No. _____

IN THE

Supreme Court of the United States

JON KAISER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When an agent-affiant intentionally or recklessly omits the images of purported child pornography from a search warrant application in a case alleging possession of child pornography on the sole theory that the images depicted the lascivious exhibition of the genitalia of a minor, such that the issuing magistrate judge is unable to view the images, does that omission fatally undermine a finding of probable cause?

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JON KAISER,
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jon Kaiser, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit is not reported in the Federal Reporter, but can be found online at 771 Fed. Appx. 441 (9th Cir. 2019). Pet. App. 1a-5a (Copy of slip opinion).

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on June 4, 2019. Mr. Kaiser's petition for rehearing was denied on July 3, 2019. Pet. App.

6a (Order denying rehearing). This petition is timely filed pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2256(2)(A) states, in pertinent part:

"[S]exually explicit conduct" means actual or simulated--

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person.

STATEMENT OF THE CASE

Jon Kaiser was convicted after a stipulated-testimony trial of possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(5)(B), (b)(2), and sentenced to 51 months in custody and five years of supervised release. (ER 18, 47-48).[1] The issue in this petition relates to whether probable cause existed for issuance of a search warrant issued by a federal magistrate judge.

On May 9, 2012, United States Magistrate Judge Rita C. Federman signed a search warrant for Mr. Kaiser's home. The search warrant was based on information contained in an affidavit submitted by Federal Bureau of Investigation ("FBI") Special Agent Brad Peterson. Under the heading "PROBABLE CAUSE," the affidavit describes the following:

In February 2011, FBI Special Agent Daniel E. O'Donnell discovered "Sam's Place Message Board" ("Sam's Place"). (ER 102-103). Sam's Place was created in June of 2009. (ER 102). The FBI was investigating a separate message board for child pornography when that separate message board closed in February 2011. Using Google, SA O'Donnell discovered other Aceboard message boards, including "Sam's Place." (ER 102-103). "Sam's Place" was not connected to the other board under investigation by the FBI. (*Id.*).

SA O'Donnell created an account, logged into Sam's Place, and reviewed the "Administrator welcome message," which provided a list of rules for the site, which

[1] "ER" followed by a number refers to the applicable page in the Appellant's Excerpts of Record filed in the Ninth Circuit.

included, among other things, that all members were required to post regularly or face removal from the group (ER 103); no active or "hot links" were allowed—active or hot links are links that a user can simply click on to navigate to an external site (ER 103-04); no child pornography was allowed (ER 103); and all user posts had to include preview or thumbnail images to all external downloads so members could see thumbnail previews of the images before downloading them (ER 103).

Given the rules of the website, users would author posts, and these posts would generally contain several images: an image associated with the user, usually in the upper-left corner, and one or two preview images (or thumbnail images). (ER 391-93). Under the preview image would be non-active links that a user who wanted to download the images described would have to manually cut and paste into a browser search bar, and navigate to. (ER 391-393; 106-08). The links, once placed into a browser search bar, would, in theory, take a user to a different site, where images were stored. (Id.; ER 106-108). Other users could comment on the original posts. (ER 106).

Here, the only evidence that the search warrant affidavit pointed to of user "SASHA12" (who the agents later came to believe was Mr. Kaiser) actually accessing the images purportedly accessible at the links set out on three posts cited in the affidavit, are comments that SASHA12 made on three separate posts. There was no direct evidence that SASHA12 had manually cut and pasted the links on other users' original posts and gone to the other site and downloaded child pornography. Accordingly, the affidavit's basis for probable cause was almost

entirely based on a proffered interpretation of SASHA12's comments on original posts that did not, in themselves, contain child pornography.

The investigation determined that from April 6, 2011 to September 27, 2011, SASHA12 posted to the board approximately 56 times. (ER 112). In the affidavit, Agent Peterson gave three examples of comments that SASHA12 made on posts created by others, primarily user "Zend" that Agent Peterson believed demonstrated that SASHA12 received and possessed child pornography. Agent Peterson's belief that SASHA12 manually navigated to the links included in the original posts created by Zend were based on Agent Peterson's interpretation of SASHA12's comments on Zend's original posts.

