786 F.3d at 723–24 (quoting *Powell*, 838 P.2d at 927, *vacated on other grounds*, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994)). But, in 2000, "the Nevada Supreme Court again reversed course, abrogating *Powell*" by holding in *Byford* that the first-degree murder statute includes three separate mens rea elements. *Riley I*, 786 F.3d at 724. *Byford* explained that "in *Powell* we overlooked earlier pronouncements of this court which recognized that 'deliberate' and 'premeditated' define distinct elements." *Byford*, 994 P.2d at 713–14 (citing *Hern*, 635 P.2d at 280). In interpreting *Byford*, *Nika* explained it amounted to a "change in state law" that "abandoned the line of cases starting with *Powell*." *Nika*, 198 P.3d at 847, 849. So for a short period—from 1992 to 2000—Nevada operated under the principle that the three elements were merged. However, this occurred *after* Riley's conviction was final. Thus, before and after *Powell*, the Nevada Supreme Court interpreted its first-degree murder statute to include three distinct mens rea elements—an interpretation to which we defer.

Because there was no change in Nevada law that affects *Riley I*'s interpretation of the required elements for first-degree murder in Nevada when Riley's conviction became final, the district court did not abuse its discretion by denying the State's motion under Rule 60(b)(6). The judgment of the district court is **AFFIRMED.**

UNITED STATES of America, Plaintiff-Appellant,

v.

Royce Lequient JOBE, Defendant-Appellee.

No. 18-50204

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 17, 2019 Pasadena, California

Filed August 9, 2019

Background: Mail fraud and firearm defendant moved to suppress evidence discovered during a search of laptop seized from his residence, and the United States District Court for the Central District of California, No. 2:17-cr-00003-GW-1, George H. Wu, J., granted motion. Government appealed.

Holdings: The Court of Appeals, Korman, District Judge, sitting by designation, held that:

(1) even if affidavit in support of warrant for search of suspect's residence for evidence of marijuana growing operation was insufficient to establish probable cause for seizure of suspect's laptop, evidence did not have to be suppressed, and

(2) officer's 21-day delay in applying for warrant to search laptop that had previously been seized during a warranted search of suspected marijuana grower's residence did not warrant application of exclusionary rule.

Reversed.

1. Criminal Law ⚿392.37

Mere fact that a Fourth Amendment violation has occurred does not necessarily mean that the exclusionary rule applies. U.S. Const. Amend. 4.

2. Criminal Law ⚿392.37

To trigger application of the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.

3. Criminal Law ⚿1139

On appeal from district court's suppression holding, the Court of Appeals reviews whether the exclusionary rule was properly applied de novo.

4. Criminal Law ⚿392.38(10)

Exclusionary rule does not apply to officer's objectively reasonable reliance on a subsequently invalidated search warrant, unless the warrant was based on affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; even if an affidavit fails to establish probable cause, an officer cannot be expected to question the magistrate's "probable cause" determination, unless the affidavit is "bare bones," as failing to provide a colorable argument for probable cause. U.S. Const. Amend. 4.

5. Criminal Law ⚿392.38(12)

Even if affidavit in support of warrant for search of suspect's residence for evidence of marijuana growing operation was insufficient to establish probable cause for seizure of suspect's laptop and other electronic devices, affidavit contained sufficient information to make reasonable an officer's reliance on search warrant in seizing laptop, and thus weighed against application of the exclusionary rule; affidavit set forth facts indicative of large-scale marijuana growing operation, including the suspect's having registered marijuana business and the substantial, consistent foot traffic to his residence late at night, such that there was a colorable argument for probable cause to seize items tending to establish and document suspect's sales of marijuana. U.S. Const. Amend. 4.

6. Criminal Law ⚿392.16(2)

Federal law enforcement officer's 21-day delay in applying for warrant to search laptop that had previously been seized during a warranted search of suspected marijuana grower's residence, while officer initially waited for determination as to whether the case would be prosecuted federally and after which officer drafted warrant application, did not warrant application of exclusionary rule and suppression of evidence discovered during subsequent search of laptop; officer, in securing warrant for search of suspect's home and second warrant for search of laptop, was attempting to comply with his obligations under the Fourth Amendment, and any delay did not evince negligence, let alone any deliberate and culpable misconduct on his part. U.S. Const. Amend. 4.

7. Criminal Law ⚿392.37

In connection, not with unconstitutional seizure, but with law enforcement officers' allegedly unreasonable 21-day delay in applying for warrant to search laptop which they had previously seized, deterrent value of suppressing evidence in discouraging such delay was only a necessary, and not a sufficient, condition for application of the exclusionary rule; in deciding whether to apply rule, court also had to account for substantial social costs generated by exclusionary rule. U.S. Const. Amend. 4.

