threatening statute. Despite making harassing comments to some DSP officers over the phone and on Facebook and stating that he knew where they lived (unsurprising in Newark, DE, an area with a population of approximately 30,000 people), no evidence was presented to the magistrate to demonstrate any "fair probability" that Mr. Shotwell was planning, or threatening, to engage in any activity likely to result in death or in serious injury. After all, even if Mr. Shotwell's speech towards DSP officers was unsavory, it was still a form of pure speech that "must be interpreted with the commandments of the First Amendment clearly in mind." *Watts v. United States*, 394 U.S. 705, 707 (1969). Further, as the District Court stated, Sgt. Taylor sought only to seize documents and devices used for "conducting [of] internet searches for such purposes as locating individuals as well as to obtain names and other identifying information including photographs of family members as well as to post messages to be viewed on the internet." JA 11. Conducting a Google search of a person is simply not criminal behavior. This means that the magistrate did not

have a substantial basis for concluding that there was probable cause that Mr. Shotwell engaged in terroristic threatening.

Even if there was probable cause to believe that Mr. Shotwell had violated the statute, the D&D Warrant authorized the seizure of "[a]ny and all documents to include, but not limited to, photographic images, video images, printouts from Facebook or other social media ventures. Any and all photos depicting any of these aforementioned items [electronic and media storage devices]." JA 128. But the criminal behavior in question—(1) "harassing remarks" to officers that led to an investigation in May 2016, (2) a phone call in June 2016, and (3) a Facebook post in July 2016—has *no* nexus to these items. Sgt. Taylor's affidavit of probable cause failed to articulate any reason to suspect that Mr. Shotwell would have any physical images from Facebook or physical photos depicting his electronic devices, as none of these events involved physical documents. As such, this section of the warrant was lacking in probable cause, and the magistrate erred in issuing it. The warrant's authorization to seize these items even though there was absolutely no reason to believe that they existed demonstrates that the magistrate merely served as a "rubber stamp" for the Warrant, overcoming any deference this Court would otherwise provide.

As for the media storage devices listed in the D&D Warrant, probable cause is only attempted based on the observation that "individuals use media storage

devices to save such internet searches as well as information obtained from these searches and to save or record internet postings." JA 132. To establish probable cause, the affiant needed to establish a nexus between Mr. Shotwell's alleged terroristic threatening and his media storage devices. A mere assertion that people generally use these types of devices for the stated purpose does not establish the nexus. *United States v. Griffith*, 867 F.3d 1265, 1272-73 (D.C. Cir. 2017). Yet, Sgt. Taylor could not provide any particularized statement that there was a "fair probability" of finding such devices in Mr. Shotwell's house. As such, this section of the Warrant was lacking in probable cause, and the magistrate erred in issuing it. The complete lack of any demonstration of a nexus means that the magistrate did not have a "substantial basis" for finding that probable cause existed to authorize this seizure. The seizure of Mr. Shotwell's media storage devices without probable cause violated his Fourth Amendment rights.

Finally, we turn to the physical seizures of Mr. Shotwell's electronic devices. The D&D Warrant must articulate a reason the government suspected the defendant owned "computers, tablets, and personal digital assistants" to search for and seize those items. *Griffith*, 867 F.3d at 1272. Here, the nexus of mere ownership was not even established for each item listed in the warrant. While it may have existed for computers and phones, due to the Facebook posts, there was no evidence that Mr. Shotwell owned a "smart TV," nor would that reasonably fall within a commonsense

item to be seized when the alleged violations involve Facebook posts and phone calls. JA 128-132 Nor was there any particularized statements to show that there was a fair probability that Mr. Shotwell owned any tablets. As such, probable cause did not exist in this portion of the warrant either.

Taken together, the Defendant-Appellees lacked probable cause to search for and seize almost every item listed in the D&D Warrant. By approving seizures of all these items without even a hint of probable cause, let alone a "substantial basis" for finding probable cause, the magistrate acted as a mere "rubber stamp" for the Sgt. Taylor's actions. As a result, this Court must find that there was no probable cause to support the D& Warrant despite the deference owed to the magistrate. Therefore, the District Court's dismissal must be reversed. The affidavit did not contain sufficient probable cause to justify seizures of all the items listed in the D&D Warrant. The Defendant-Appellees violated Mr. Shotwell's Fourth Amendment rights via this search and seizure.

ii. The D&D Warrant Did Not Establish Probable Cause to Search All of the Data Contained on Mr. Shotwell's Devices.

