NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TERM 2018

MICHAEL LOUGH, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KRISTEN M. LEDDY
RESEARCH AND WRITING SPECIALIST
Office of the Federal Public Defender
for the Northern District of West Virginia
230 West Pike Street, Suite 360
Clarksburg, WV 26301
(304) 622-3823
Counsel for Michael Lough

I. QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit erred when it affirmed the district court's denial of Lough's motion to suppress evidence?

II. PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

III. TABLE OF CONTENTS

I. QUESTION PRESENTED FOR REVIEW. 1

II. PARTIES TO THE PROCEEDINGS. 2

III. TABLE OF CONTENTS. 3

IV. TABLE OF AUTHORITIES. 4

V. OPINIONS BELOW. 5

VI. JURISDICTION. 6

VII. CONSTITUTIONAL PROVISION INVOLVED. 7

VIII. STATEMENT OF THE CASE. 8-14

IX. REASON FOR GRANTING THE WRIT. 14-18

A. The writ should be granted to determine whether Lough's Fourth Amendment rights were infringed.

X. CONCLUSION. 19

APPENDIX A - APPEALS COURT DECISION

APPENDIX C - DISTRICT COURT DECISION

IV. TABLE OF AUTHORITIES

Cases

Riley v. California, 134 S. Ct. 2473 (2014).. 17

United States v. Grubbs, 547 U.S.90 (2006).. . . . . 16, 17

United States v. Leon, 468 U.S. 897 (1984). . . . . *passim*

United States v. Horton, 863 F.3d 1041 (8th Cir. 2017). 14

United States v. Hurwitz, 459 F.3d 462 (4th Cir. 2006). 15

United States v. Levin, 874 F.3d 316 (1st Cir. 2017).. 14

United States v. McLamb, 880 F.3d 685 (4th Cir. 2018).. . . . . 13, 14, 15, 17, 18

United States v. Williams, 592 F.3d 511 (4th Cir. 2010).. 16

United States v. Workman, 863 F.3d 1313 (10th Cir. 2017). 14

United States v. Talley, 449 Fed.Appx. 301 (4th Cir. 2011). 16

Constitutional Provision, Statutes, and Rules

U.S. Const. amend. IV.. . . . . *passim*

18 U.S.C. § 3231. 8

18 U.S.C. § 3742. 8

28 U.S.C. § 1254. 6

28 U.S.C. § 1291. 8

Fed. R. Crim. P. 41(b). 11, 12

Sup. Ct. R. 10.. 14

Sup. Ct. R. 13.1. 6

Sup. Ct. R. 13.3. 6

Other Authorities

Kaleigh E. Aucoin, *The Spider's Parlor: Government Malware on the Dark Web*, 69 Hasting L.J. 1433, 1449 (2018).. 10

Jonathan Mayer, *Government Hacking*, 127 Yale L.J. 570 (2018). . . . . .

Paul Ohm, *The Investigative Dynamics of the Use of Malware by Law Enforcement*, 26 Wm. & Mary Bill Rts. J. 303 (2017). 16

V. OPINIONS BELOW

The unpublished opinion by the United States Court of Appeals for the Fourth Circuit in the case, *United States v. Michael Lough*, No. 17-4125, is attached to this Petition as Appendix A. The final judgment order of the United States District Court for the Northern District of West Virginia is unreported and is attached to this Petition as Appendix B.

VI. JURISDICTION

This Petition seeks review of an opinion of the United States Court of Appeals for the Fourth Circuit entered on May 4, 2018. Mr. Lough did not seek to petition for rehearing or rehearing *en banc*. This Petition is filed within 90 days of the opinion affirming the decision of the district court. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation and application of the Fourth Amendment to the United States Constitution that provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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."

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

Because this charge constituted an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Criminal Indictment, Guilty Plea and Sentencing

On March 15, 2016, the United States Attorney for the Northern District of West Virginia filed an Information, charging Lough with the possession of child pornography. J.A. 11-12.[1] On March 23, 2016, Lough pleaded guilty to the sole count of the Information against him. J.A. 13. On April 7, 2016, the district court accepted Lough's guilty plea. J.A. 4.

On May 4, 2016, however, Lough filed a motion indicating his wish to withdraw his guilty plea. J.A. 87-92. On August 25, 2016, the district court granted Lough's request to withdraw his guilty plea. J.A. 201-218. On September 12, 2016, he filed a motion to suppress evidence. J.A. 219-392. Lough's efforts at suppression were denied. J.A. 508-535. Lough entered a conditional guilty plea before the district court on November 14, 2016. J.A. 452. Sentencing took place on February 21, 2017. J.A. 536. Lough timely filed his notice of appeal on March 2, 2017. J.A. 567-68.