8. Criminal Law ⚿392.37

Prior to suppressing evidence obtained in search of defendant's laptop, based upon law enforcement officers' allegedly unreasonable 21-day delay in applying for warrant to search laptop after it was seized, court had to determine that deterrence of such delay was worth the price paid by the justice system. U.S. Const. Amend. 4.

9. Criminal Law ⚿392.38(1)

Court's analysis in deciding whether to apply exclusionary rule is objective in nature; court must consider whether a reasonably well trained officer would have known that search was illegal. U.S. Const. Amend. 4.

10. Criminal Law ⚿392.37

The greater the distance between the actions of a reasonably well trained officer and the actions of officer in a particular case, the more likely it is that exclusion is the proper remedy for any violation of defendant's rights.

11. Criminal Law ⚿392.37

Application of exclusionary rule to suppress evidence is warranted to deter deliberate, reckless, or grossly negligent conduct.

12. Criminal Law ⚿392.37

Even if police conduct is not deliberate, reckless, or grossly negligent, recurring or systemic negligence alone may warrant deterrence through application of exclusionary rule.

Appeal from the United States District Court for the Central District of California, George H. Wu, District Judge, Presiding, D.C. No. 2:17-cr-00003-GW-1

Bram M. Alden (argued), Assistant United States Attorney; L. Ashley Aull, Chief, Criminal Appeals Section; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellant.

Margaret A. Farrand (argued), Deputy Federal Public Defender; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellee.

Before: Kim McLane Wardlaw and Andrew D. Hurwitz, Circuit Judges, and Edward R. Korman,* District Judge.

OPINION

KORMAN, District Judge:

On or about October 26, 2016, Department of Homeland Security ("DHS") agents received a tip that marijuana was being grown at an address in Van Nuys, California. The tipper stated that shortly after Royce Jobe moved in next door, "a brown privacy fence was constructed to hide the view of the detached garage on the property," "a strong smell of marijuana" began emanating from the house, and there had been "a lot of activity in the late evening at the house including multiple vehicles arriving and individuals coming and going." On or about November 3, Special Agent Paul Cotcher found that the utilities account associated with the residence was not registered under Jobe's name. Cotcher prepared an affidavit outlining the information in the tip and stating that power use for the property had spiked, Jobe had prior convictions for possession of a firearm and marijuana, and Jobe had a business registered as "420 Boutique," a reference to marijuana. The affidavit also stated that Cotcher had observed "PVC piping, planters, and cooling fans" attached to and around the garage.

Based on that affidavit, on November 21, a California state judge issued a warrant authorizing a search of Jobe's residence and the seizure of certain property, including "[a]rticles of personal property tending to establish and document sales of [marijuana,] ... including ... hard drives." The next day, on November 22, Cotcher and other officers executed the

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

warrant and seized, among other items, drugs, a pistol, Jobe's laptop and other electronic devices. The laptop was not searched at that time.

After the evidence was seized, Cotcher contacted the United States Attorney's Office ("USAO") to ask whether the case would be prosecuted federally. Over the next ten days, Cotcher continued his investigation: He logged and arranged for storage of seized evidence, obtained Jobe's rental application and lease agreement, interviewed a postal employee who stated that Jobe mailed packages three to four times a week, and interviewed individuals whose names were tied to the utilities accounts Jobe used. On or about December 1, Cotcher was informed that the case would be prosecuted federally. He began drafting an affidavit in support of a criminal complaint and a federal warrant to search the laptop, which he completed on or about December 7. On December 12, twenty days after the laptop was seized, the complaint was filed and the warrant was signed. That same day, agents searched Jobe's laptop. The laptop contained messages indicating that Jobe had stolen credit card and bank account information. He was charged with identity theft, accessing devices without authorization, mail fraud, and being a felon in possession of a firearm.

Jobe moved to suppress the evidence found on the laptop. The district judge granted the motion, finding that, while the state seizure warrant was supported by probable cause, the government unreasonably delayed before obtaining a second warrant to search Jobe's computer. The government timely appealed that order. We have jurisdiction under 18 U.S.C. § 3731 and reverse.

DISCUSSION

[1–3] "The fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in [the Supreme Court's] cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 144. We review whether the exclusionary rule was properly applied de novo. *United States v. Luong*, 470 F.3d 898, 902 (9th Cir. 2006).

