No. 18-8577

ORIGINAL

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Gerald Long — PETITIONER
(Your Name)

vs.

People of the State of Illinois — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Appellate Court of Illinois, Fourth District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gerald Long S17120
(Your Name)
Pinckneyville Correctional Center
5835 State Route 154
(Address)

Pinckneyville, IL 62274
(City, State, Zip Code)

(Phone Number)

Questions Presented

1. Did the Trial Court err when it concluded that Gerald Long's Fourth Amendment right proscribing unreasonable searches and seizures was not violated because officers had probable cause for the search warrant; when proper standard under Supreme Court precedent is whether the search warrant was rendered "stale" due to the "remoteness of time between the observance of the alleged crime and the filing of a complaint seeking a search warrant?"

2. Did both the Trial Court and the Court of Appeals err when they concluded that the State had proven inevitable discovery for a cell phone seized in violation of Gerald Long's Fourth Amendment right proscribing unreasonable searches and seizures because officers "could and would have obtained a search warrant"; when proper standard under Supreme Court precedent is whether officers "obtained" a search warrant, and whether the evidence would have been inevitably "discovered by lawful means and without reference to any police error or misconduct?"

3. Did the Trial Court err and violate Gerald Long's Fifth and Fourteenth Amendment right to Due Process by not noticing or using the six factor test established for determining whether or not material is "lewd" when denying the Motion for a Finding of Directed Verdict; when proper standard under Supreme Court precedent require that the six factor test be used?"

4. Did the Court of Appeals err and violate Gerald Long's Fifth and Fourteenth Amendment right to Due Process in its assessment of the photographs using the six factor test by determining that the photos were "lewd"; when proper standard and review under Supreme Court precedent following the rules and guidelines set forth by the Court shows that the photographs are not "lewd," and therefore do not constitute child pornography?

5. Did the Trial Court err and violate Gerald Long's Fifth and Fourteenth Amendment right to Due Process in denying the Motion for a Finding of Directed Verdict; when proper standard under Supreme Court precedent is whether Gerald Long was proven guilty "beyond a reasonable doubt" on "every element of the crime?"

6. Did the Court of Appeals err and violate Gerald Long's Fifth and Fourteenth Amendment right to Due Process by ruling that there was no plain error in failing to instruct the jury as to "lewd" because trial counsel failed to tender an alternative instruction and therefore the issue was waived; when proper guidance under Illinois Supreme Court Rule 451(c) provides that "substantial defects" in criminal jury instructions "are not waived by failure to make timely objections thereto if the interest of justice require?" Did the failure of the Trial Court to properly instruct the jury result in a violation of Gerald Long's Sixth Amendment right to a trial by an impartial jury?

Additional Questions Presented, But Not Argued At This Time

7. Did the Trial Court and violate Gerald Long's Fifth and Fourteenth Amendment right to Due Process and Sixth Amendment right to a trial by an impartial jury when it allowed, over objections, admission of other evidence at trial; when proper standards under Supreme Court precedent is whether the person was convicted solely on the evidence of the charges he was on trial for, and whether the evidence was reliable and relevant?

8. Did the Trial Court err and violate Gerald Long's Fifth and Fourteenth Amendment right to Due Process and Eighth Amendment right proscribing Cruel and Unusual Punishment when it sentenced Gerald Long, and when it denied the Motion for Reconsideration of Sentence; when proper sentencing under Article I §11 of the Constitution of the State of Illinois is to be based on "the seriousness of the offense and with the objective of restoring the offender to useful citizenship?"

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The petitioner, Gerald W. Long, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits, The Appellate Court of Illinois, Fourth District, appears at Appendix A to the petition and is unpublished.

The opinions of the trial court, Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the highest state court, The Supreme Court of Illinois, decided my case was November 28, 2018. A copy of that decision appears at Appendix C to the petition. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

Constitutional And Statutory Provisions

1. Fourth Amendment of the United States Constitution

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.

2. Fifth Amendment of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Sixth Amendment of the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

4. Eighth Amendment of the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

5. Section 1 of Fourteenth Amendment of the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. Article I, section 11 of the Constitution of the State of Illinois

All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

7. Rule 451(c) of the Illinois Supreme Court Rules

Except as otherwise provided in these rules, instructions in criminal cases shall be tendered, settled, and given in accordance with section 2-1107 of the code of Civil Procedure; but substantial defects are not waived by failure to make timely objections thereto if the interests of justice require. The court shall instruct the jury after the arguments are completed, or, in its discretion, at the close of the evidence.

8. Rule 615(a) of the Illinois Supreme Court Rules

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.

9. Illinois Statute 720 ILCS 5/11-20.1(b)(5)

The charge of child pornography does not apply to a person who does not voluntarily possess a film, video, or visual reproduction or depiction by computer. Possession is voluntary if the defendant knowingly procures or receives a film, video, or visual reproduction or depiction by computer for a sufficient time to be able to terminate his or her possession.

Statement of Facts of the Case

On February 19, 2013, a search warrant was issued for a mobile home in the Wilder Haven Trailer Park, 266 Lisa Drive, authorizing the police to seize "any and all magnetic or optical or other computer media, including but not limited to hard disk drives, floppy disks, compact disks, DVDs, and USB storage devices," the passwords for any devices, information showing ownership for such devices, and "any and all data or information pertaining to the possession or dissemination of child pornography." (Vol. XXXVIII, People's Exhibit 2, C. 63) The warrant did not specifically request the seizure of cell phone devices or cellular media devices, nor did it specifically request the search of any persons or vehicles. (Vol. XXXVIII, People's Exhibit 2, C. 63)

The search warrant for 266 Lisa Drive was executed on February 19, 2013, at 8:45 AM. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 26) As officers approached the trailer park, Gerald Long was seen in his truck driving out of the trailer park. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 7) Gerald was stopped by police officers while driving on Greenswitch Road, "right before the train tracks meeting at... Route 48," approximately one mile from 266 Lisa Drive. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 56) During this stop, the police seized a cell phone, and its micro SD card was removed and accessed by the police. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 38)