---

[1] "J.A." refers to the parties' joint appendix filed in connection with Lough's appeal to the United States Court of Appeals for the Fourth Circuit.

C. Investigation, Guilty Plea and Withdrawal of Plea

There is no dispute about the facts as rendered by the district court in its Memorandum Opinion and Order denying Defendant's Motion to Suppress Evidence. J.A. 508-512. Briefly, the FBI investigated a website known as "Playpen" on the "dark web" that trafficked in child pornography. J.A. 508. Playpen operated on the "TOR" network, which enables users to exchange information anonymously and beyond traditional law enforcement detection techniques. J.A. 508-509.

The FBI developed a network investigation technique ("NIT") to uncover the identities of individuals seeking and disseminating child pornography via Playpen. J.A. 509. On February 15, 2015, the FBI seized a computer server in Renior, North Carolina, and took the server back to a facility in the Eastern District of Virginia, as part of its investigation. J.A. 509. At that time, the FBI obtained a search warrant from Magistrate Judge Buchanan, which authorized the FBI's NIT. J.A. 509. The FBI administered the server for 13 days, instead of disabling it, in order to gain information about the users of Playpen. J.A. 509. Whenever a new user logged into the website, the FBI's NIT would initiate software, which allowed the FBI to gain identifying information from the user's computer. J.A. 509.

The warrant application revealed that Playpen had 158,094 members, and over 11,000 weekly visitors. This single warrant would authorize the searches of tens of thousands of unknown persons. The search warrant did not specify a place to be searched, and at the time the warrant was issued, the scope of its search authority was open-ended. Futher, it was an anticipatory warrant, meaning the warrant's search

authority would be triggered by any computer user who logged onto Playpen's homepage. The warrant did not require the user to have visited Playpen before, or to access the site's illicit content located past the homepage. The government has since acknowledged the breathtaking scope of the search authority conveyed by this warrant; ultimately, the FBI searched around 9,000 computers. This warrant has become known as "The Warrant Deployed Around the World." *See* Kaleigh E. Aucoin, *The Spider's Parlor: Government Malware on the Dark Web*, 69 Hasting L.J. 1433, 1449 (2018).

Lough, under the user name "2tots" logged into the Playpen website and accessed child pornography. J.A. 509. Lough had logged on for approximately seventeen hours between the dates of November 23, 2014 and March 1, 2015. J.A. 509. The FBI obtained an administrative subpoena and served it on Frontier Communications Corporation, resulting in information that indicated the IP address for "2tots" belonged to Lough, and was registered to his street address. J.A. 509-10. Based upon this information, the FBI obtained a search warrant for Lough's home, which a magistrate judge in this District issued on July 15, 2015. J.A. 510. The FBI raided Lough's home, seizing multiple items containing evidence that contained a small collection of child pornography. J.A. 510.

The United States Attorney filed a one-count Information against Lough on March 15, 2016, and he appeared in court before United States Magistrate Judge Michael Aloi on March 23, 2016, and entered a guilty plea the Information. J.A. 510. Lough waived his right of indictment. J.A. 510. On May 4, 2016, after some research

by his defense counsel concerning others being prosecuted as a result of the search warrant authorized by Magistrate Judge Buchanan, the so-called "Playpen" cases, Lough determined to withdraw his guilty plea and, instead, to move the district court to suppress evidence obtained against him. J.A. 511. The district court vacated Lough's guilty plea on August 25, 2016.

D. Suppression Proceedings

On September 12, 2016, Lough moved to suppress the evidence seized from his home as a result of the NIT warrant, arguing that it violated Fed. R. Crim. P. 41(b) because the warrant permitted a search outside the magistrate judge's jurisdictional limit, and consequently, was void *ab initio*. J.A. 511.

The government responded that Fed. R. Crim. P. 41(b) did authorize the warrant because the FBI's NIT was a form of tracking device, similar to a GPS. J.A. 511. In the alternative, the government argued, if the NIT warrant violated Rule 41(b), it was only a technical, as opposed to constitutional, violation that did not rise to the level where suppression of evidence was necessary. J.A. 511. Finally, according to the government, even if the warrant was void *ab initio*, the exigent circumstances exception or *Leon* good faith exception would render a warrantless search reasonable in this case. J.A. 511-12.