Today, a massive amount of revealing personal information is stored on our computers and cell phones and "in the cloud," on Internet-connected servers hosted by the scores of online companies whose products and services we use daily. Modern computers, including cell phones, "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions,

maps, or newspapers." *Riley*, 573 U.S. at 393. Digital information generated by today's devices and services reveals individuals' private matters far beyond what one could learn from physical analogs. *Id.* at 394.

Neither the Supreme Court nor this Circuit have addressed the contours of warrants when it comes to searches of cell phones; the cases only address the necessity of a warrant in the first place. However, various other courts have used the privacy discussion present in *Riley* to guide their analysis of the probable cause requirement in cell phone searches. The Supreme Court of Delaware, for example, has held that a warrant that authorizes a limitless search of a cell phone is presumptively unconstitutional under the Fourth Amendment. *See Buckham v. State*, 185 A.3d 1, 18-19 (Del. 2018) (finding that when applying for a warrant, officers must restrict themselves to only the areas of the phone (i.e. photos, messages) and duration that they have probable cause to search). In *Buckham*, the court held that warrants must take care to be "no broader than the probable cause on which [they are] based." *Id.* (citing *Wheeler v. State*, 135 A.3d 282, 299, 305 (Del. 2016)). The overwhelming weight of authority agrees with the Supreme Court of Delaware's analysis. *See, e.g.*, *Burns v. United States*, 235 A.3d 758, 773 (D.C. 2020) (holding that a warrant to search electronic data must be strictly limited to the time period and information for which there is probable cause to search); *Commonwealth v. Broom*, 52 N.E. 3d 81, 89 (Mass. 2016) (determining that warrants to search electronic data

must meet a narrower and more demanding standard); *United States v. Morales*, 77 M.J. 567, 574 (A. Ct. Crim. App. 2017) (finding that the even if officers have probable cause to believe that there are texts about a sexual assault, that does not support a search of the phone's pictures); *United States v. Winn*, 79 F. Supp. 3d 904, 919 (S.D. Ill. 2015) (holding that if officers seek to search all data on a phone they must justify how and why each area of the phone is connected to the criminal activity in question).

The D&D Warrant did not establish probable cause to conduct a limitless search of Mr. Shotwell's data. To support probable cause to search Mr. Shotwell's data, the affidavit stated (1) Mr. Shotwell made "harassing remarks" to officers that had led to an investigation two months earlier, (2) Mr. Shotwell insulted Detective Biddle on a phone call, (3) on July 3, 2016, Mr. Shotwell made a Facebook post insulting Detective Biddle, (4) Mr. Shotwell posted Facebook images of firearms and made comments about upgrading his collection, and (5) people use electronic devices to obtain names and identifying information about other people. JA 131-132.

Although probable cause may have existed for a search of *some* of Mr. Shotwell's data, there simply was not probable cause to search *all* of Mr. Shotwell's data. Starting with the last point, a statement about how people generally use electronic devices is not enough to establish any probable cause. *See Buckham*, 185 A.3d at 17. As for the other statements, there is simply no nexus between them and

the vast majority of the data stored on Mr. Shotwell's devices. There must be a direct link between the established probable cause and the areas of the device that the officers seek to search. A limitless search of the data outruns the probable cause present here.

The extractions here included lists of thousands of documents dating back to January 2014, over two and half years before the events at issue in this case. JA 178-182. This included every call, text message, photo, Internet search history, etc., that Mr. Shotwell had ever entered on these devices. JA 178-182 Because neither the text of the D&D Warrant nor the affidavit provided meaningful limitations or restrictions on the officers who searched these extracted documents, the officers had free rein to search files that had no probable cause linkage to the alleged crimes. This Court should find that the magistrate did not have a substantial basis to believe that probable cause existed to conduct this broad search, and so the District Court's holding to the contrary should be reversed and remanded.

C. The D&D Warrant did Not Authorize a Search of the Data on the Devices Seized.

The District Court granted summary judgment to the Defendant-Appellants holding that the search of the data on Mr. Shotwell's devices was within the scope of the search authorized by the D&D Warrant. JA 47-48. This Court conducts plenary review of that order. *See Ellis*, 11 F.4th at 229.

The act of *searching for and seizing* an electronic device is not synonymous with a *search of* the electronic device. Indeed, they are two separate steps sometimes requiring separate warrants. The Supreme Court recognized the distinction between seizing a cell phone and searching a cell phone in *Riley*. In that case, the Court held that police could seize the suspect's cell phone to ensure that it could not be used as a weapon but could not search the data in the cell phone without a warrant. *Riley*, 573 U.S. at 387. A warrant was required to "ensure[] that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime.'" *Id.* at 382 (quoting *Johnson*, 333 U.S. at 14).

In this case, the D&D Warrant identifies the "items to be searched for and seized" as all of Mr. Shotwell's digital devices but does not mention searches of said devices. JA 128-132. There is no reference in either the D&D Warrant or its supporting documents specifying that the data would be searched, or which data would be searched, much less that the data would be examined in a particular manner or in a particular location.

As such, the D&D Warrant only authorized a "search for" electronic and media storage devices, not a "search of" them. Digital search warrants must specifically connect the devices in question to particular evidence being sought and specify that a search of data is authorized. *See, e.g.*, *Stabile*, 633 F.3d at 241

(observing that "a magistrate issued a state search warrant to search all six hard drives for evidence of financial crimes"); *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents ($92,422.57)*, 307 F.3d 137, 149 (3d Cir. 2002) (finding that a warrant specified "Computers, computer peripherals, related instruction manuals and notes, *and software* in order to conduct an off-site search for *electronic copies* of the items listed above") (emphasis added); *United States v. Wecht*, 619 F. Supp. 2d 213, 241 (W.D. Pa. 2009) (noting that the warrant "authorized the seizure of the computer itself, as well as 'all information and data contained therein, including data stored on any associated data storage devices such as zip drives, discs (of any kind including cd and hard), and back-up tapes.'").

While the unincorporated affidavit mentions that people use electronic devices to conduct Internet searches and use media storage devices to save the results of these searches, it does not link these facts to a search of Mr. Shotwell's data, as the warrant in *Stabile* did. *See Stabile*, 633 F.3d at 241. Nor does the affidavit mention an off-site search, as the warrant in *Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents ($92,422.57)* did. *See Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents ($92,422.57)*, 307 F.3d at 149. Because neither the D&D Warrant nor the affidavit contemplated such a data search, the magistrate did not authorize such a search when approving

the warrant. As a result, the search of Mr. Shotwell's data exceeded the scope of the search authorized in the warrant.

II. The Contempt Warrant was Unconstitutional Because it Lacked Sufficient Probable Cause and was a General Warrant

A. The Magistrate Did Not Have a Substantial Basis to Find that there was Probable Cause that Mr. Shotwell Violated the PFA Order or that he Possessed Weapons

In reviewing the District Court's grant of the Defendant's Motion to Dismiss regarding probable cause, this Court conducts plenary review but gives some deference to the magistrate that issued the warrant. *See* Part I.B, *supra*.

Although Mr. Shotwell would be in violation of the relevant PFA Order if he possessed any firearms, the Defendant-Appellees had no evidence that Mr. Shotwell possessed firearms. Instead, they relied upon evidence that Mr. Shotwell: (1) owned firearms in the past, before the PFA, (2) recently shared posts of pictures of firearms that other users had posted on Facebook with a comment about wanting to own them in the future, and (3) had lawfully given one of his firearms to his mother instead of relinquishing it to authorities. JA 125-126. Past ownership, sharing another person's Facebook post, and relinquishing ownership of a firearm to a legally eligible individual do not justify the Contempt Warrant as there was not a "fair probability" that any crime had been committed. *Cf. United States v. Colon*, 532 Fed.Appx. 241, 244 (3d Cir. 2013) (finding that probable cause to conduct a search for drugs and firearms was established under a totality of the circumstances after a combination of

an informant's tip about drugs and firearms and direct police observation of a large street cash transaction). As such, the magistrate did not have any basis, much less a substantial basis, for concluding that there was probable cause to believe that Mr. Shotwell had violated the PFA order and to authorize a search for and seizure of all weapons that he may have possessed.

Furthermore, the magistrate served as a "rubber stamp" of Sgt. Taylor's actions when they approved the Contempt Warrant. In addition to firearms and related items, the Contempt Warrant authorized seizures of "[a]ny and all knives, swords, or similar style edged weapons or anything similar that could be used on a deadly weapon." JA 123. However, Sgt. Taylor had provided no evidence in the affidavit and had no reason to believe that Mr. Shotwell owned any items that fall into these categories. This means that the necessary nexus between the alleged criminal activity and the items to be seized to show probable cause was not established. *Griffith*, 867 F.3d at 1272. As such, the magistrate did now have a substantial basis for concluding that there was probable cause to seize such items. Approving a seizure of them anyway violated Mr. Shotwell's Fourth Amendment rights.

B. The Contempt Warrant Expanded the Breadth of the Search Beyond the Particular Factual Context of the Case

In reviewing the District Court's grant of the Defendant's Motion to Dismiss regarding general warrants, this Court conducts plenary review. *See* Part I.A, *supra*.

The District Court improperly held that the Contempt Warrant was not a general warrant merely because it particularly described that the items to be seized were firearms, replicas of firearms, knives, swords, and photos of those weapons. JA 11. It is true that that this Circuit has previously held that listing specific categories of items to be searched for and seized can sometimes satisfy the Fourth Amendment's particularity requirement. *Yusuf*, 461 F.3d at 394. However, the Court also held that a warrant that listed specific categories of items can be general if the claimant establishes the "crucial fact [that] the government had information available 'to make the description of the items to be seized much more specific.'" *Id.* at 394 (quoting *United States v. American Investors of Pittsburgh*, 879 F.2d 1087, 1106 (3d Cir. 1989)). Thus, to not be a general warrant, the warrant must be "as specific as possible under the circumstances." *Id.* at 395. "The breadth of items to be searched depends upon the particular factual context of each case and also the information available to the investigating agent that could limit the search at the time the warrant application is given to the magistrate." *Id.*

Here, even though the Contempt Warrant particularly described categories of items, the categories listed could have been far more specific under these circumstances. The evidence that the Defendant-Appellees obtained through Mr. Shotwell's Facebook posts all pertained to firearms and photos of them, not knives

or swords.[5] JA 144-150. An investigation into an alleged violation of a PFA order does not require the broad investigations authorized in the context of complex white-collar crimes. *Yusuf*, 461 F.3d at 395. Furthermore, since the Defendant-Appellees had specific images of the firearms that they alleged that Mr. Shotwell possessed (even though he did not in fact possess them), they could have been far more particular in describing the firearms rather than relying on the generic description of "[a]ny handguns, firearms, ammunition, shot guns or shot gun ammunition." Thus, even though the Contempt Warrant listed specific categories of items to be searched for and seized, it could have been far more particular under this factual context and therefore it authorized a general exploratory rummaging of Mr. Shotwell's home.

Furthermore, as explained in Part I.A.iii, *supra*, the unincorporated affidavit could not cure this issue, as the Contempt Warrant too did not contain any explicit language incorporating the affidavit. JA 121; *Tracey*, 597 F.3d at 149. Because the Contempt Warrant was not sufficiently particular, it was a general warrant, and this Court should reverse and remand the District Court's decision to the contrary.

[5] The PFA Order was not included with the Contempt Warrant or affidavit, and, therefore, is not a part of this record as it was not relied upon by the officers conducting the search. The absence of the Order further demonstrates the lack of clarity and specificity of the search for weapons.

CONCLUSION

This Court should reverse the District Court's grant of dismissal and summary judgment and remand for further proceedings. Both Warrants were general warrants because they provided *carte blanche* to search any and all items in Mr. Shotwell's home and on his devices. The District Court erred in relying on unincorporated affidavits to cure these general warrants. Furthermore, Sgt. Taylor's affidavits of probable cause did not create the requisite nexus between the charged offenses and the search authorized by the Warrants. Nor did the affidavit in support of the D&D Warrant justify a search of the entirety of Mr. Shotwell's electronic data. Finally, neither the D&D Warrant nor the unincorporated affidavit specified and authorized a search of the data on Mr. Shotwell's devices. Under the relevant standard of plenary review, this Court should reverse the District Court's erroneous decisions and remand for further proceedings.

Respectfully submitted,

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CERTIFICATION OF ADMISSION TO THE BAR

I, Dwayne J. Bensing, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.
2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: December 18, 2024

/s/ Dwayne J. Bensing
Dwayne J. Bensing

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 9264 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 16.91 in 14-point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Palo Alto XDR Version 8.6 virus detection software has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: December 18, 2024

/s/ Dwayne J. Bensing
Dwayne J. Bensing

CERTIFICATE OF FILING AND SERVICE

I certify that on this 18th day of December 2024, the foregoing Brief and Joint Appendix Volume I were filed through CM/ECF system and served on all parties or their counsel of record through the CM/ECF system.

Dated: December 18, 2024

/s/ Dwayne J. Bensing
Dwayne J. Bensing