All three comments by SASHA12 described in the affidavit occurred in August 2011. As to the first comment, the Affidavit provides the following:

On August 8, 2011, SASHA12 posted a comment in response to a post from member "Zend." Zend's post was located in the forum "under 18 downloads" under the topic title "Skirts no panties_re-up." Zend's post included a preview image of a minor female wearing a t-shirt and skirt. The girl is pulling her skirt up exposing her bare vagina. SA O'Donnell showed in his reports that he utilized one of the links and downloaded a file that was that was approximately 24 MB in size. When he extracted the data from the file, it contained approximately 74 images. He indicated: "I reviewed these images and the vast majority, if not all, of them appear to be minors. I believe that several of them constitute child pornography. For example, there are multiple images that show a different prepubescent female lying

on her back naked from the waist down, spreading her legs, and exposing her vagina." (ER 112-114)1

Agent Peterson did not include an image of the post he described with the Affidavit—even though he had a screenshot of the post he described here. (ER 391). That screenshot shows that there were three images displayed on the original post: a cartoon image of a young girl, an image of a girl lifting her skirt, and an image of a girl sitting on a couch with her legs crossed. Id. That is, there were three images displayed on Zend's post—the post on which SASHA12 commented when he wrote "Thx very much for the cuties and hotties." Id.

As to the second comment, the affidavit provided that on August 14, 2011, SASHA12 posted a comment in response to another post from member "Zend." Zend's post was located in the forum "under 18 downloads" under the topic titles "8.13 nude Lolita post." Within Zend's post, Zend included a preview image of a minor female lying on her back wearing a little black dress and white fishnet stockings. Her genitals were covered by the dress but it is a very suggestive photo and I believe it constitutes child erotica. Zend then included links for multiple locations where the compressed file containing all the images could be downloaded. Zend also included a password for the files.

SA O'Donnell showed in his reports that he utilized one of the links and downloaded a file that was approximately 21.4 MB in size. When he extracted the data from the file, it contained several images of two different females—Angelica and Bambi. He indicated that he reviewed the Angelica images and observed that

she was a prepubescent female. I believe that some of her images constitute child pornography and the rest child erotica. For example, one of them shows her naked, lying back on her hands, and her legs are spread giving a clear view of her bare vagina. He also claimed to have reviewed the Bambi images and said she appears to be a prepubescent female as well. There were eight images of her. I believe one of them constitutes child pornography and the rest child erotica. The one image shows her jeans unbuttoned and below her genital area. She is not wearing underwear and the camera is focused on a clear view of her bare vagina. (ER 114-116).

Again, though he had a screenshot of the post that he described here, Agent Peterson did not include the screenshot with the affidavit presented to the Magistrate Judge. Nor did the agent include any of the purported images of child pornography he claimed he viewed through the link.

And as to the final, third comment, the affidavit provided that on August 25, 2011, SASHA12 posted a comment in response to another post from member "Zend." Zend's post was located in the form "under 18 downloads" under the topic titled "Madison blue panties custom - resized." Zend's post included a preview image of two minor females. One is the same erotica image of the girl in the black dress and fishnet stockings described in the above paragraph. The other one shows a naked female child with her vagina exposed. SA O'Donnell showed in his reports that he utilized one of the links and downloaded a file that was approximately 28.75 MB in

size. When he extracted the data from the file, it contained several images of a minor child.

The agent indicated he had reviewed the images and observed that they were of a prepubescent female and that he "believe[d]" that at least one of the images constitutes child pornography and the rest child erotica. In one image, the girl is lying on her back naked, her legs spread, showing a clear view of her vagina, and she has a fluid substance on her bare chest. (ER 116-118).

Again, Agent Peterson had the screenshot of this post and the comments but did not provide it or any of the purported child pornography to the magistrate judge. (ER 393).