The district court held that Lough had no reasonable expectation of privacy in his IP address, and absent a legitimate expectation of privacy, Lough cannot invoke protections of the Fourth Amendment. J.A. 514. According to the district court, "[a]lthough he may have wished to remain anonymous, and even hoped that the TOR

would facilitate that goal, hoping and wishing are not the equivalent of expecting a certain result." J.A. 515. Further, the FBI's use of the NIT to discover Lough's IP address was not a search of the contents of Lough's computer. J.A. 517.

With respect to the validity of the warrant, the district court held that as neither Lough nor his computer was located in the Eastern District of Virginia, Fed. R. Crim. P. 41(b) did not authorize the NIT warrant. J.A. 519-520. "Nevertheless," the district court continued, "because the NIT is analogous to a tracking device in both function and effect, the magistrate judge was authorized under Rule 41(b)(4) to issue a warrant for its use." J.A. 520. Moreover, assuming *arguendo* that the NIT warrant violated Rule 41(b), suppression is not warranted here because the violation was technical and not constitutional. J.A. 523. Any jurisdictional defect in the warrant was not prejudicial to Lough because a district judge could have issued the same warrant, and the magistrate judge did not intentionally and deliberately disregard a provision in Rule 41(b). J.A. 526-27. Lastly, the district court discussed how the *Leon* good faith exception rendered suppression improper in this case. J.A. 527-535.

E. Conditional Guilty Plea and Sentencing

Following the district court's denial of his motion to suppress evidence, Lough entered plea negotiations with the government, so that he could reserve the right to appeal the district court's denial of the motion to suppress. Lough entered his guilty plea on November 14, 2016. J.A. 7.

Sentencing took place on February 21, 2017. J.A. 536. There were no objections to the findings as presented in the Pre-Sentence Investigation Report ("PSR"). J.A.

543. The PSR had Lough's guidelines range for sentencing purposes calculated at 70 to 87 months. J.A. 581. Lough received a variant sentence of 37 months, to be followed by a term of supervised release of five (5) years. J.A. 549. According to the district court, the following reasons formed the basis for its variance downwards: "[f]irst, the Court reduced the total offense level by two for use of a computer as the Court deems this characteristic to be present in all cases of this kind. The court also noted that the defendant's lack of criminal history, clear acceptance of responsibility, a plea to an information, and pretrial treatment he voluntarily sought, were additional factors warranting a downward variance." J.A. 593. "Finally," the district court noted, "the total number of images involved was relatively small as a further reason to vary downward." J.A. 595. It was from this conviction and sentence that Lough appealed.

F. Appeal Before United States Court of Appeals for the Fourth Circuit

Lough timely appealed to the Fourth Circuit. After a short abeyance, during which time the Fourth Circuit reached its published decision in another Playpen case, *United States v. McLamb*, 880 F.3d 685 (4th Cir. 2018), the Fourth Circuit affirmed the judgment of the district court in the instant case. That unpublished per curiam decision issued on May 4, 2018, relying on *McLamb*. *See United States v. Lough*, No. 17-4125.

In *McLamb*, the Fourth Circuit held that even if the warrant is unconstitutional, the *Leon* good faith exception applies and the appellant's motion to suppress was properly denied. *McLamb*, 880 F.3d at 688. In this holding, the Fourth Circuit followed the lead of three other Circuit Courts of Appeals in their analyses of the same

NIT warrant in this case. *See United States v. Horton*, 863 F.3d 1041 (8th Cir. 2017); *United States v. Levin*, 874 F.3d 316 (1st Cir. 2017); *United States v. Workman*, 863 F.3d 1313 (10th Cir. 2017). In *McLamb,* the Fourth Circuit determined that the boundaries of the magistrate judge's jurisdiction in the context of remote access warrants were unclear at the time of the warrant application. *McLamb*, 880 F.3d at 691. Nonetheless, the Fourth Circuit was "disinclined to conclude that warrant is 'facially deficient' where the legality of an investigative technique is unclear and law enforcement seeks advice from counsel before applying for the warrant." *Id.* The Fourth Circuit did not explain how a warrant that failed to identify any particular place to be searched could be anything other than constitutionally deficient.

IX. REASONS FOR GRANTING THE WRIT

The writ should be granted to determine whether the district court infringed on Lough's rights under the Fourth Amendment by denying his motion to suppress evidence seized pursuant to an originating warrant, issued in the Eastern District of Virginia that authorized searches of unspecified computers throughout the world, and violated Federal Rule of Criminal Procedure 41 as well as the Fourth Amendment.

Like other citizens, Mr. Lough deserves a ruling on appeal that is commensurate with established law. The opinion of the Court of Appeals for the Fourth Circuit represents a serious and unwarranted departure from Supreme Court precedent. The departure is of such a degree that it places the opinion outside the accepted and usual course of judicial proceedings and calls for an exercise of this Court's supervisory power. *See* Sup. Ct. R.10 (a).