Gerald Long was charged by information with one count of creating child pornography, based on an image recovered from the micro SD card in the cell phone. (C. 23) He was also charged with three counts of possession of child

pornography, based on deleted videos found on computer equipment seized from his home. (C. 24-26) Gerald's counsel filed a motion to suppress evidence, asserting that the warrant only covered the residence, so the seizure of the cell phone was outside the boundaries of the warrant, and any evidence recovered from a search of it should be suppressed. Counsel also asserted that police officers lacked probable cause for a warrant and acted in bad faith. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 6)

The Motion to Suppress

Gerald Long testified that he first noticed the police as he was driving out of the trailer park, while waiting to turn left on Greenswitch Road, and he continued to drive away before he was pulled over by the police and told that they wanted him to return to his home. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 56) The officer noticed the phone in the truck and instructed Gerald to hand it over to ensure that he went straight home. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 56) Gerald was told that the phone, which belonged to his mother, would be returned upon his arrival at the residence. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 57) Gerald denied that he wanted to return to the residence. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 57) Deborah Dunn, his mother, testified that after he returned home, she heard Gerald ask an officer for his phone, and the officer said no and walked away. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 61)

Lieutenant Samuel Walker testified that he conducted an investigative

stop of Gerald Long's vehicle. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 7) Walker told Gerald that officers were searching his home, and Gerald tried to call his mother using a cell phone. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 8) Gerald told Walker the phone belonged to his mother and he was taking it for servicing. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 9) Walker asked Gerald to voluntarily turn over the phone, which he did. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 9) When Walker gave Gerald the opportunity to return to his home, Gerald indicated that he wanted to retrieve his sister's laptop. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 9-10) Gerald returned to his home in his own vehicle. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 14)

Officer Ronald Borowczyk testified that he prepared and applied for the search warrant for 266 Lisa Drive. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 18-19) When examining an Acer Laptop that had been seized, Borowczyk found images he believed constituted child pornography that was created using a LG cellular device, and recalled that a LG cellular phone had been inventoried. (Trial Court Transcripts, 13-CF-236, March 24, 2015 pg. 47-49) Borowczyk attempted to search the cell phone by turning it on, noticed it had a pattern lock, and then determined that their software could not bypass a pattern lock. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 49) Borowczyk searched the phone by taking it apart, located the cellular media contained within it in the form of a micro SD memory card, removed the micro SD memory card, and searched it. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 49) Images

from the Acer laptop were found on the micro SD card. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 49)

Defense counsel argued that neither Gerald Long nor his vehicle were named as a place to be searched under the warrant. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 16) Counsel further argued that the State had no basis to stop Gerald when he had already left his home some time prior to the officers' arrival. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 24) The State argued that the cell phone's micro SD card was covered by the warrant as removable magnetic media. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 21) The State also argued that since the State could and would have probable cause to get a search warrant for the cell phone after examining the Acer laptop, that inevitable discovery should be granted. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 21)

The trial court ruled (without explanation) that the officers had a valid search warrant for the residence. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 25) The court believed that Lt. Walker had the right to "stop or detain" Gerald "in conjuction with the execution of the search warrant." (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 25) The court did not believe that the micro SD card was "contained within the 4 corners of the warrant being some magnetic equipment, but I do believe...a warrant for the cell phone could have been inevitably obtained" once Borowczyk saw the image on the laptop. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 26) The motion to suppress was denied. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 27)

An amended information was filed upgrading Count I to a Class X offense,

charging Gerald with child pornography. (Trial Court Transcripts, 13-CF-236, June 3, 2015, pg. 2) The State also filed an additional information, Count V, a Class X offense, charging Gerald with child pornography. (Trial Court Transcripts, 13-CF-236, June 3, 2015, pg. 2) The State later amended A.H. to L.H. (Trial Court Transcripts, 13-CF-236, August 24, 2015, pg. 11) Gerald had a jury trial on Counts I and V. (Trial Court Transcripts, 13-CF-236, August 24, 2015, pg. 7)

Trial Testimony

Detective Ronald Borowczyk testified that he conducted a forensic exam of the Acer laptop, and identified People's Exhibits 7-14 as images located on the hard disk drive in the Acer laptop. (Trial Court Transcripts, 13-CF-236, August 24, 2015, pg. 245, 251) Borowczyk testified that he found a video in a series of folders on the Acer laptop of Gerald and two female children. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 6) The State played VID_20130215_191920 from People's Exhibit 16, the video from the Acer laptop, over defense objection. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 8-9) The video showed Gerald, L.H., and her friend H.J. in a hallway in L.H.'s and H.J.'s house. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 69-70)

Borowczyk explained that the EXIF data indicated that a LG phone was used to create the images found on the Acer laptop. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 16) Borowczyk retrieved and searched the LG phone and the micro SD memory card contained within it. (Trial Court

Transcripts, 13-CF-236, August 25, 2015, pg. 16-18) The micro SD card contained images identified as People's Exhibits 7-14, as well as People's Exhibit 16, the video. (Trial court Transcripts, 13-CF-236, August 25, 2015, pg. 19)

People's Exhibit 13 (Count V) shows L.H. reclining on a bed wearing a light-colored nightgown. A dark shape is present in the lower right side of the photo, which appears to belong to the person whose hand is in the lower left corner, pulling down L.H.'s nightgown to reveal her upper breast and nipple. (People's Exhibit 13) In People's Exhibit 14 (Count I), the camera has moved closer and slightly lower, and L.H.'s upper breast and nipple are in the center of the frame. (People's Exhibit 14)

Borowczyk admitted that he can not tell who took the photographs. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 24, 37) The images were written to the computer on February 19, 2013, at 11:06 AM, although the search warrant had been executed at 8:45 AM that same day. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 26) Borowczyk confirmed that the time on the laptop screen, as seen in the photo of it that was taken by police during the execution of the search warrant, is 11:08, which would be 9:08 AM Central (local) time. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 47)

H.J., L.H.'s friend (L.H.'s father's girlfriend's daughter), testified that she does not remember Gerald taking any pictures of her or asking to take any pictures of her, and did not know that the video was being taken. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 69-70)

L.H. testified that she did not know that the photos or video were being taken. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 83, 84, 86) Although Blake had an interest in photography and making videos, he did not ask her to be in any videos. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 88)

Defense counsel made a Motion for a Finding of Directed Verdict, asserting that there was no evidence as to the pictures being lewd, or to Mr. Long being the one who took the photos. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 91-92) The motion was denied (without explanation). (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 93)

Deborah Dunn testified that she made the rental or contractual agreement for the Acer laptop and the black LG phone. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 123) She rented the laptop for Gerald's use, but the phone was for herself. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 126) She saw Gerald's friends Jessie, Ryan, and three other boys also use the phone and laptop. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 124)

Gerald Long was found guilty of both counts. (Trial Court Transcripts, 13-CF-236, August 26, 2015, pg. 3) A motion for new trial was filed, which asserted, inter alia, that the trial court erred in not granting the motion to suppress and in allowing information contained on the cell phone micro SD card to be admitted. (Trial Court Transcripts, 13-CF-236, October 20, 2015, pg. 4-5) At sentencing, the motion for new trial was denied (without explanation).

(Trial Court Transcripts, 13-CF-236, October 20, 2015, pg. 7-8) The trial court sentenced Gerald to two consecutive terms of 25 years imprisonment and ordered that he register under SORA. (Trial Court Transcripts, 13-CF-236, October 20, 2015, pg. 83-84) A motion to reconsider sentence was filed and denied. (Trial Court Transcripts, 13-CF-236, December 22, 2015, pg. 4) The trial court appointed State Appellate Defender counsel on appeal and directed the Clerk to file notice of appeal. (Trial Court Transcripts, 13-CF-236, December 22, 2015, pg. 4)

Appellate Court

Appellate counsel filed a brief and argument for Gerald Long, asserting that the trial court erred when it failed to suppress information removed from the cell phone, that Gerald Long was not in the immediate vicinity of 266 Lisa Drive when the officers executed a search warrant, that the seizure of the cell phone was not consentual, that the State did not meet its burden of establishing inevitable discovery, that the introduction of the information obtained from the cell phone was not harmless beyond a reasonable doubt, that People's Exhibits 13 and 14 were not lewd and therefore did not meet the definition of child pornography, and that the jury was not properly instructed on the test that defined the element of "lewd." (Appellant's brief, generally)

The appellate court affirmed Gerald's conviction, ruling that the trial court did not err in denying the motion to suppress evidence, that the photographs were "lewd," and that the court did not err in instructing the jury. (Decision of The Appellate Court of Illinois, generally) No petition for

rehearing was filed.

Appellate counsel filed a PLA to The Supreme Court of Illinois, which was denied. No petition for rehearing was filed.

Reasons For Granting The Petition

1. Did the Trial Court err when it concluded that Gerald Long's Fourth Amendment right proscribing unreasonable searches and seizures was not violated because officers had probable cause for the search warrant; when proper standard under Supreme Court precedent is whether the search warrant was rendered "stale" due to the "remoteness of time between the observance of the alleged crime and the filing of a complaint seeking a search warrant?"

Yes. The Trial Court erred when it claimed that officers had "good cause" for the search warrant. (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 25) No reason was ever stated for this. The remoteness of time between the observance of the alleged crime and the filing of a complaint seeking a search warrant was such that probable cause did not exist.

The time at which a search warrant is issued should not be too remote from the time the crime was observed. (People v. Hughes, 278 Ill.Dec. 379, 798 N.E.2d 763, 343 Ill.App.3d 506, rehearing denied 273 Ill.Dec. 138, 807 N.E.2d 979, 207 Ill.2d 618) A search warrant is stale when too much time has elapsed between the facts alleged in the affidavit in support of the search warrant and the issuance of the warrant. (People v. Donath, 293 Ill.Dec. 120, 827 N.E.2d 1001, 357 Ill.App.3d 57)

Staleness of information on which probable cause is based is highly relevant to the legality of a search for a perishable or consumable object, like cocaine, but rarely relevant when it is a computer file. (U.S. v. Seiver, 692, F.3d 774, certiorari denied 133 S.Ct. 915, 184 L.Ed.2d 703) Child

pornography is, in fact, one of those rare instances where staleness of information on which probable cause is based is highly relevant to the legality of a search warrant. 720 ILCS 5/11-20.1(b)(5) clearly states: "The charge of child pornography does not apply to a person who does not voluntarily possess a film, video, or visual reproduction or depiction by computer. Possession is voluntary if the defendant knowingly procures or receives a film, video, or visual reproduction or depiction by computer for a sufficient time to be able to terminate his or her possession." Termination of possession of computer, or digital, files is done by deletion. Once a file is deleted, possession is terminated and the charge of child pornography no longer applies. See U.S. v. Hall, 142 F.3d 988 (Defendant knowingly possessed, where defendant downloaded files at issue and did not delete them)

Age of information supporting application for search warrant is factor that magistrate should consider but is only one factor; if other factors indicate that information is reliable and that object of search will still be on premises, then magistrate should not hesitate to issue a warrant. (U.S. v. Batchelder, 824 F.2d 563) Officer Borowczyk testified during the supression hearing that there was no expectation of child pornography files being kept past a period of 6 weeks. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 43-44) So once 6 weeks have passed since the last observance of the crime, probable cause no longer exists since all files are expected to be deleted, and the charge of child pornography does not apply to deleted material

since possession is terminated upon deletion. See People v. Damian, 299 Ill.App.3d 489, 701 N.E.2d 171 (1st Dist. 1998) (Search warrant quashed. Officers waited to request a warrant until after 6 weeks of no criminal activity, with no evidence of continuing criminal conduct after the last observance of a crime)

In determining whether there is probable cause for a search, the passage of time is less critical when the affidavit in support of the search warrant refers to facts that indicate ongoing continuous criminal activity. (U.S. v. Mitten, 592 F.3d 767, certiorari denied 131 S.Ct. 635, 178 L.Ed.2d 510) Officer Borowczyk testified during the suppression hearing that the dates used to obtain the search warrant, on which child pornography was believed to be available, were between July and October in 2012. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 20, 42-43) Yet officer Borowczyk waited until February 19, 2013 to obtain a search warrant. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 18-19) This was well outside the established 6 week timeframe. Borowczyk failed to give any facts that would indicate, as required, an ongoing continuous criminal activity, past the last observance made, in this particular and specific case.

Furthermore, the unique nature of the case did not warrant reasonable belief in support of probable cause for a search warrant that files would still be in possession on the computer. After Borowczyk had already testified to there being no expectation of files being kept past a period of 6 weeks, the State asked him if he had reasonable belief, due to the unique nature, that whoever was doing it would still have child pornography files in their possession on the

computer, to which he said yes. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 45) However, officer Borowczyk failed to give any facts supporting such a claim, and the State failed to argue any facts in support of such a claim, since no such facts existed. Therefore, the Court should consider any claims or arguments by the State regarding unique nature forfeit.

The unique nature of this case is that officers do not know who was downloading the material (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 31; October 20, 2015, pg. 68), can not say that it was Gerald Long who did it (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 53; October 20, 2015, pg. 63-64, 68), and no facts to show or base a suspicion on of continuing criminal conduct past the last observance made by officers or that material would still be in possession on a computer. Borowczyk had already testified that files were expected to be deleted. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 43-44)

The internet account, which did not belong to Gerald Long, had been active for several years, yet observations by the officers show that material was only downloaded and available for only a few months in 2012 from July to October (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 20, 42-43) Over 30 people had access to the internet through the internet account at that residence. (See Affidavit, located in Appendix D)

All of this suggests that whoever it was who had done it was someone who only had temporary access to the internet through that account during those few

months and was not an actual member of that household. This not only means that there was no probable cause for the search warrant, but also renders any reasonable belief in support of probable cause for a search warrant of files still being in possession and on the computer non-existant.

Therefore, probable cause did not exist and the search and seizure conducted by officers under the warrant was unreasonable and in violation of Gerald Long's Fourth Amendment right under the U.S. Constitution.

2. Did both the Trial Court and the Court of Appeals err when they concluded that the State had proven inevitable discovery for a cell phone seized in violation of Gerald Long's Fourth Amendment right proscribing unreasonable searches and seizures because officers "could and would have obtained a search warrant", when proper standard under Supreme Court precedent is whether officers "obtained" a search warrant, and whether the evidence would have been inevitably "discovered by lawful means and without reference to any police error or misconduct?"

Yes. Both the Trial Court (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 26-27) and the Court of Appeals (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 11-13) erred in their assessment resulting in the granting of inevitable discovery. No reasonable and rational trier of fact could have determined that the State had proven inevitable discovery for the cell phone.

The "inevitable discovery doctrine" is a means for the government to avoid suppression of evidence obtained as a result of unlawful conduct by the police, and for the doctrine to apply the government must prove by a preponderance that authorities would have found the challenged evidence through lawful means. (U.S. v. Cherry, 436 F.3d 769 rehearing denied, certiorari denied 127 S.Ct. 934, 166 L.Ed.2d 717) Under inevitable-discovery doctrine, evidence that would be inadmissible at trial because it was obtained in violation of a defendant's constitutional rights may nonetheless be admitted if the prosecution can establish by a preponderance of the evidence that it inevitably would have been discovered by lawful means and without reference to any police error or misconduct. (Nix v. Williams, 467 U.S. 431, 444, 448 (1984)) Generally, courts will find that evidence inevitably would have been discovered where: (1) the condition of the evidence when actually found by lawful means would have been the same as that when improperly obtained; (2) the evidence would have been discovered through an independent line of investigation untainted by the illegal conduct; and (3) the independent investigation was already in progress at the time the evidence was unconstitutionally obtained. (People v. Shanklin, 250 Ill.App.3d 689, 696 (5th Dist. 1993); People v. Winsett, 222 Ill.App.3d 58, 69 (2nd Dist. 1991))

First, inevitable discovery did not exist because officers never obtained a search warrant for the illegally seized phone after having illegally seized it during the improper stop. Searches conducted outside the Judicial Process are unreasonable under the Fourth Amendment. (Kate v. U.S., 389 U.S.

347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1976)) The essence of the Constitutional provisions against "unreasonable searches and seizures" is not merely that the evidence so seized may not be used before the Court, but that it may not be used at all. (People v. Martin, 46 N.E.2d 997, 382 Ill. 192) Inevitable-discovery doctrine does not permit police to conduct warrantless search merely because they plan to subsequently obtain a warrant. (U.S. v. Griffin, 502 F.2d 959, 961 (6th Cir. 1974)) See also, People v. Carter, 2016 IL App (3d) 140958, 33-34. (Rejecting State's argument that warrantless seizure of gun was excused by inevitable-discovery doctrine because police could have obtained a warrant) Allowing officers to justify warrantless searches and seizures by showing that they could and/or would have obtained a warrant would render the Fourth Amendment's warrant requirement meaningless. Therefore, inevitable discovery did not exist.

Second, inevitable discovery did not exist because, as was discovered during trial, officers planted the material from the phone onto the laptop during their execution of the search warrant. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 26-28, 46-48) Officer Borowczyk testified that the images were written to the computer on February 19, 2013, the day of the execution of the search warrant, at 11:06 AM as recorded by the laptop's time, which was set ahead of local time, although the search warrant was executed at 8:45 AM. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 26) Borowczyk confirmed that the time on the laptop screen, as seen in the photo, of the laptop, that was taken by police during the

execution of the search warrant, is 11:08, a mere 2 minutes after the images were wrote to that computer. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 47) As such, no material existed to base a claim of inevitable discovery on. Therefore, inevitable discovery did not exist.

Third, inevitable discovery did not exist because Gerald Long was the target of the investigation, (Trial Court Transcripts, 13-CF-236, April 23, 2015, pg. 12), but the phone in question did not belong to Gerald Long. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 57; April 23, 2015, pg. 9; August 25, 2015, pg. 123, 126) Any warrant obtained by officers would have been for Gerald Long's phone, not the phone in question. Therefore, inevitable discovery did not exist.

Fourth, inevitable discovery did not exist because the material in question is not lewd and therefore does not constitute the crime of child pornography. This issue is covered in detail in "Question 4." As such, there was no illegal material in existance to base a claim of inevitable discovery on. Therefore, inevitable discovery did not exist.

Fifth, inevitable discovery did not exist because the independent line of investigation was tainted by illegal conduct. As was previously covered in "Question 1," officers lacked probable cause for a search warrant, making the searches and seizures conducted by officers unreasonable and tainted by illegal conduct.

As was previously covered in this very Question, "Question 2," under the Second reason why inevitable discovery did not exist, officers planted the

material from the phone onto the laptop during their execution of the search warrant. This shows that the independent line of investigation was tainted by the illegal conduct of officers.

In addition, the investigation was further tainted by illegal conduct as the search warrant was also invalid as it did not meet the particular description requirement of the Fourth Amendment. Search warrant must particularly describe "things to be seized." (Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)) Typically, a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional and facially invalid. (U.S. v. Stokes, 710 F. Supp. 2d 689) Search warrant that violates particularity requirement cannot pass constitutional muster even if warrant application contains particular information. Factors in degree of particularity required for search warrant are whether: (1) probable cause exists to seize all items of a particular type described in warrant; (2) warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) government was able to describe items more particularly in light of information available to it at time warrant was issued. (In re search of 3817 W. West End, First Floor Chicago, Illinois 60621, 321 F. Supp. 2d 953)

Officers had no excuse to not follow the particular description requirement of the Fourth Amendment as it is possible to particularly describe, or list, every type of computer media storage device that

exists. The search warrant used the word "other" and the phrase "including but not limited to" when describing the things to be seized. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 50) See Lo-Ji Sales v. N.Y., 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979) (Invalid warrant listed "other similarly obscene materials.")

The Fourth Amendment's requirement that all warrants particularly describe the place to be searched, and the persons or things to be seized, helps enforce the probable cause requirement by limiting law enforcement officers' discretion to determine for themselves the scope of their warrant. (U.S. v. Aljabari, 626 F.3d 940, certiorari denied 131 S.Ct 2164, 179 L.Ed.2d 945) The search warrant asked for computers and computer media. (Trial Court Transcripts, 13-CF-236, March 24, 2015, pg. 50) The warrant listed "and other computer media," meaning that everything in that sentence fell under the category of "computer media." Officers can not claim that their failure to follow the particular description requirement was harmless or that officers knew exactly what was to be seized when they illegally seized cellular phones, cellular media, a camera, camera media, and an e-reader, none of which are computers or computer media, but are seperate and distinct electronic devices.

Therefore, inevitable discovery did not exist.

3. Did the Trial Court err and violate Gerald Long's Fifth and Fourteenth

Amendment right to Due Process by not noticing or using the six factor test established for determining whether or not material is "lewd" when denying the Motion for a Finding of Directed Verdict; when proper standard under Supreme Court precedent require that the six factor test be used?

Yes. The Trial Court erred when it denied the Motion for a Finding of Directed Verdict (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 93) without using the six factor test for assessing "lewd." By denying the Motion, the judge is indicating his belief that material is lewd and that the State has met the burden of proof beyond a reasonable doubt that the material is lewd.

It can not be presumed that the judge applied the proper burden of proof where he failed to reference or use the established six factor test, especially when he had stated that he had never had one of these cases before (Trial Court Transcripts, 13-CF-236, August 24, 2015, pg. 10) and that he does not do criminal cases very often, that his experience is mostly in civil work. (Trial Court Transcripts, 13-CF-236, August 24, 2015, pg. 16, 19) This would lead a reasonable person to determine that the judge was unaware of the six factor test, especially when neither Trial counsel nor State mentioned it.

It also can not be presumed that the judge applied the proper burden of proof, especially when the State improperly argued against the Motion, implying to the court that nudity is in itself "lewd." (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 92)

The Courts have established a six factor test for assessing whether a visual

depiction of a child constitutes "lewd." See, U.S. v. Wolf, 890 F.2d 241 (10th Cir. 1989); U.S. v. Villard, 885 F.2d 117 (3d Cir. 1989); U.S. v. Rubio, 834 F.2d 442 (5th Cir. 1987); U.S. v. Dost, 636 F.Supp. 828 (S.D. Cal. 1986); aff'd sub nom. U.S. v. Wiegand, 812 F.2d 1239 (9th Cir. 1987); People v. Kongs, 30 Cal.App.4th 1741, 37 Cal.Rptr.2d 327 (1995); State v. Gates, 182 Ariz. 459, 897 P.2d 1345 (App. 1994); People v. Hebel, 174 Ill.App.3d 1, 20-22, 123 Ill.Dec. 592, 527 N.E.2d 1367 (1988); People v. Lamborn, 185 Ill.2d 585, 236 Ill.Dec. 764, 708 N.E.2d 350 (1999); People v. Lewis, 305 Ill.App.3d 665, 238 Ill.Dec. 679, 712 N.E.2d 401 (1999); People v. McSwain, 2012 IL App (4th) 100619, 358 Ill.Dec. 152, 964 N.E.2d 1174 (2012). This test is covered in more detail in "Question 4."

By not using the established six factor test, the Court erred in denying the Motion and violated Gerald Long's Fifth and Fourteenth Amendment right to Due Process. See also, "Question 5."

4. Did the Court of Appeals err and violate Gerald Long's Fifth and Fourteenth Amendment right to Due Process in its assessment of the photographs using the six factor test by determining that the photos were "lewd"; when proper standard and review under Supreme Court precedent following the rules and guidelines set forth by the Courts show that the photographs are not "lewd," and therefore do not constitute child pornography?

Yes. The Court of Appeals erred in its assessment of the photographs when using the six factor test and determining that the photos were "lewd."

(Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 15-17) The Court failed to properly follow the rules and guidelines as required when assessing material using the six factor test. When properly assessed, the photos are clearly and obviously not "lewd."

To determine whether or not material is lewd, the Courts consider the following factors in assessing the visual depiction: (1) Whether the focal point of the visual depiction is on the child's genitals; (2) Whether the setting of the visual depiction is sexually suggestive, ie., in a place or pose generally associated with sexual activity; (3) Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) Whether the child is fully or partially clothed, or nude; (5) Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) Whether the visual depiction is intended or designed to elicit a sexual response in the viewer. See, U.S. v. Wolf, 890 F.2d 241 (10th Cir. 1989); U.S. v. Villard, 885 F.2d 117 (3d Cir. 1989); U.S. v. Wiegand, 812 F.2d 1239 (9th Cir. 1987); People v. Lamborn, 185 Ill.2d 585, 236 Ill.Dec. 764, 708 N.E.2d 350 (1999)

Certain rules and guidelines must be followed in order to properly assess the material in considering the factors. These include: (1) Nudity is in itself not lewd. Nudity without lewdness is not child pornography. (Lamborn, 185 Ill.2d at 594); (2) "Private Fantasies" are not within the ambit of the child pornography statute. (Villard, 885 F.2d at 125); (3) Pictures of nude children do not necessarily become child pornography when they reach the hands of a pedophile. (Villard, 885 F.2d at 125); (4) A defendant's intent

does not create a lewd exhibition out of the otherwise innocent activity of children. (State v. Gates, 182 Ariz. 459, 897 P.2d 1345 (App. 1994)); (5) The Courts apply an objective standard (Not subjective) in determining whether or not the material is child pornography. (Lamborn, 185 Ill.2d at 594-95); (6) Consideration of lewd can not rely on how the material was made, or other information extraneous to the material itself, but the material must be judged on its own terms, a defendant's subjective intentions are irrelevant. (People v. Sven, 365 Ill.App.3d 226, 233-34 (2nd Dist. 2012))

To evaluate the pictures, they must first be described. People's Exhibit 13 shows L.H. reclining on a bed wearing a light-colored nightgown. The photo cuts off the top of her head right above her eyes, and a blanket with a tassel is visible at the top of the frame, covering or shadowing one eye. Her one visible eye is slightly open, but not looking at the camera. A dark shape is present in the lower right side of the photo, which appears to be the clothing of the person whose hand, clad in a dark sleeve, is in the lower left corner pulling down L.H.'s nightgown to reveal her upper breast and nipple. In People's Exhibit 14, the camera has moved closer and lower, removing L.H.'s head from the frame. L.H.'s upper breast and nipple are exposed in the center of the frame.

Errors made by the Court of Appeals in their assessment will be addressed following each factor's proper assessment.

Factor 1 - The Focal Point of the Picture

In People's Exhibit 13, the partial exposure of part of L.H.'s right breast

is in the lower corner of the picture. L.H.'s face is visible, detracting the viewer's attention from the exposure, and the focus is therefore on the upper part of L.H.'s body overall and not specifically on the exposure itself, which is only in the lower left corner. There is nothing to force the attention of the viewer to the exposure. This factor does not support a finding of lewd for People's Exhibit 13. (People v. Lewis, 305 Ill.App.3d 665, 238 Ill.Dec. 679, 712 N.E.2d 401 (1999) In People's Exhibit 14, only the partial exposure of part of L.H.'s right breast is visible in the center of the picture. Her face is no longer visible. This factor does support a finding of lewd for People's Exhibit 14.

It was inappropriate for the Court of Appeals to claim that the focal point of People's Exhibit 13 was on the exposure and supported a finding of lewd (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 15), when it was in the lower corner and nothing was forcing the viewer's attention to it.

Factor 2 - Whether the Setting is Sexually Suggestive

In both pictures, L.H. is lying on her back in her bed. The pictures do not depict opened legs or any display of her genitals. She is not interacting with the camera. The setting of the bedroom seems happenstance and not intended to add sexual content to the pictures. There is nothing in the background to suggest that sexual activity has, is currently, or is about to take place. In fact, so little of the background is visible that it can not be used to support a finding of lewd. This factor does not support a finding of lewd of People's Exhibits 13 and 14.

The Court of Appeals properly assessed this factor. (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 15-16)

Factor 3 - Unnatural Pose or Inappropriate Attire

The element of nudity is not part of this criterion. (People v. Wayman, 379 Ill. App. 3d 1043, 1055 (5th Dist. 2008)) It is important to remember that nudity is in itself not lewd. As such, nudity can not render a pose unnatural or the attire inappropriate. Only the pose itself can make the pose unnatural, just as only the attire itself can make the attire inappropriate considering the age of the child. In both pictures, L.H. is laying on her bed. There is nothing unnatural about her pose. Laying down is a natural pose for all people of all ages. The pictures do not depict opened legs or any display of her genitals, and she is not interacting with the camera. L.H. is dressed in a long-sleeved nightgown that was commercially made for and is appropriate for a pre-teen girl. This factor does not support a finding of lewd for People's Exhibits 13 and 14. (People v. Lewis, 305 Ill. App. 3d 665, 238 Ill. Dec. 679, 712 N.E.2d 401 (1999); People v. Lamborn, 185 Ill.2d 585, 236 Ill. Dec. 764, 708 N.E.2d 350 (1999))

It was inappropriate for the Court of Appeals to claim that the partial exposure somehow makes the pose unnatural and finds in support of lewd. (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 16) It was also inappropriate and improper for the Court of Appeals to even try to use nudity at all in this factor, when it does not apply.

Factor 4 - Whether the Child is Fully or Partially Clothed, Or Nude

In both pictures, L.H. is wearing a long-sleeved night gown. Whereas there is a partial exposure of part of L.H.'s right breast, she is still clothed and therefore this factor does not support a finding of lewd for People's Exhibits 13 and 14.

It was inappropriate for the Court of Appeals to claim that this factor supports a finding of lewd. (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 16) L.H. is not nude. She is fully clothed, with a partial exposure visible, and therefore is on the "fully or partially clothed" side of the factor which does not support a finding of lewd.

Factor 5- Whether the Visual Depiction Suggests Sexual Coyness

In both pictures, there is nothing about the child or the remainder of the picture that suggests sexual coyness or a willingness to engage in sexual activity. There is nothing sexual about her facial expression. She is not interacting with the camera. Her pose is natural and her attire is appropriate. (People v. Lewis, 305 Ill.App.3d 665 (1999)) This factor does not support a finding of lewd for People's Exhibits 13 and 14.

It was inappropriate for the Court of Appeals to claim that this factor supports a finding of lewd (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 16), especially when only by using words like "appears" (used with caution) and "might." Their statements and claim fall within the category of "Private Fantasies" which is not allowed, and violates the rules and guidelines previously covered.

Factor 6 - Whether the Image is Designed to Elicit a Sexual Response

In both pictures, only part of L.H.'s right breast is visible. The lack of anything more being exposed, combined with the facts that she is not interacting with the camera, there is nothing sexual about her facial expression, her pose is natural, her attire is appropriate, and the setting is not sexually suggestive shows that the pictures are not designed to elicit a sexual response. (Lewis, 305 Ill.App.3d 665 (1999)) This factor does not support a finding of lewd for People's Exhibits 13 and 14.

It was inappropriate for the Court of Appeals to claim that this factor supports a finding of lewd (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 16-17), especially only when they improperly used information extraneous to the material itself instead of judging it on its own terms as required. The Court of Appeals improperly applied a claim of voyeur from People v. Sven, 365 Ill.App.3d 226, 238, 848 N.E.2d 228, 239 (2006) by using L.H.'s testimony of not being aware that the photos were being taken. This is using information outside the material itself, not judging it on its own terms, and violates the rules and guidelines previously covered. Furthermore, it is inappropriate to ever apply a claim of voyeur to a picture case. In Sven, a video case, the court could only make a factual determination of the material being voyeur after watching the video, during the course of which it becomes apparent to the viewer that the subject is, in fact, unaware of being filmed. This is never possible with picture charges, only video charges.

Therefore, the pictures, People's Exhibits 13 and 14, are clearly, obviously, and unmistakenly Not lewd and do Not constitute child pornography.

5. Did the Trial Court err and violate Gerald Long's Fifth and Fourteenth Amendment right to Due Process in denying the Motion for a Finding of Directed Verdict; when proper standard under Supreme Court precedent is whether Gerald Long was proven guilty "beyond a reasonable doubt" on "every element of the crime?"

Yes. The Trial Court erred and violated Gerald Long's Fifth and Fourteenth Amendment right to Due Process in denying the Motion for a Finding of Directed Verdict (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 93) without explaining his reasons for doing so. In denying the Motion, the judge is indicating his belief that Gerald Long took the photos and that the State has met the burden of proving beyond a reasonable doubt that Gerald Long took the photos at issue.

Under Due Process clause of the Fifth Amendment, the prosecution is required to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. The standard protects three interests. First, it protects the defendant's liberty interest. Second, it protects the defendant from the stigma of conviction. Third, it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. (In re Winship, 397 U.S. 358, 364) See also, Fiore v. White, 531 U.S. 225, 228-29 (2001); and Sullivan v. La., 508 U.S. 275, 278 (1993)

It can not be presumed that the Trial judge applied the proper burden of proof when he failed to explain his reasoning behind his decision to deny the

Motion, especially when he had stated that he had never had one of these cases before (Trial Court Transcripts, 13-CF-236, August 24, 2015, pg. 10), and that he does not do criminal cases very often, that his experience is mostly in civil work. (Trial Court Transcripts, 13-CF-236, August 24, 2015, pg. 16, 19)

During the Motion for a Finding of Directed Verdict, the State's only argument to Gerald Long being the one who took the photos was a claim of circumstantial evidence showing that it was Gerald Long. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 92-93) However, this was a false claim. The circumstantial evidence she is refering to is the vide file, VID_20130215_191920, on People's Exhibit 16, which was allowed over Trial counsel's objection. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 8-9) The video file is neither reliable nor relevant. It is not reliable as it was an editted file with no indication of who started or ended the recording as these portions of the video are missing. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 16, 28, 39) The video is not relevant as it does not prove that the pictures are lewd, only the pictures themselves can do that, it is not proof of a crime, it is not proof of an attempt at a crime, and it is not a crime in and of itself. Even if Gerald Long recorded the video, which he did not (see Affidavit in Appendix E), the video itself or any wrong conclusion of Gerald Long recording it does not mean in the lightest, or prove with any sufficiency that Gerald Long was the one who took the pictures.

The law requires a criminal conviction be based upon evidence establishing beyond a reasonable doubt that the accused committed the specific crime

for which he has been formally charged and tried and not upon evidence showing that he has a propensity to commit the type of criminal conduct at issue. (People v. Correal, 559 N.Y.S.2d 1005 (App. Div. 1990)) The video was unreliable and irrelevant, and the State knowingly and intentionally presented it as false evidence to secure a wrongful conviction. This is especially true in light of how it was presented at trial by the State with getting an officer to give an opinionated statement that was objected to and sustained (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 5-6), yet the State still implied that very same false and opinionated view of the video being an attempt at an upskirt shot in her improper closing argument (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 129-130, 152-153) The State went so far as to improperly and falsely argue to the jury that Gerald Long engaged the girls in conversation to get them to walk up and down the hall. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 130, 153) This is not supported by any evidence on record, and is completely untrue. (See Affidavit in Appendix E)

In light of the evidence, there was no circumstantial evidence proving that Gerald Long took the pictures. In addition, neither L.H. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 83-84), H.J. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 69), nor officer Borowczyk (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 24, 33, 37) were able to say that it was Gerald Long who took the pictures. Therefore, there was no evidence to show that Gerald Long took the pictures, and the Trial Court violated Gerald Long's

Fifth and Fourteenth Amendment right to Due Process in denying the Motion.

6. Did the Court of Appeals err and violate Gerald Long's Fifth and Fourteenth Amendment right to Due Process by ruling that there was no Plain error in failing to instruct the jury as to "lewd" because trial counsel failed to tender an alternative instruction and therefore the issue was waived; when proper guidance under Illinois Supreme Court Rule 451(c) provides that "substantial defects" in criminal jury instructions "are not waived by failure to make timely objections thereto if the interest of justice require?" Did the failure of the Trial Court to properly instruct the jury result in a violation of Gerald Long's Sixth Amendment right to a trial by an impartial jury?

Yes. The Court of Appeals erred and violated Gerald Long's Fifth and Fourteenth Amendment right to Due Process when it ignored Illinois Supreme Court Rule 451(c) and concluded that the jury was properly instructed as to lewd. (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 17-19) and harmed the integrity of the judicial process.

"Substantial defects" in criminal jury instructions "are not waived by failure to make timely objections thereto if the interest of justice require." (IL. S.Ct. Rules, Rule 451(c)) This Rule is coextensive with the "Plain error" clause of Illinois Supreme Court Rule 615(a), and these rules are construed identically. (People v. Delgado, 376 Ill.App.3d 307, 314 (1st Dist. 2007)) An issue is reviewable as a matter of Plain error if: "(1) the

evidence is closely balanced; or (2) the error is 'so substantial that it affected the fundamental fairness of the proceeding, and remedying the error is necessary to preserve the integrity of the judicial process.'" (People v. Blanton, 396 Ill.App.3d 230, 235 (4th Dist. 2009)) "Under the second prong, 'prejudice to the defendant is presumed because of the importance of the right involved.'" (Blanton, 396 Ill.App.3d at 235-36)

Appellate Counsel argued that plain error could be found under either prong. (Appellate Court Transcripts, 4-16-0015, Defendant-Appellant Brief, pg. 35) The Court of Appeals never actually addressed the issues under either prong. (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 17-19) Instead, the Court of Appeals only improperly addressed one of the cases cited by Appellate Counsel, People v. McSwain, 2012 IL App (4th) 100619, ¶132, 964 N.E.2d 1174, saying that they "did not hold that a jury must be instructed as to the Lamborn factors..." (Appellate Court Transcripts, 4-16-0015, August 30, 2018, pg. 19) The contention was that in McSwain, the Court of Appeals ruled that the Trial Court had "meaningfully provided the jury with guidance on the issue" by providing the jury with the Lamborn factors. (McSwain, 2012 IL App (4th) 100619, ¶132) If, by providing the jury with the Lamborn factors (six factor test), the jury was meaningfully provided with guidance on the issue, then the opposite is also true, that by not providing them with the factors, the jury received no meaningful guidance on the issue at all.

The word "lewd" is not self-defining, and has a specific meaning under Illinois law and a specific test to apply. (People v. Lamborn, 185 Ill.2d 585

(1999); McSwain, 2012 IL App (4th) 100619, ¶ 32) See People v. Delgado, 376 Ill.App.3d 307, 314 (1st Dist. 2007) (It was "clear and obvious" error to fail to properly define sexual conduct because the term was not self-defining under Illinois law, but had "a more narrow meaning than would be assumed by a layman."); People v. Cook, 2014 IL App (1st) 113079, ¶29 (Found error in not instructing jury on the definition of recklessness, since "this court has found that 'recklessness' may be commonly understood by a lay person to mean ordinary negligence."); People v. Coots, 968 N.E.2d 1151, 1165, Ill.App. 2 Dist. (Jury was provided with insufficient guidance on the meaning of "deliver" in trial of defendant for drug-induced homicide.)

No reasonable or rational trier of fact could conclude that the jury was properly instructed on the meaning of "lewd," a key essential element of the crime of child pornography, that is not self-defining, but has a specific meaning and a specific test to apply, complete with rules and guidelines for applying the specific test properly.

The jury was further improperly instructed in the matter at issue when the jury was instructed to "consider all the evidence in the light of your own observations and experiences in life." (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 156), leaving the jury "with an I-know-it-when-I-see-it approach, reminiscent of the United States Supreme Court's attempts to define obscenity." (People v. McSwain, 2012 IL App (4th) 100619, ¶29; People v. Sven, 365 Ill.App.3d at 229) This is most especially true when the State engaged in improper closing arguments, improperly and inappropriately defining

lewd for the jury with comments like "This is the defendant's hand pulling her shirt down. That is lewd.," and "this man is pulling her shirt down in a seductive manner, in a lewd manner...," and by stating that the photo was not art, or artistic. (Trial Court Transcripts, 13-CF-236, August 25, 2015, pg. 133-134)

Failure by the Trial Court to properly instruct the jury resulted in a violation of Gerald Long's Sixth Amendment right to a trial by an impartial jury, and harmed the integrity of the judicial process.

By not instructing the jury as to the specific test and its application for the meaning of lewd, which is not self-defining, the jury was not impartial in its deliberations, and was left to determine on its own what lewd means. Further complicating matters, the jury only had improper and inappropriate statements to go off of, given by the State in her improper closing arguments. See People v. Kidd, 997 N.E.2d 634, 642, Ill.App. 2 Dist. (Prejudice resulted from Counsel's deficient failure to proffer jury charge defining "delivery" for drug-induced homicide.)

Therefore, the Trial Court erred and violated Gerald Long's Sixth Amendment right to a jury trial by an impartial jury, and the Court of Appeals violated Gerald Long's Fifth and Fourteenth Amendment right to Due Process.

Final Word

People all across the United States are falsely accused and wrongly convicted in cases like this, just as I was. People are convicted on nothing more than pure prejudice. Further complicating matters is the difficulty people face in receiving a fair court proceeding in cases like this. Given the type of case that it is, the temptation to let feelings, emotions, and anger take control, which lead to improper rulings and determinations, is strong.

Some of you know what it is like to be falsely accused of something you never did. To have your name slandered and dragged through the mud. To be prejudiced against, not on any evidence, but only on an accusation.

The United States Supreme Court needs to hear and rule on this case to establish proper and clear precedent to hopefully prevent others from having their rights violated, or, failing that, to hopefully provide a path to remedy their wrongful conviction. The United States Supreme Court needs to hear and rule on this case to protect the rights and dignity of the people, regardless of what they are accused of, and to restore, preserve, protect, and uphold the integrity of the judicial system. I truely am innocent, and I am in need of your help.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gerald Long

Date: 3-06-19

APPENDIX A

Contains:

Decision of The Appellate Court of Illinois,
Fourth District