Agent Peterson expressly did not include images with the affidavit of any of the images Agent O'Donnell downloaded from the external site that Agent Peterson described as containing "child pornography." He simply describe the images that Agent O'Donnell downloaded from the external sites, and gave his opinion that he believed some of those images were "child pornography," but that most of the images were merely "child erotica." (ER 112-117.) The Affidavit makes clear that Agent Peterson "reviewed the images" and had access to them, but chose not to provide them with the Affidavit. (*Id.*). And the failure to provide the images to the magistrate judge was not an oversight; Agent Peterson expressly testified that he intentionally did not provide the images to the magistrate judge for review. (ER 250). He explained that it's his experience that magistrate judges don't want to look

at "these type of images with children" and it's his "practice" to only provide them when asked. (ER 250).

Although it had not reviewed any of the images relied on by the FBI to claim that Mr. Kaiser viewed and thus may possess child pornography, the magistrate judge granted the search warrant.

Mr. Kaiser filed a motion to suppress arguing that the agent recklessly or intentionally omitted material information from the affidavit in support of a search warrant—including the failure to include any of the purported images of child pornography—and the district judge conducted a *Franks*[2] hearing. (ER 65; 200). After initial argument, the district court found that Mr. Kaiser had made a sufficient preliminary hearing to entitle him to a Franks hearing and to cross Agent Peterson, in order for the district judge to make a determination as to whether the agent had intentionally or recklessly omitted information that would undercut probable cause. (ER 222).

After the hearing, the district judge concluded that Agent Peterson did not intentionally or recklessly omit information from the search-warrant affidavit. (ER 275). The district judge noted that Agent Peterson's omission of information in the affidavit may have been "negligent." (ER 275).

On appeal to the Ninth Circuit, Mr. Kaiser argued that the affidavit, on its face, failed to establish probable cause because it required an untenable chain of

[2] *Franks v. Delaware*, 438 U.S. 154 (1978).

inferences, moving into the realm of speculation—all based on the agent's reading of SASHA12's ambiguous comments on some other user's posts.

He further argued that Agent Peterson recklessly omitted information that utterly undermined any probable cause showing, including, among other things, any the screenshots showing the posts on which Kaiser commented, or any of the purported images of child pornography he claimed to have viewed when using the provided links to other sites.

The Ninth Circuit affirmed the conviction, concluding that the agent's affidavit established probable cause sufficient to support a search warrant because the combination of the agent's extensive experience on child pornography investigations, his detailed descriptions of the images focused on minors' exposed genitals, and reasonable inferences from Kaiser's comments about multiple images gave rise to a "fair probability" that Kaiser visited the external links on the forum's posts and downloaded images qualifying as child pornography onto his computer. Pet. App. 2a-3a.

The court also concluded that "the district judge reasonably credited the agent's testimony that any omissions in his affidavit in support of the search warrant—e.g., the failure to mention the poster's signature image in the first post and to provide copies of the images themselves—were 'honest oversight[s],' and did not clearly err in finding that the omissions were not intentional or reckless." Pet. App. 4a (citing *United States v. Perkins*, 850 F.3d 1109, 1116–18 (9th Cir. 2017)

(holding that the agent's omissions constituted a "clear, intentional pattern" of deception).

REASONS FOR GRANTING THE WRIT

The writ should be granted to make clear whether a magistrate judge (or other judge issuing a search warrant) must review any purported images of child pornography prior to issuing a search warrant based on the theory that the subject of the warrant possessed images depicting the lascivious exhibition of the genitalia of a minor, a subjective determination that cannot be deferred to the subjective evaluation of an affiant-agent.

A search warrant is supported by probable cause if the issuing judge finds that, given all the circumstances set forth in the affidavit before him there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This Court has explained that a reviewing court should find that probable cause is *not* met when the issuing judge lacked a "substantial basis for . . . conclud[ing]" that probable cause existed. *Gates*, 462 U.S. at 238-39.

"Conclusions of the affiant unsupported by underlying facts cannot be used to establish probable cause." *United States v. Cervantes*, 703 F.3d 1135, 1139-40 (9th Cir. 2012) (affording little if any weight to detective's conclusory statement that, based on his training and experience, the box in defendant's possession came from a suspected narcotics stash house). "An affidavit must recite underlying facts so that the issuing judge can draw his or her own reasonable inferences and conclusions; it

is these facts that form the central basis of the probable cause determination." *United States v. Underwood,* 725 F.3d 1073, 1081 (9th Cir. 2013) (citing *Giordenello v. United States*, 357 U.S. 480, 486 (1958) ("The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.")).