A. Warrants that fail to identify any particular place to be searched are so lacking in particularity as to be facially deficient.

The question presented in this petition mirrors the question raised in the petition for writ of certiorari in *McLamb v. United States*. Namely, whether a warrant that lacks particularity in the place to be searched can be anything other than facially deficient, such that an executing officer could not reasonably presume the warrant to be valid. *See McLamb*, No. 17-9341. As Lough stated in his appeal to the Fourth Circuit, the relevant question in this case is not whether the defendant had a reasonable expectation of privacy in the information the government obtained through its search; but instead, whether the defendant had a reasonable expectation of privacy in the place where the search occurred. Here, a place that the government did not describe with particularity in its warrant. This case is an appropriate vehicle for answering this question, as the issues are fully preserved, and this case should either be held or consolidated with *McLamb,* if certiorari is granted in that case for disposition.

The Fourth Amendment to the United States Constitution requires that search warrants particularly describe the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. This requirement of particularity "applies to the warrant, as opposed to the application or the supporting affidavit submitted by the applicant. *See United States v. Hurwitz,* 459 F.3d 462, 470 (4th Cir. 2006). By requiring warrants to state the scope of the proposed search with particularity, the Fourth Amendment "ensures that the search will be carefully tailored to its

justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *United States v. Talley*, 449 Fed.Appx. 301, 302 (4th Cir. 2011). "The fact that this single warrant [in the Playpen cases] was used to effect maybe thousands of searches in computers around the globe seems to strain the Constitution's guarantee that search warrants be supported with particularity." Paul Ohm, *The Investigative Dynamics of the Use of Malware by Law Enforcement*, 26 Wm. & Mary Bill Rts. J. 303, 335 (2017) (internal citation omitted). Moreover, particularity is satisfied "when the description of items leaves nothing to the discretion of the officer executing the warrant." *United States v. Williams*, 592 F.3d 511, 519 (4th Cir. 2010).

The Fourth Circuit in *McLamb* assumes without deciding that the warrant violated the Fourth Amendment, but relies on the good faith exception of *Leon*. 880 F.3d at 690. Yet, the Fourth Amendment concern that the warrant in this case raises directly connects to the question of whether the executing officers were entitled to rely on the warrant, which clearly did not identify any user or device or location with any particularity, and authorized the search and seizure of a potentially unlimited number of computers located across the globe. Further, the Fourth Circuit conceded in its decision in *McLamb* that the legality of the investigative technique in these cases was "unclear." *McLamb*, 880 F.3d at 691.

The warrant at issue in this case appears to fit the description of a "watering-hole" warrant, identified by this Court in *United States v. Grubbs*, wherein the

government obtains a warrant permitting it to search hundreds of thousands of computers all over the world, interfering with the privacy of thousands of innocent people. 547 U.S. 90 (2006). These warrants "subject their execution to some condition precedent other than the mere passage of time - a so-called 'triggering condition.'" *Grubbs*, 547 U.S. at 94.

Here, the FBI sought one warrant for a worldwide search, a watering-hole warrant, when it could have submitted the same warrant in each district. No reasonably trained agent would think that a single warrant that authorized the search of an unknown number of unspecified places passes constitutional muster under the Fourth Amendment. By analogy, no magistrate court in the country would issue a single warrant authorizing an in-person search of an unspecified number of homes, even assuming probable cause existed for the search. The particularity requirement should not so easily be disregarded. *See Riley v. California*, 134 S. Ct. 2473, 2494 (2014) (comparing the broad authority to search cell phones to general warrants).

B. This case is an appropriate vehicle for resolving the question presented.

This case in an appropriate vehicle for resolving the question presented, as the issues are fully preserved and the Fourth Circuit ruled that the NIT warrant was invalid under the Fourth Amendment, based upon its holding in *McLamb*. 880 F.3d at 691. The Fourth Circuit did not reach the merits of the particularity discussion, it held that, for purposes of the good faith exception, the warrant was not so facially

deficient that reliance on the warrant was unreasonable. *Id.* There are no impediments to review this question.

X. CONCLUSION

For these reasons, Mr. Lough asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted,

MICHAEL PHILLIP LOUGH

KRISTEN M. LEDDY
Research and Writing Specialist
Office of the Federal Public Defender
for the Northern District of West Virginia
230 West Pike Street, Suite 360
Clarksburg, WV 26301
(304) 622-3823
Counsel for Michael Lough

DATED: August 2, 2018.