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IN THE  
**SUPREME COURT OF THE UNITED  
STATES**

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NEIL C. KIENAST & BRAMEN B. BROY  
*PETITIONERS,*

V.

UNITED STATES OF AMERICA, et al  
*RESPONDENTS,*

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APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR  
WRIT OF CERTIORARI

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To the Honorable Elena Kagan  
Associate Justice  
Supreme Court of the United States

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TO the Honorable Elena Kagen, Associate Justice of the United States Supreme Court: Applicants, Niel C. Kienast and Bramen B. Broy (“Applicants”) collectively and respectfully request an extension of time to file a petition for writ of certiorari appealing a Decision of the United States Seventh Circuit of Appeals in Case No.: 17-1840. Under Sup. Ct. R. 13 the earliest deadline for Applicants to file their Petition is Wednesday, January 23<sup>rd</sup>, 2019, which is ninety days from October 23, 2018, the date when the 7<sup>th</sup> Circuit Court of Appeals entered the Decision giving rise to this appeal, denying the Applicants motions for suppression for violations of the applicants fourth Amendment rights.

For good cause set forth herein, Applicants ask that this deadline be extended by sixty days so that the new deadline would be Friday, March 22<sup>nd</sup>, 2019.

#### **STATEMENT OF THE CASE:**

While investigating a source of child porn in Naples Florida, The FBI by means of an unlawfully issued and defunct warrant and through the reproduction of the contraband server containing child pornography, conducted an electronic search from a remote jurisdiction on thousands of American citizens.

With one broad sweeping motion the NIT warrant issued by a magistrate judge in West Virginia authorized the electronic entry and

modification of thousands of personal computers. Thousands of people were searched for a broad range of suspected contraband remotely.

The magistrate did not have jurisdiction to issue such a vast warrant. The Agents that applied for the warrant excluded material information from its application and The Warrant itself is invalid. The Applicants challenge the application of the Good Faith exclusion in such a scenario.

## **JURISDICTION**

Jurisdiction is based on a Federal Question that has not, but should be, settled by this Court under Sup. Ct. R. 10(c).

This appeal raises issue with and is subject to interpretation of the Federal Rules of Criminal Procedure Rule 41 and § 636(a) of the Federal Magistrates Act, which govern the issuance of an extraterritorial warrant in this case.

The Applicants challenges the issuance of an extraterritorial warrant issued by a magistrate judge in West Virginia authorizing the search via NIT exploit of many citizens outside the territory of the Magistrates own jurisdiction.

Finally, the Applicants contend that in denying the Petitioners motion to compel discovery and produce Agent Douglas McFarland for questioning and failing to disclose the method by which the search was conducted, violated the Defendants right to a fair trial and confrontation rights as granted by the United States Constitution.

**OPINIONS BELOW:**

**CASES FROM 7th CIRCUIT ADDRESSING THIS ISSUE:**

U.S. v. Epich, No. 15-CR-163-PP, 2016 WL 953269 (E.D. Wis. Mar. 14, 2016) (adopting magistrate judge's report and recommendation).

U.S. v. Owens, No. 16-CR-38-JPS, 2016 WL 7053195 (E.D. Wis. Dec. 5, 2016) (adopting magistrate judge's report and recommendation)

**CASES FROM OTHER JURISDICTIONS ADDRESSING ISSUE:**

Twelve courts have found that the warrant did not violate § 636(a) of the Federal Magistrates Act and/or Rule 41 of the Federal Rules of Criminal Procedure. U.S. v. Jones, No. 3:16-cr-026, 2017 WL 511883 (S.D. Ohio February 2, 2017); U.S. v. Austin, No. 3:16-cr-00068, 2017 WL 496374 (M.D. Tenn. Feb. 2, 2017); U.S. v. Bee, No. 16-00002-01-

CR-W-GAF, 2017 WL 424889 (W.D. Mo. Jan. 31, 2017) (adopting magistrate judge's report and recommendation); U.S. v. Sullivan, No. 1:16-cr-270, 2017 WL 201332 (N.D. Ohio Jan. 18, 2017); U.S. v. Dzwonczyk, No. 4:16-CR-3134, 2016 WL 7428390 (D. Neb. Dec. 23, 2016) (adopting magistrate judge's report and recommendation); U.S. v. McLamb, No. 2:16cr92, 2016 WL 6963046 (E.D. Va. Nov. 28, 2016); U.S. v. Lough, No. 1:16CR18, 2016 WL 6834003 (N.D.W. Va. Nov. 18, 2016); U.S. v. Johnson, No. 15-00340--01-CR-W-GAF, 2016 WL 6136586 (W.D. Mo. Oct. 20, 2016) (adopting in part magistrate judge's report and recommendation); U.S. v. Smith, No. 4:15-CR-00467 (S.D. Tex. Sept. 28, 2016); U.S. v. Jean, 207 F. Supp. 3d 920 (W.D. Ark. 2016); U.S. v. Eure, No. 2:16cr43, 2016 WL 4059663 (E.D. Va. July 28, 2016); U.S. v. Matish, 193 F. Supp. 3d 585 (E.D. Va. 2016); U.S. v. Darby, 190 F. Supp. 3d 520 (E.D. Va. 2016); cf. U.S. v. Laurita, No. 8:13CR107, 2016 WL 4179365 (D. Neb. Aug. 5, 2016) (adopting magistrate judge's report and recommendation) (finding no violation of the statute or Rule by a NIT warrant issued in a different pornography website investigation).

Twenty-two district courts have found that the warrant did violate § 636(a) and/or Rule 41(b), but that the violation did not warrant suppression. U.S. v. Gaver, 3:16-cr-88, 2017 WL 1134814 (S.D. Ohio

Mar. 27, 2017); U.S. v. Perdue, No. 3:16-CR-305-D(1), 2017 WL 661378 (N.D. Tex. Feb. 17, 2017); U.S. v. Pawlak, No. 3:16-CR-306-D(1), 2017 WL 661371 (N.D. Tex. Feb. 17, 2017); U.S. v. Kahler, No. 16-cr-20551, 2017 WL 586707 (E.D. Mich. Feb. 14, 2017); U.S. v. Deichert, No. 5:16-CR-201-FL-1, 2017 WL 398370 (E.D.N.C. Jan. 28, 2017); U.S. v. Vortman, No. 16-cr-00210-THE-1, 2016 WL 7324987 (N.D. Cal. Dec. 16, 2016); U.S. v. Hammond, No. 16-cr-00102-JD-1, 2016 WL 7157762 (N.D. Cal. Dec. 8, 2016); U.S. v. Duncan, No. 3:15-cr-00414-JO, 2016 WL 7131475 (D. Or. Dec. 6, 2016); U.S. v. Stepus, No. 15-30028-MGM, 2016 WL 6518427 (D. Mass. Oct. 28, 2016); U.S. v. Scarbrough, No. 3:16-CR-35, 2016 WL 5900152 (E.D. Tenn. Oct. 11, 2016) (adopting magistrate judge's report and recommendation); U.S. v. Allain, No. 15-cr-10251, 2016 WL 5660452 (D. Mass. Sept. 29, 2016); U.S. v. Broy, 209 F. Supp. 3d 1045 (C.D. Ill. 2016); U.S. v. Knowles, 207 F. Supp. 3d 585 (D.S.C. 2016); U.S. v. Ammons, 207 F. Supp. 3d 732 (W.D. Ky.2016); U.S. v. Torres, No. 5:16-CR-285-DAE, 2016 WL 4821223 (W.D. Tex. Sept. 9, 2016); U.S. v. Henderson, No. 15-cr-00565-WHO-1, 2016 WL 4549108 (N.D. Cal. Sept. 1, 2016); U.S. v. Adams, No. 6:16-cr-11-Orl-40-GJK, 2016 WL 4212079 (M.D. Fla. Aug. 8, 2016); U.S. v. Rivera, 2:15-cr-00266-CJB-KWR (E.D. La. July 20, 2016); U.S. v. Werdene, 188 F. Supp. 3d 431 (E.D. Penn. 2016); U.S. v. Stamper, No. 1:15cr109, 2016 WL 695660 (S.D. Ohio February 19, 2016); U.S. v.

Michaud, No. 3:15-cr-05351-RJB, 2016 WL 337263 (W.D. Wash. Jan. 28, 2016).

A few courts have declined to decide whether the statute and/or the Rule authorized the warrant but found that exclusion was unwarranted regardless. U.S. v. Schuster, No. 1:16-cr-51, 2017 WL 1154088 (S.D. Ohio Mar. 28, 2017); U.S. v. Tran, No. 16-10010-PBS, 2017 WL 7468006 (D. Mass. Dec. 28, 2016); U.S. v. Anzalone, No. 15-10347-PBS, 2016 WL 5339723 (D. Mass. Sept. 22, 2016); U.S. v. Acevedo-Lemus, No. SACR 15-00137-CJC, 2016 WL 4208436 (C.D. Cal. Aug. 8, 2016);

Four courts have suppressed the evidence. U.S. v. Croghan, 209 F. Supp. 3d 1080 (S.D. Iowa 2016); U.S. v. Workman, 205 F. Supp. 3d 1256 (D. Colo. 2016); U.S. v. Arterbury, No. 15-CR-182-JHP (N.D. Okla. May 17, 2016) (adopting magistrate judge's report and recommendation); U.S. v. Levin, 186 F. Supp. 3d 26 (D. Mass. 2016).

## **REASONS EXTENSION IS JUSTIFIED**

Supreme Court Rule 13.5 provides that “An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified.” Sup. Ct. R. 13.5.

A copy of the October 23<sup>rd</sup> Opinion is attached hereto as “Exhibit I”

**The specific reasons why an extension of time is justified are as follows:**

1. The schedules of all phases in this case have been extremely compressed and work-intensive.
2. Counsel for Kienast and Broy are located in different states delaying communication and drafting.
3. The analysis of the complexities of issuing multijurisdictional warrants, the due process concerns and fourth amendment concerns require extensive research at the state, district and circuit levels.
4. The issue is highly technological and requires extensive pleading to advance to this court.



5. The massive amount of litigation that has been triggered by the issuance of the warrant throughout the United States requires monitoring and updating as the issue is more fully developed, nationwide.
6. The requested extension also is necessary to accommodate pressing deadlines in Applicants' counsel's other matters. Applicant attorneys are engaged in State and Federal practice with other cases before the 7<sup>th</sup> Circuit in briefing and may State level trials approaching.

#### **CONCLUSION:**

For the foregoing reasons and good cause shown, Applicants respectfully request that this Court grant this application for an extension of time to file a petition for writ of certiorari.

Respectfully Submitted:

/s/John Miller Carroll

**John Miller Carroll**  
**State Bar #1010478**

/s/ Steven A. Greenberg

**Steven A. Greenberg**

**Prepared By:**  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on January 11<sup>th</sup>, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Supreme Court by using the CM/ECF system.

DATED at Appleton, Wisconsin, this 11<sup>th</sup> day of January, 2019.

Respectfully Submitted,

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