19-6909

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

EFRAIN J. ROSA — PETITIONER
(Your Name)

vs.

ACTING WARDEN AT USP TUCSON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Ninth Circuit court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Efrain J. Rosa
(Your Name)
United States Penitentiary Tucson
P.O. Box 24550
(Address)

Tucson, Arizona 85734-4550
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

I. When the Government affirms that all the requisite documentation, under the rule of Brady v. Maryland, 373 US 83 (1963) will be provided, but then suppresses documentation that is favorable to the defense and material to the defendant's guilt or punishment, has a violation of DUE PROCESS of the Federal Constitution's FIFTH AMENDMENT accured requiring reversal of the conviction?

II. When a conviction arises based upon a record lacking any evidence as to the crucial elements of the offense, due to the Government's suppression of documentation proving the evidence was lacking, has a denial of DUE PROCESS in violation of the Federal Constitution's FIFTH AMENDMENT accured requiring reversal of the conviction?

III. When the police charged with an investigation acts in such a way as to shock the conscience destroying the fairness, integrity, and honor of the operation of the criminal justice system by replacing seized property with another item and then falsely claim to have found incriminating evidence to secure a conviction and then suppress their own documentation proving this fact, has a crucial denial of DUE PROCESS in violation of the Federal Constitution's FIFTH AMENDMENT accured, requiring reversal of the conviction?

LIST OF PARTIES

[XX] 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:

RELATED CASES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[XX] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 13, 2019.

[XX] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The FIFTH Amendment to the United States Constitution [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a prentment or indictment of a Grand Jury, except in cases arising in the land or navel 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 offence 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.

The SIXTH Amendment to the United States Constitution [1791]

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.

STATEMENT OF THE CASE

BACKGROUND:

On September 27, 2007, members of the Oswego County, New York, Sheriff's Office executed a search warrant at Petitioner's residence for computers, computer equipment, firearms, and "notes or records which would tend to identify criminal conduct". The warrant, however, never identified the criminal conduct, nor was there any incorporated documents to identify the criminal conduct. (ATT. 1) That same day Petitioner was charged with 6 counts in the state court, these charges were dismissed 4-years later when Petitioner refused to drop his demand for a trial, since the states own experts had confirmed there was no evidence to convict Petitioner on in the state court.

On March 13, 2008, a grand jury in the Northern District of New York (herein after NDNY) returned a 19 count indictment charging Petitioner with 3 counts of Producing Child Pornography 18 USCS 2251(a); 1 count Witness Tampering 18 USCS 1512(b)(1); 2 counts Receiving and Attempting to Receive Child Pornography 18 USCS 2252A(a)(2)(A); and 12 counts of Possessing Child Pornography 18 USCS 2252(a)(5)(B). 5:07-cr-443-NAM

On October 9, 2008, Petitioner was deceived into accepting a guilty plea to 3 counts of 18 USCS 2251(a) and 1 count of 18 USCS 1512(b)(1), with a promise of 15 to 30 years.

On February 12, 2009, Petitioner was sentenced to 120-years.

Petitioner appealed in the Second Circuit court of appeals. The court affirmed the denial to suppress the evidence obtained under the search warrant, unbeknownst to Petitioner there was no evidence to suppress, granting the officer the Leon Good Faith exemption. United States v. Rosa, 626 F.3d 56 (2d Cir. 2010), then on March 8, 2011, denied Petitioner's motion for rehearing, with one dissent. 634 F.3d 639 (2d Cir. 2011).

On February 27, 2012, this Court denied Petitioner's motion for a writ of cert., Rosa v. United States, 132 S. Ct. 1632 (2012) on May 14, 2012 then denied Petitioner's motion for rehearing.

On May 13, 2013, Petitioner filed a motion to vacate the conviction pursuant to 28 USCS 2255. On March 7, 2014, the NDNY denied the motion as time barred. Rosa v. United States, 758 F.3d 856 (2d), and cert. denied 136 S. Ct. 270 (2015).

On October 27, 2015, Petitioner filed for a successive 2255 motion. On January 14, 2016 the Second Circuit denied the motion.

On April 11, 2016, a 28 USCS 2241 motion was filed with the Tucson Arizona District court and was denied. 4:16-cv-3-CKJ-JR

In Septmeber 2017, Petitioner recieved unsollicited, a copy of the Oswego County New York Sheriff's Departments Evidence/ Property Report, newly discovered evidence, (ATT. 2-16), Brady material, suppressed by prosecution and law enforcement, in

unequivically proving there never was any child pornography discovered in the case and that the law enforcment charged with the investigation had replaced the seized Compaq model EVO laptop serial number p106x420bc12xol, the same laptop they falsly claimed to have discovered child pornography on, with another Compaq laptop, one with no model or serial number. (Compare ATT. 17 and 20 with 8)

On August 29, 2018, Petitioner filed a motion under 28 USCS 2241 with the Tucson District court, 4:18-cv-438-CKJ_DTF, challenging Petitioner's conviction as violating Due Process since it was obtained with a total lack of evidence, Petitioner's Due Process had been violated by the prosecution's withholding of Brady material, and that Petitioner was actually and factually not guilty of the crime convicted.

On February 14, 2019, the Tucson District court denied the motion

On April 4, 2019, a motion for a certificate of appealability was filed with the Ninth Circuit. Rosa v. Rhodes, No. 19-15637. On September 13, 2019, the Ninth Circuit denied the motion. (Appendix A.)

This motion follows.

FACTS:

After Petitioner was indicted in the NDNY, the United States Attorney's Office affirmatively stated that all Brady material had been given to the defense and that any newly discovered Brady material will be provided in a timely manner to be used. Based upon this affirmation, Petitioner had no reason to believe that any Brady material had been suppressed or would be suppressed. Stickler v. Green, 527 US 263, 287 (1990)

Upon discovery of the facts in the newly discovered Evidence/ Property Report, Petitioner has made every available attempt to have his conviction overturned. The facts being that the Prosecution did not have any evidence to convict Petitioner, the investigators tampered with the seized property and replaced the seized property with another, the prosecution withheld this information from the defence for over 9-years after his conviction.

It is clearly plain that this newly discovered evidence was not made available for the defence to utilize before the signing of the plea deal on October 9, 2008, the sentencing on February 12, 2009, or the first 2255 motion on May 13, 2013.

The last entry in the newly discovered Evidence/Property Report is June 16, 2010, when items were removed and released to an Inv. B. Blake for the FBI. (ATT. 16).

I. WHEN THE GOVERNMENT AFFIRMS THAT ALL THE REQUISITE DOCUMENTATION, UNDER THE RULE OF BRADY V. MARYLAND, 373 US 83 (1963) WILL BE PROVIDED, BUT THEN SUPPRESSES DOCUMENTATION THAT IS FAVORABLE TO THE DEFENSE AND MATERIAL TO THE DEFENDANT'S GUILT OR PUNISHMENT, HAS A VIOLATION OF DUE PROCESS OF THE FEDERAL CONSTITUTION'S FIFTH AMENDMENT ACCURED REQUIRING REVERSAL OF THE CONVICTION?

Petitioner was arrested September 27, 2007, after the local sheriff's executed a search warrant (ATT. 1) for computers, electronic media, firearms, and notes or records "which would tend to identify criminal conduct". During the execution of the warrant police seized several desktop computers, hard-drives, two laptop computers. On the seizure lists (ATT. 17-19, 20-21) each computer is identified by its unique make, model, and serial number, even the hard-drives are identified as such. Within four (4) days of the seizure of the items, members of the sheriff's office were ordered to secure the "items in accordance with their standard operating procedure" (ATT. 21) Only thirty-one (31) of the seized items that day were secured, but none of the computers, cameras, or other electronic media was secured. While the officer claims to have been conducting a forensic exam on the seized media from "September 27th through December 18th, 2007" (ATT. 22) it was not until January 04, 2008 that evrything had been secured. (ATT. 13) At no time was there ever any images of child pornography secured or entered in the the Evidence/Propert Report. (ATT. 2-16)

Further there no evidence that the seized items which the officer claims to have been conducting a forensic exam on were ever stored or removed from a secure storage during this time. While the officer claims to have discovered alleged "photographic and video files" "which would be considered child pornography" (ATT. 23) these mysterious photographic and video files along with the "DVD labeled Videos" were never secured in the evidence locker or entered into the Evidence/Property Report. There is no evidence these even existed.

This brings to question the fact that while a Compaq model EVO laptop serial number p106x420bc12xol along with six (6) specific hard-drives identified by their unique serial numbers are listed as being seized, these specific items were also never secured in the evidence lcoker or recorded on the Evidence/ Property Report. Though there is a Compaq laptop and six hard-drives listed as stored in the evidence locker this is not the original Compaq model EVO laptop serial number p106x420bc12xol or six (6) hard-drives seized one September 27, 2007. This also ignores the fact that it is unknown what DVDs, floppy discs or zip disc were seized, secured, or examined as the officer merely listed these items as "numerous" and "various". (ATT. 18,21,22,12)

This information was suppressed by the prosecution for nearly ten (10) years after the plea offer and sentencing, even though the prosecution affirmed that all Brady material would be provided to the defense early in the proceedings. Petitioner relied upon

the affirmation by the Government and did not seek additional documentation.

This information and documentation, if made available to the defense prior to the plea offer, it is clear the plea offer would never have been accepted and defense would have demanded a trial and no less. The Government withheld and suppressed this material documentation in violation of Brady v. Maryland, 373 US 83 (1963), totally disregarding their affirmation that all Brady material would be provided. This Court in Strickler v. Green, 527 US 263, 287 (1999), stated as much, "Given that representation [the Petitioner] had no basis for believing the [government] had failed to comply with Brady."

"In Brady v. Maryland, 373 US 83 (1963), this Court held that the Government violated the Constitution's Due Process Clause 'if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.' Smith v. Cain, 565 US 73, 75 (2012)." Turner v. United States, 198 L. Ed. 2d 443, 446 (2017). This extends to any "favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 US 419, 437 (1995).

While the Ninth Circuit in their denial for a certificate of appealability stated that "appellant has not shown that 'jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that

jurist of reason would find it debatable whether the district court was correct in its procedural ruling", is plainly incorrect, Due Process is a Constitutional guarantee and it is clear that Petitioner's due process has clearly been denied in this case. (See Appendix A)

II. WHEN A CONVICTION ARISES BASED UPON A RECORD LACKING ANY EVIDENCE AS TO THE CRUCIAL ELEMNETS OF THE OFFENSE, DUE TO THE GOVERNMENT'S SUPPRESSION OF DOCUMENTATION PROVING THE EVIDENCE WAS LACKING, HAS A DENIAL OF DUE PROCEES IN VIOLATION OF THE FEDERAL CONSTITUTION'S FIFTH AMENMENT ACCURED REQUIRING REVERSAL OF THE CONVICTION?

On Septmeber 27, 2007, member sof the Oswego County, New York, Sheriff's Office executed a search warrant at Petitioner's residence seizing computers, laptops,a firearm, electronic media, etc... During the execution of the search warrant a Compaq model EVO laptop serial number p106x420bc12xol, six hard-drives of various makes, models, and serial numbers, along with "Numerous Compact disc" (ATT. 17-19, 20-21) were allegedly seized, and forensically examined, were "photgraphic and video files" were allegedly recovered "that would be considered child pornography" (ATT. 23-24)

It is vital to bring this Court's attention to the fact that the Compaq model EVO serial number p106x420bc12xol, the Fijitsu model MPE3136AT hard-drive serial number 30KTT401046595, the alleged "photgraphic and video files" (ATT. 23-24) and the mysterious "DVD labeled Videos" are all absent from the Evidence/Propert Report (ATT. 2-16) and it is evident that these item were never secured in the first place in any evidence locker. However, it was these items are what formed the the basis for the conviction and provided the crucial elements for the offense

charged and convicted, yet are missing.

While waiting for the Ninth Circuit to reply to the motion for a certificate of appealability or appeal, the U.S. Dept. of Justice, after two (2) years, replied to the request for any and all records "to the chain of custody of all items and evidence, i.e. computers, hard drives and all related items secured in the case". (ATT. 25) Amazingly the "United States Attorney's Office for the Northern District of New York has located no records regarding the [] specific subject(s). After an extensive search, the records which [Petitioner] requested cannot be located." (ATT. 26)

It cannot be any clearer, Petitioner's conviction is totally devoid of any evidentiary support. Petitioner is not guilty of the crimes charged.

For a conviction under 18 USCS 2251(a) to stand there must have been a "visual depiction produced". United States v. Laursen, 847 F.3d 1026, 1032 (9th Cir. 2017). Congress in its construction of 18 USCS 2251(a) mandates that there must be photographic and/or video files produced using items that had at one time traveled in interstate commerce. While the computers, elctronic storage media, and the cameras seized did at one time travel in interstate commerse, production of child pornography still requires at least one photograph or video, and in this case there is not one photograph or video.

As this Court so plainly stated in Harris v. United States, 404 US 1232, 1233 (1971), "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process." This follows the decision in Gregory v. Chicago, 394 US 111, 112 (1969), "Under the principle first established in Thompson v. City of Louisville, 362 US 199 (1960), convictions so totally devoid of evidentiary support violate due process". Due process is a Constitutional Guarantee under the Fifth Amendment, making the decision from the Ninth Circuit incorrect. Petitioner has stated a valid claim of a denial of a constitutional right, and based upon the fact that the newly discovered evidence did not come to light untill September 2017 years after Petitioner had appealed and filed his first 2255 motion, jurist of reason would have found the district court was incorrect in its procedural ruling.

It cannot be any more clear, there never was any images of child pornography discovered in this case to support a conviction under 18 USCS 2251(a), as such the conviction is totaly devoid of any evidentiary support. A fact suppressed by the U.S. Attorney Office for the Northern District of New York and the investigating law enforcement agency, the Oswego County, New York, Sheriff's Department.

This violation requires reversal.

As 18 USCS 2251(a) reads; Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct ... shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction wil be transported or transmitted ... if that visual depiction was produced ... or if such visual depiction has actually been transported ...

The plain reading of this statute requires a visual depiction to have been produced and that the person who produced the visual depiction to know it will be transported or ith was actuallly transported. Without a visual depiction there cannot be a conviction. The same goes for 18 USCS 2252(a)(2)(A) and 18 USCS 2252(a)(5)(B). They all require an image or visual depiction of actual child pornography, with any visual depiction or image there is no evidence to convict a person.

Further 18 USCS 1512(b)(1) , not only requires the use of "intimidation, threatens or corruptly persuad[ing] another person, or attempt[ing] to do so, or engag[ing] in misleading conduct toward another person, with intent to influence, delay, or prevent the testimony of any person" it requires to do so with the intent to do "in an official proceeding".

Not only is Petitioner not guilty of the crime of producing child pornography, because there never was any visual depiction, Petitioner is not guilty of any of the other crimes accussed of. Again there was never any visual depiction of child pornography disocovered in this case and the proceeding was not an official proceeding in which testimony was influenced in, it was a state proceeding which does not fall under "an official proceeding".

Petitioner in not guilty, and the violations require reversal.

III. WHEN THE POLICE CHARGED WITH AN INVESTIGATION ACTS IN SUCH A WAY AS TO SHOCK THE CONSCIENCE DESTROYING THE FAIRNESS, INTEGRITY, AND HONOR OF THE OPERATION OF THE CRIMINAL JUSTICE SYSTEM BY REPLACING SEIZED PROPERTY WITH ANOTHER ITEM AND THEN FALSELY CLAIM TO HAVE FOUND INCRIMINATING EVIDENCE TO SECURE A CONVICTION AND THEN SUPPRESS THEIR OWN DOCUMENTATION PROVING THIS FACT, HAS A CRUCIAL DENIAL OF DUE PROCESS IN VIOLATION OF THE FEDERAL CONSTITUTION'S FIFTH AMENDMENT ACCURED, REQUIRING REVERSAL OF THE CONVICTION?

On September 27, 2007, the Oswego County, New York, Sheriff's executed a search warrant at Petitioner's residence seizing among other items a Compaq model EVO laptop serial number p106x420bc12xol and a Fijitsu hard-drive model MPE3136AT serial number 30ktt401046595. Then during an alleged forensic examination of these items, the same office who conducted the search, claims to have discovered "photographic and video files" wich "would be considered child pornography". (ATT. 23-24) The officer claims his computer forensic examination was conducted from "September 27, 2007 through December 18, 2007" (ATT. 22) Other than this unsigned and undated forensic report there is no evidence that a forensic examination was actually conducted, even the Evidence/ Property Report uterly fails to show the items ever being removed for a forensic examination.

Before the end of September 2007, a Magistrate had ordered the seized itmes secured "in accordance with their standard

operating procedures and pursuant to CPL section 690.55." (ATT. 21)

On October 3, 2007, a member of the sheriff's office, identified in the Evidence/Property Report as B.J. Blake, gave to L.J. Totman a generic Compaq laptop with no model or serial number for storage in the evidence locker and entry in the Evidence/Property Report. On June 16, 2010, an R. Pitcher removed the generic Compaq laptop and gave it back to B. Blake. (ATT. 8, 16) This clearly was not the same Compaq laptop model EVO serial number p106x420bc12xol seized on September 27, 2007. The same goes for the Fijitsu hard-drive model MPE3136AT serial number 30KTT401046595, a total of six (6) hard-drives are listed as being seized by B. Blake, each with unique and identifiable make, model, and serial numbers, however, again B.J. Blake secured six generic hard-drives with no make, model, or serial numbers in the evidence locker on December 31, 2007, and on January 4, 2008. (ATT. 17-19, 20, 11-12, 15) One must ask himself, where did these generic hard-drives and generic Compaq laptop come from if not the sheriff's own stock and supply.

This is a unique circumstance, one in which Petitioner has not been able to find happening in any other case in the district courts, the courts of appeals, or this Court's own cases.

This is not simply a bald asertion unsupported, but quite the opposit. These allegations are one hundred persent supported by

the Government's own documents. Documentation, that nevertheless, was suppressed by the Government and law enforcement until anonymously mailed to Petitioner at the Institution through the regular prison mail with no indication of the sender or the date it was mailed.

Being there is no published case law pertaining to such a situation, this Court should provide guidance in this case. Every court that Petitioner had addressed this issue in has glossed over the claim with no response.

The actions of the Oswego County, New York, Sheriff's Department in this case should shock the conscience of any reasonable person, as the law enforcement in this case so clearly trampled on the "fairness, integrity, and honor in the operation of the criminal justice system", which Due Process requires. Moran v. Burbine, 455 US 412, 467 (1986).

"It is the obligation of the prosecution to establish the chain of custody ... that is to establish the identity and integrity of physical evidence by tracing its continuous whereabouts." Melendez-Diaz v. Massachusetts, 557 US 305, 335-36 (2009). The prosecutions own documentation in this case make that obligation an impossibility in this case. This case even transends into the Sixth Amendment to the U.S. Constitution which provides that, "in all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against

him." The witnesses in this case, the alleged photographs and video files, never existed.

An investigating agency, such as law enforcement, cannot be permitted to ever again replace seized items with items of their own and then falsely claim to have found evidence on those items in order to obtain a conviction.

This conviction cannot stand and must be vacated.

REASONS FOR GRANTING THE PETITION

The Tucson Arizona District court has decided an important federal question in a way that has so far departed from the accepted and usual course of judicial proceedings in a way that conflicts with relevant decisions of this Court, calling for an exercise of this Court's supervisory power. The Ninth Circuit court of appeals has declined to issue a certificate of appealability on the issues presented, falsely claiming a lack of a denial of a constitutional right. On February 14, 2019, after filing a motion under 28 USCS 2241 in the Tucson District court, bringing to light newly discovered evidence that; (1) clearly proves a total lack of evidence for the conviction; (2) was provided to Petitioner in September 2017; (3) has a last entry date of June 16, 2010; (4) could not have been discovered even with due dilligence as it was suppressed by law enforcement; (5) was required to be provided to the defense under the rule of Brady v. Maryland, 373 US 83 (1963); (6) was promised by the prosecution to have been provided under the rules of Brady and Giglio, the Tucson District court denied relief under 28 USCS 2241. In denying relief the Tucson District court claimed that, "Even if true" that Petitioner is actually innocent of his convictions, he has not shown that he lacked an unobstructed procedural shot to pursue his claims and "that the legal basis for his claims did not arise until after he had exhausted his first 2255 motion."

This claim by the Tucson District court ignores the facts presented, as well as the fact that; (1) Petitioner is a Pro Se

litigant with no legal training and that the pleading was to be liberally construed; (2) Petitioner did show that he lacked an unobstructed procedural shot to pursue his claims, as the legal basis for the claim did not arise until after he had exhausted his direct appeal and first 2255 motion; and (3) it was on March 6, 2014 the trial court denied the first 2255 motion while the newly discovered evidence (EVIDENCE/PROPERTY REPORT) did not come to light until September 2017, 3-years later.

Petitioner, however, did not stop with that decision, being a Pro Se litigant, Petitioner filed a motion for rehearing showing how the court was incorrect in their ruling. Petitioner attempted to prove; (1) the newly discovered evidence did not come to light until Septmber 2017, 3-years after the denial of the first 2255 motion; (2) the newly discovered evidence shows a total lack of evidence for a conviction; (3) the law enforcement agency charged with the seizure, storage, and forensic examination of the seized items tampered with the seized items by replacing certain items with ones from their own supply; and (4) how all of this proves the police falsely claimed to have had evidence for a conviction. The court denied the motion on March 6, 2019.

Petitioner then filed for a Certificate of Appealabilty with the Ninth Circuit court of appeals, and was denied on September 13, 2019. The court failed to see the Brady claim and the denial of Due Process as a denial of a Constitutional right and that Petitioner did show "that jurist of reason would find it debateab le whether the district court was correct."

Petitioner, while Pro Se and in artful in his pleadings, is at a loss to be any plainer. On September 27, 2007, the Oswego County, New York, Sheriffs Department executed a general warrant for items "which would tend to identify criminal conduct." The affiant of the warrant swore that he "was responsible for identifying and collecting the evidence and items to be seized within the scope of the warrant". It would have been very difficult to have not noticed the warrant was for any evidence of any criminal conduct without limit. The Second Circuit, however, claimed the officer had good faith in believing the warrant valid. This Court denied certiorari on the issue. Finally in September 2017, Petitioner is provided in the until mail a copy of the Sheriff's EVIDENCE/PROPERTY REPORT, with no indication of the sender or the date mailed. Petitioner had believed that all documentation including all Brady material had been provided as the Assistant U.S. Attorney on the case had affirmed she would provide all requisite Brady and Giglio material early in the proceedings. After receiving the EVIDENCE/PROPERTY REPORT, Petitioner noticed that not all the property seized on September 27, 2007, had been secured until 6-days to over three months later. Leading to the logical conclusion that these items remianed unsecured, susceptable to tampering and replacement. It was then noticed that the Compaq model EVO laptop serial number p106x420bc12xol on which the same office claimed to have discover ed evidence was missing, and never secured, and had been replaced with another Compaq laptop, one with no model or serial number. This was strange since every other computer was secured and logged

with its unique identifiable make, model, and serial numbers. Then upon further inspection it was noticed that the six hard-drives seized on September 27, 2007 and listed on the seizure sheet, each identified by its unique make, model, and serial numbers were missing from the report, replaced by six unknown hard-drives. Then there is the issue of the "numerous" CDs, floppy disc, and zip disc, these were never individually indified and there is no way to know what was seized let alone stored in the evidence locker, since they are logged in as "one paper bag containing various CD'S". Finally and most important of all is the fact that there is no mention or evidence of child pornography in the case or the EVIDENCE/PROPERTY REPORT. As such there never was any evidence to charge or convict Petitioner of the crime 18 USCS 2251(a) Production of Child Pornography. Petitioner is not guilty of the crimes convicted of.

This, Court numerous times, has very clearly stated that convictions totally devoid of evidentiary support violates Due Process. Harris v. United States, 404 US 1232, 1233 (1971); Gregory v. Chicago, 394 US 111, 112 (1969); and Thompson v. City of Louisville, 362 US 199 (1960). The Due Process violations in this case cannot be made any plainer.

In McDonough v. Smith, 139 S. Ct. 2149, 2155 n.2 (2019), this Court left open the proper handling of fabricated evidence claim founded on an allegation that the use of fabricated evidence was so egregious as to shock the conscience, the actions by the law

enforcement in the case go far beyond shocking the conscience. We are not talking just fabricated evidence to obtain a conviction, this was pure purjury by law enforcement and the Government to claim there was evidence, when truely there never was any, combined with the suppression of the truth by the same law enforcement officers and prosecutor.

This Court in United States v. Russell, 411 US 423, 431-32 (1973), stated, "We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that Due Process principles would absolutely bar the government from invoking judicial process to obtain a conviction ..." This is the day. "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law is the transcending value at stake" here. Sherman v. United States, 356 US 369, 380 (1958).

This case calls for the exercise of this Court's supervisory power to correct, and has been in the past, but should be sttled by this Honorable Court.

CONCLUSION:

This case involves blatant violations to the Due Process guarantee of the Fifth Amendment to the United States Constitution and a violation of the Sixth Amendment to the United States Constitution. The law enforcement in this case, along with the United States Attorney's Office for the Northern District of New York, suppressed documentation material to the defendant's guilt and punishment that is favorable to the defense in violation of Brady v. Maryland, 373 US 83 (1963). Documentation which proves the innocence of Petitioner and unequivically proves the fact that the law enforcement officer who wrote the search warrant in this case, executed the search warrant, seized items , and performed the forensic examination on the seized items willfully replaced the Compaq model EVO laptop the Fijitsu model MPE3136AT hard-drive with items from his own supply and tampered with the items. This documentation proves beyond any doubt that there never was any evidence to convict Petitioner.

Had this documentation been provided to the defense prior to any plea offer, as the Assistant U.S. Attorney had affirmed would be provided, the results of the proceedings would have been different, Petitioner never would have accepted any plea offer and would have demanded a trial or dismissal of the charges, just as what happened in the Oswego County, New York State court when Petitioner was provided medical reports and a rape examination both of which were negative for any evidence of child sexual abuse

and negative for any history of sexual abuse, Petitioner demanded a trial and refused all plea offers even when the judge on the case told Petitioner that he would still be found guilty and the judge would sentence Petitioner to life.

Law enforcement and prosecutors committing perjury or submitting false reports to obtain a conviction is a rampant problem, begging this Honorable Court to step and put a stop to. As a USA Today article states, "Since 1988, data from the National Registry of Exonerations shows 987 people have been convicted, then exonerated in cases that involve a combination of official misconduct by prosecutors and perjury or a false report by police and other witnesses." USA Today Weekend Ed., October 18-20, 2019. (ATT. 31-33)

In a USA Today Weekend, October 18-20, 2019, reporters published a report on an investigation on prosecutors lack of compliance with the 1963 U.S. Supreme Court ruling in Brady v. Maryland, 373 US 83. What they found includes, that "Thousands of people faced criminal charges or went to prison based in part on testimony from officers deemed to have cridibility problems by their bosses or prosecutors. At least 300 prosecutors' offices across the nation are not taking steps necessary to comply with the Supreme Court mandates. ... The National Registry of Exonerations shows that cases overturned because of perjury and official misconduct by prosecutors or police have more than doubled from 2008 to 2018." Investigators also uncovered a slide presentation for Miami prosecutors which "cast the strategy of hiding officer misconduct as a contest between prosecutors and the defense." One slide quotes United States v. Bagley, 473 US 667 (1985), "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome", accompanied with a picture that reads, "You were happily playing Scabble ... but now your playing Chess, THAT'S A GAME CHANGER SON".

This is clearly a rampant problem crying out for this Court to step in and put a stop to. "Since 1988, data from the National Registry of Exonerations shows 987 people have been convicted, then exonerated in cases that involve a combination of official

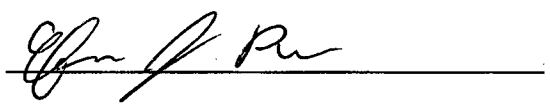
misconduct by prosecutors and perjury or a false report by police and other witnesses."

This case involves official misconduct by the prosecutor in suppressing documentation showing her officers had tampered with evidence by replacing items seized with items from their own inventory, then created a false report claiming that they had found images of child pornography, when in fact there never was any images or video discovered of child pornography. This was nothing more than law enforcement conducting a general search for any evidence of any criminal conduct without limitation, then them fasley claiming to have found evidence of the most heinous crime, than for nother more to just get a feather in their cap for stopping a crime which never happened. Conduct of this nature cannot be allowed to persist.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: November 17, 2019