Indeed, an affidavit lacks probable cause when it simply recites the statutory definition of child pornography without a sufficient factual description of the images to enable the magistrate judge to make an independent determination that the images constitute child pornography. *United States v. Battershell*, 457 F.3d 1048, 1051 (9th Cir. 2006) (finding no probable cause based on affidavit's description of image as a "young female naked in a bathtub") (citing *United States v. Jasorka*, 153 F.3d 58, 60 (2d Cir.1998); *United States v. Brunette*, 256 F.3d 14, 18 (1st Cir.2001)).

Under the relevant statute, "child pornography" is defined as a visual image depicting "sexually explicit conduct." 18 U.S.C. § 2256(8). There are five categories of images that depict "sexually explicit conduct"; while the first four "deal with specific conduct that is easy to identify and describe," the fifth category, "lascivious exhibition of the genitals or pubic area of any person," 18 U.S.C. § 2256(2)(A)(v), "turns on the meaning of 'lascvious'" and is therefore "far more subjective and open to interpretation than the first four." *Battershell*, 457 F.3d at 1051 (citing *Jasorka*, 153 F.3d at 60 (quoting the district court's declaration that the conduct involved in the first four categories is "clearly defined and easily recognized"); *Brunette*, 256

F.3d at 18 ("[T]he identification of images that are lascivious will almost always involve, to some degree, a subjective and conclusory determination on the part of the viewer." (internal quotation marks omitted); *United States v. Getzel*, 196 F. Supp. 2d 88, 91 (D.N.H. 2002) (ruling that the identification of images as lascivious is "subjective")).

Indeed, in *Brunette*, the First Circuit determined that a warrant application, supported by the affiant's statement that the photograph at issue depicted "a prepubescent boy lasciviously displaying his genitals," was insufficient to establish probable cause. 256 F.3d at 17. The court held that "[o]rdinarily, a magistrate judge *must* view an image in order to determine whether it depicts the lascivious exhibition of a child's genitals." *Id.* at 19 (emphasis added). By contrast, the Ninth Circuit in *Battershell* concluded that while "[i]t would [be] preferable if the affiant . . . included copies of the photographs in the warrant application . . . , failing to include a photograph in a warrant application is not fatal to establishing probable cause." 457 F.3d at 1053 (citing *United States v. Smith*, 795 F.2d 841, 847-48 (9th Cir. 1986)).

Here, the search warrant affidavit itself noted that the majority of the images downloaded from the three Zend posts by SA O'Donnell were legal, child erotica. (ER 112-117). The images that the agent believed were "child pornography" fall in the fifth and most subjective category of "sexually explicit conduct," given that the affidavit identifies the following images as "child pornography": (1) "Multiple images that show a different prepubescent female lying on her back naked from the

waist down, spreading her legs and exposing her bare vagina," (2) an image of a minor "naked, lying back on her hands, and her legs are spread giving a clear view of her bare vagina," (3) an image of a minor with her "jeans unbuttoned below her genital area," (4) an image in which a "girl is lying on her back naked, her legs spread, showing a clear view of her vagina, and she has a fluid substance on her bare chest." (ER 112-17).

The affidavit does not explicitly state that the images contain lascivious exhibition of the genitals or pubic area. Instead, the agent relies on the apparent belief that any depiction of genitals or pubic area is "child pornography." The agent's factual depictions alone did not provide the magistrate judge with sufficient information to make an independent determination whether the images were "child pornography" under the statute. *See United States v. Perkins*, 850 F.3d 1109, 1118 (9th Cir. 2017) (concluding that agent's "description of the [purported child pornography in question]" was not "a reliable substitute for the image itself"); *Brunette,* 256 F.3d at 19 ("[o]rdinarily, a magistrate judge must view an image in order to determine whether it depicts the lascivious exhibition of a child's genitals"). Thus, the affidavit required the magistrate judge to essentially accept the agent's belief that the images he described were "child pornography."

Agent Peterson had the best context for SASHA12's ambiguous comments in his possession—the screenshots from the website and the images he claimed to have viewed when he followed the links to external sites. He chose not to provide the best context for the comments to the magistrate judge, and instead provided his

own tendentious portrayal of the context, a portrayal that skewed and pushed a particular inference, rather than allowing the magistrate judge to draw her own inferences based on the full context. He was, at the very least, reckless in choosing to withhold information that undermined probable cause. *See also United States v. Lull*, 824 F.3d 109, 116–17 (4th Cir. 2016) (holding that an affiant acted at least recklessly by omitting facts about an informant's credibility and "usurp [ed] the magistrate's role" in determining probable cause).

Indeed, even the Ninth Circuit has held that failure to "furnish copies of the images [of purported child pornography] to the magistrate" constituted "at least a reckless disregard for the truth." *United States v. Perkins*, 850 F.3d 1109, 1117 (9th Cir. 2017). Indeed, the agent's description of the purported image of child pornography was not a "reliable substitute for the image itself." *Id.* at 1118. This is so because "[d]etails about the placement and prominence of genitalia is highly relevant to determining whether an image is lascivious." *Id.* (citing *United States v. Overton*, 573 F.3d 679, 686 (9th Cir. 2009) (factors in determining lasciviousness include whether the focal point of the depiction is on the child's genitalia or pubic area and whether the visual depiction is intended or designed to elicit a sexual response)). Nevertheless, the decision here demonstrates that because there is not a bright-line rule requiring review of the images, a court can merely permit a reviewing judge to grant a search warrant application based on the subjective interpretation of an agent and his "oversight" in not providing the images for review.

"[S]uch 'inherent subjectivity is precisely why the determination should be made by a judge,' not the affiant." *Id.* (quoting *United States v. Pavulak*, 700 F.3d 651, 662 (3d Cir. 2012) (quoting *United States v. Brunette*, 256 F.3d 14, 18 (1st Cir. 2001))). That is why the agent is supposed to be "required to provide copies of the images for the magistrate's independent review." *Id.*

To be clear, the failure to provide the images to the magistrate judge here was *not* an "oversight"; Agent Peterson expressly testified that he *intentionally* did not provide the images to the magistrate judge for review. (ER 250). He explained that it's his experience that magistrate judges don't want to look at "these type of images with children" and it's his "practice" to only provide them when asked. (ER 250).

Moreover, the description cited by the court below as being among the "detailed descriptions of the images" that demonstrated lascivious exhibition of the genitals and supported a finding of probable cause, Pet. App. 3a, 4a, was plainly not enough to satisfy probable cause and further demonstrates why the intentional omission of the images in the warrant application here was material and unconstitutional. For example, "the agent described one image where the girl photographed was 'lying on her back naked, her legs spread, showing a clear view of her vagina[] and . . . a fluid substance on her bare chest.'" Pet. App. 4a (citing 18 U.S.C. § 2256(2)(A)(v) for the definition of "sexually explicit conduct" as including the lascivious exhibition of the genital area). But that description on its own does

not establish lascivious exhibition—unless someone is predisposed to interpret the description that way.

The description does nothing more than describe a child taking a bath or lying down somewhere soon after taking a bath or swimming—"not all images of nude children are pornographic." *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006) ("For example, 'a family snapshot of a nude child bathing presumably would not' be criminal." (citation omitted)). The description does not indicate that the focal point of the image is the child's genital area, only that there was a clear view of her vagina." Pet. App. 3a.

The fact is, without actually looking at the images themselves, it is impossible, based on the descriptions used in the search warrant affidavit here, to determine if the images actually qualified as lascivious exhibition of the genital area. And that's why in these circumstances the reviewing judge must be required to view any purported images of child pornography before issuing a search warrant. By providing an incomplete and misleading recitation of the facts and withholding the images, the agent effectively usurped the magistrate's duty to conduct an independent evaluation of probable cause.

Accordingly, this Court should grant Mr. Kaiser's petition for a writ of certiorari to make clear that a reviewing judge *must* review images purporting to be the lascivious exhibition of the genitals of a child to make an independent determination if such images qualify as child pornography before issuing a search warrant, and cannot merely rely of the subjective evaluation of an agent.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: October 1, 2019

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