I. The State Warrant

[4] We begin with an assessment of the seizure of Jobe's laptop pursuant to the state warrant. The exclusionary rule does not apply to an officer's "objectively reasonable reliance on a subsequently invalidated search warrant," unless the warrant was "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *United States v. Leon*, 468 U.S. 897, 922–23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (quoting *Brown v. Illinois*, 422 U.S. 590, 610–11, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring in part)). Even if an affidavit fails to establish probable cause, "an officer cannot be expected to question the magistrate's probable-cause determination," *id.* at 921, 104 S.Ct. 3405, unless the affidavit is "bare bones," *i.e.*, "it fails to provide a colorable argument for probable cause," *United States v. Underwood*, 725 F.3d 1076, 1085 (9th Cir. 2013).

[5] We accept that there was insufficient probable cause to seize the laptop.

The state judge "lacked a substantial basis for concluding that probable cause existed" to seize the laptop because Cotcher's affidavit did not mention a computer or any electronic devices, much less state any facts suggesting that Jobe's laptop would likely contain evidence of a marijuana growing operation. *Id.* at 1081 (internal quotation and alteration marks omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Nevertheless, Cotcher's affidavit supporting the state warrant contained sufficient information to render his reliance on the warrant reasonable. It laid out facts indicative of a large-scale marijuana growing operation, including information from a tipper that was corroborated by Cotcher's own observations, investigation, and experience. Given the apparent scale of Jobe's operation, as indicated by his having a registered marijuana business and the substantial, consistent foot traffic to his residence late at night, the affidavit provided "a colorable argument for probable cause," *id.* at 1085, to seize items "tending to establish and document sales of marijuana." Cotcher reasonably relied on the warrant's authorization to seize digital devices, such as Jobe's laptop, that might contain such documents.

II. The Federal Warrant

[6] Jobe argues that even if the seizure of the laptop under the state warrant does not provide a basis for exclusion, the twenty-day delay between that seizure and the subsequent execution of the federal search warrant justifies suppression. Even assuming that the delay was unreasonable, we disagree.

The exclusionary rule has traditionally been driven by one primary policy consideration: the deterrence of unconstitutional acts by law enforcement. *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ."); *see also Leon*, 468 U.S. at 909, 104 S.Ct. 3405. The rule effects this goal in different ways, depending on the case. The most common is preventing police from benefiting from evidence obtained as a result of a constitutional violation, thereby removing the incentive to violate the Constitution to obtain evidence. *See, e.g.*, *United States v. Artis*, 919 F.3d 1123, 1133–34 (9th Cir. 2019); *United States v. Camou*, 773 F.3d 932, 944–45 (9th Cir. 2014).

[7, 8] But in another category of cases, police misconduct effectively bears no "fruit." *See United States v. Cha*, 597 F.3d 995, 1003 (9th Cir. 2010). Unreasonable delays fall into this latter category. *See id.* In those cases, "deterrent value" is only "a necessary condition for exclusion, . . . not a sufficient one. The analysis must also account for the substantial social costs generated by the [exclusionary] rule." *Davis v. United States*, 564 U.S. 229, 237, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (quotation marks and citation omitted). Put another way, a court must determine that "deterrence is worth the price paid by the justice system" before suppressing evidence. *Herring*, 555 U.S. at 144, 129 S.Ct. 695.

[9, 10] *Cha* is our only prior decision addressing the issue posed in *Herring* in the context of delays. *See United States v. Burgard*, 675 F.3d 1029, 1035 (7th Cir. 2012) (so recognizing). *Cha* laid out several guideposts to follow. First, the analysis is objective in nature. *See Cha*, 597 F.3d at 1005; *see also Herring*, 555 U.S. at 145, 129 S.Ct. 695. We must consider "whether a reasonably well trained officer would have known that the search was illegal." *Leon*, 468 U.S. at 922 n.23, 104 S.Ct. 3405. The greater the distance between the actions of a "reasonably well trained officer" and the actions of an officer in a particular case, the more likely it is that exclusion is

the proper remedy. *See Cha*, 597 F.3d at 1005 ("[T]he police officers were a far stretch from *Leon*'s 'reasonably well trained officer.' ").

[11] *Cha* and *Herring* also explain that suppression is warranted "to deter deliberate, reckless, or grossly negligent conduct." *Herring*, 555 U.S. at 144, 129 S.Ct. 695. We summarized the misconduct in *Cha* as follows:

> The police seized the Cha's house for a minimum of 26.5 hours while Mr. Cha waited outside for the majority of the time—even to the early hours of the morning. The police refused to allow Mr. Cha to enter his house accompanied by a police officer to retrieve his diabetes medication for four hours. ... [N]one of this delay was "unavoidable"—the officers had probable cause at 1 a.m., and ... could have drafted the warrant application at least after the 12 p.m. briefing. The officers, however, had a "nonchalant attitude" and proceeded in a "relaxed fashion."

Cha, 597 F.3d at 1005–06. Such facts demonstrate more than sufficient culpability that exclusion is worth the costs. *Herring*, 555 U.S. at 144, 129 S.Ct. 695; *see also Leon*, 468 U.S. at 911, 104 S.Ct. 3405 ("[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus.").

Cotcher's behavior is far-removed. There is no indication that Cotcher deliberately tarried or received insufficient training. Rather, immediately after seizing the laptop, he contacted the USAO about prosecuting the case federally. During the ten days between that initial contact and being told that the USAO would handle the case—a period which included the Thanksgiving holiday—Cotcher continued with his investigation. Once the USAO responded to his inquiry, he began drafting a detailed and lengthy affidavit in support of a federal search warrant, which he finished less than a week later and then transmitted to an Assistant U.S. Attorney. Jobe contends that Cotcher could have prepared an affidavit even without hearing from the USAO. But it is USAO policy to review warrant applications prior to their submission to a magistrate, so a reasonable officer in Cotcher's position could have believed that he could not submit his warrant application until the USAO decided to proceed. While Cotcher could have been more efficient in preparing an application, his delay does not evince negligence, let alone deliberate and culpable misconduct.

[12] Even if police conduct is not "deliberate, reckless, or grossly negligent," "recurring or systemic negligence" alone may warrant deterrence through exclusion. *Herring*, 555 U.S. at 144, 129 S.Ct. 695. Here, however, the record does not suggest that such conduct will recur. Indeed, if there were evidence of repeated delays, Cotcher's behavior would no longer qualify as "isolated police negligence." *Cha*, 597 F.3d at 1004.

More significantly, Cotcher obtained one warrant before seizing Jobe's laptop and a second warrant before searching it, whereas the officers in *Cha* waited until after the home had been seized to obtain any warrant. Cotcher's good-faith efforts to comply with the Warrant Clause of the Fourth Amendment indicate that his conduct was not "sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 U.S. at 144, 129 S.Ct. 695. Critically, there are no allegations that the affidavit presented to the magistrate to obtain the federal search warrant omitted or misrepresented any information. *See Leon*, 468 U.S. at 923, 104 S.Ct. 3405 ("Suppression ... remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was

false except for his reckless disregard of the truth."). Nor does Jobe challenge that probable cause supported the federal warrant. *See id.* ("Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " (quoting *Brown*, 422 U.S. at 610–11, 95 S.Ct. 2254 (Powell, J., concurring in part))).

Nor is there any indication that Cotcher believed he was depriving Jobe of a legitimate possessory interest. Rather, he reasonably believed that the laptop was lawfully seized pursuant to the state warrant. We have previously held that a twenty-one-day delay between the seizure of a laptop and obtaining a warrant is reasonable where the laptop is lawfully seized pursuant to an individual's consent. *See United States v. Sullivan*, 797 F.3d 623, 634 (9th Cir. 2015).

Jobe's reliance on *United States v. Dass*, 849 F.2d 414 (9th Cir. 1988), is misplaced. That case involved delays of between seven and twenty-three days in obtaining warrants to search hundreds of packages that were seized *without* a warrant at a post office in Hawaii. *Id.* at 414. Here, the initial seizure of the laptop was pursuant to a warrant.

The order granting Jobe's motion to suppress is **REVERSED.**

UNITED STATES of America, Plaintiff-Appellee,

v.

David James SAINZ, Defendant-Appellant.

Nos. 17-10310
17-10311
17-10312

United States Court of Appeals, Ninth Circuit.

Argued and Submitted November 16, 2018 San Francisco, California

Filed August 12, 2019

Background: Defendant moved to reduce his 120-month sentence for various drug offenses, based on an amendment to the Sentencing Guidelines that reduced his Guidelines range. The United States District Court for the Northern District of California, Beth Labson Freeman, J., denied the motion, and defendant appealed.

Holdings: The Court of Appeals, Piersol, District Judge, sitting by designation, held that on an issue of first impression, district court should not have sua sponte raised defendant's waiver of his right to move for sentence reduction based on Sentencing Guidelines amendment.

Reversed and remanded.

1. Criminal Law ⚿1156.2

Court of Appeals reviews for abuse of discretion a district court's decision to grant or deny a sentence reduction based an amendment to the Sentencing Guidelines. 18 U.S.C.A. § 3582(c)(2).

2. Criminal Law ⚿1147

A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact.