No._____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM F. WALSH, IV,

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

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PETITION FOR A WRIT OF CERTIORARI

DAVID A. SCHLESINGER
JACOBS & SCHLESINGER LLP
The Douglas Wilson Companies Building
1620 Fifth Avenue, Suite 750
San Diego, CA 92101
Telephone: (619) 230-0012
david@jsslegal.com

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Under Old Chief v. United States, 519 U.S. 172 (1997), the government in a criminal case has only a presumptive – but not an unqualified – right – under Rule 403 of the Federal Rules to present its case-in-chief as it sees fit. Thus, whenever a defendant offers to stipulate to an offense's essential element to avoid the jury's reviewing prejudicial materials, "[i]t would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd." Id. at 183-84.

The question presented is as follows:

Did the Ninth Circuit's disposition of Petitioner's Rule 403 claim, based on the district court's having abused its discretion by rejecting his proffered stipulation that would not only have conceded several essential elements under 18 U.S.C. § 2252, but also would have permitted a government agent to testify narratively to the jury about what certain images and videos depicted, conflict with Old Chief's rule?

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:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Southern District of California, United States of America v. William F. Walsh, IV, No. 3:17-cr-1269-001-AJB. The district court entered judgment on May 24, 2018.

2. United States Court of Appeals for the Ninth Circuit, United States of America v. William F. Walsh, IV., No. 18-50160. The Ninth Circuit entered judgment on November 21, 2019, and denied Petitioner's petition for panel rehearing on December 10, 2019.

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Petitioner William F. Walsh, IV, respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on November 21, 2019.

OPINION BELOW

A three-judge panel of the Ninth Circuit originally issued an unpublished memorandum disposition and entered judgment on November 21, 2019, affirming Petitioner's conviction and vacating his sentence in part.[1] The panel later denied

[1] A copy of the memorandum disposition is included in the Appendix. See App.1-5.

Petitioner's petition for panel rehearing on December 10, 2019.[2] App. 35.

JURISDICTION

The Ninth Circuit entered judgment in this case on November 21, 2019, and denied rehearing on December 10, 2019. App. 1-5, 35. This Court has jurisdiction under 28 U.S.C. § 1254(1). See also S. Ct. R. 13.3.

STATUTORY PROVISION INVOLVED

Rule 403 of the Federal Rule of Evidence reads as follows: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

STATEMENT OF THE CASE

Although Petitioner disputes that he was involved in this case's operative events, he will endeavor to – as the Court specified in Jackson v. Virginia, 443 U.S. 307 (1979) – present the facts pertinent to his petition in the light most favorable to the government. Nevertheless, Petitioner emphasizes that – notwithstanding the jury's verdict in his case – he continues to maintain his

[2] A copy of the order denying rehearing is included in the Appendix. See App. 35.

innocence regarding the charges that the indictment sets forth.

A. Petitioner is Born and Raised in Massachusetts

Petitioner William Francis Walsh, IV, was born in Boston in 1962. He was the oldest of five children in a two-parent household that resided in Watertown, Massachusetts, just outside of Boston. Both of Petitioner's parents worked full-time to support their large family; his father was a firefighter, and his mother worked as a court secretary. App. 222, 274, 299.

B. Petitioner Thrives Athletically in High School, Before Enlisting in the United States Marine Corps

Attending high school in Watertown, Petitioner played football, basketball, and baseball. Because he grew up in a family with a recent tradition of serving in the military, Petitioner decided after graduating to enlist in the U.S. Marine Corps in July 1981. App. 275, 299.

Primarily working in the USMC as a "heavy equipment operator," Petitioner rose steadily throughout the non-commissioned ranks during his approximately four-year tenure on active duty, ultimately becoming a Corporal. App. 304. During those years, the military stationed Petitioner in three separate states (California, Missouri, and South Carolina) and Japan. App. 299.

The USMC discharged Petitioner honorably in March 1985, but he served

for more than two additional years in the reserves. He finally left the service altogether via an administrative discharge in July 1987, attaining the rank of Sergeant. App. 275, 299.

Petitioner's service in the USMC was distinguished, resulting in his receiving a "Good Conduct Medal, Meritorious Mast, Letter of Appreciation, and Rifle Marksman Badge." App. 275, 299.

C. Petitioner Becomes a Long-Time Firefighter, But Sustains Job-Related Injuries That Persist Throughout His Life and Compel Him to Find Different Jobs

After leaving the USMC, Petitioner trained to work as a firefighter. He found employment at Camp Pendleton in northern San Diego County, beginning in 1989. App. 303. Additionally, through his training, Petitioner eventually became a certified emergency medical technician. Id.

But quite unfortunately, while fighting a blaze in 1994, Petitioner "inhaled smoke from poison oak." App. 301. Doing so, "caused" Petitioner "to lose 80 percent of his respiratory capacity." Id. Ultimately, that lingering condition made it "difficult" to continue as an "active fire fighter," and he left his job at Camp Pendleton to seek work in another field. Id.

D. Petitioner's First Marriage Yields Two Children, But Ends in Divorce Amidst Alcohol Abuse by Both Spouses

Just before he started working as a civilian at Camp Pendleton, Petitioner met Tracy Bueller. They soon became involved romantically, and married approximately two years later in 1990. Bueller later gave birth to the couple's two now-adult children, William Francis Walsh V and Whitney Marie Seals. App. 275, 299.

Unfortunately, the young couple (both of whom were approximately 26 years old when they met in 1988) drank too much alcohol during their marital relationship, resulting in repeated "arguments" and other "problems."[3] App. 299. Eventually, Petitioner and Bueller drew apart, and they divorced in 1996 because of "irreconcilable differences." Id. (internal quotation marks omitted).

Despite the couple's divorcing when their children were still young, Petitioner remained close to them. App. 299. And both his son and his daughter continued to support Petitioner during his district court proceedings. Id.

[3] Petitioner unfortunately continued to drink heavily through 2015, consuming a twelve-pack of beer approximately every other day. He ascribes that practice to the "military culture" in which he was inculcated after enlisting in the Marines in 1981. App. 302.

E. Petitioner Begins a Long-Term Relationship with His Common-Law Wife

Following his divorce, Petitioner started a long-term "romantic relationship" with Patricia Chisholm. Soon thereafter, in 1999, the couple entered into an official "civil union" in California, which persists to this day. App. 207-08, 217, 300.

F. Petitioner Eventually Finds Regular, Gainful Employment in Military Firefighting Units

Notwithstanding the job-related injuries that ultimately caused him to retire as an active in-the-field firefighter, Petitioner managed to remain employed steadily until November 2015. After initially leaving his first post-military job, Petitioner "worked as a general contractor for Vinco Construction," for approximately four years. App. 303.

But after the tragic events of September 11, 2001, Petitioner yearned to return to firefighting. Although his injuries precluded him from front-line duties, he secured a job as a dispatcher for the Miramar Fire Department at the USMC Miramar Air Station in San Diego. He remained there until sometime in 2008. App. 303.

At that juncture, the military "promoted" Petitioner to "shift supervisor" and transferred him back to where he had started his post-military career: Camp

Pendleton, where he became a "shift supervisor dispatching technician." He worked in that position until approximately November 2015. App. 303. During his tenure at the Camp Pendleton Fire Station, Petitioner became a decorated employee, including receiving a "Firefighter of the Year" award in 2004 for his work during the "San Diego Cedar Fire." Id.

During 2015, Petitioner worked the "graveyard" shift at Camp Pendleton. That necessitated his reporting to work each evening at 7:00 p.m. for a twelve-hour shift, lasting until 7:00 a.m. App. 212-13, 227, 230. Petitioner's schedule consisted of two off days sandwiched between, respectively, two and three consecutive days when he would be on duty. App. 227. During duty days, Petitioner would leave his house at 5:40 p.m., drive to a local Albertson's supermarket to purchase his breakfast and lunch, and then commute to Camp Pendleton to work. App. 228-29.

G. An Escondido Police Detective Obtains Sexually Explicit Content Involving Children from a Computer with an IP Address Traced to Petitioner's Residence, and Later Executes a Search Warrant

The operative events of this case ostensibly commenced on April 16, 2015. Detective Damon Jackson, an employee of the police department in Escondido, California (located in northern San Diego County) who concentrated on investigating on-line sex crimes perpetrated against children, used specialized

software on a peer-to-peer network to investigate IP addresses from purported child pornography distributors. App. 94-108. From one of those addresses, Detective Jackson downloaded two video files containing sexually explicit activities involving prepubescent girls. App. 114-17, 129-30.

Detective Jackson later connected with the same suspect IP address the following day and on May 7, 2015. During each of those sessions, he once again downloaded a video file with prepubescent girls involved in sexually explicit conduct. App. 114-17, 129-30. At trial, Detective Jackson acknowledged during the government's rebuttal case that he could not determine whether the two distributed files had been downloaded from that IP address. App. 243-44.

Following Detective Jackson's initial peer-to-peer contact on April 16, 2015, he determined that the IP address pertained to a subscriber of Cox Communications's Internet services. After receiving specific information from Cox, including the MAC and serial numbers for the IP address's router, Detective Jackson discovered that the subscriber was Patricia Chisholm, Petitioner's common-law wife, who resided at a home in nearby Vista, California. Further investigation yielded information that Petitioner also lived at the same address. Detective Jackson additionally learned that Chisholm's and Petitioner's home wireless network was "secure and password-protected." App. 118-23, 140.

Based on his downloads from the suspect IP address and his follow-on investigation, Detective Jackson applied for and obtained a search warrant for Chisholm's and Petitioner's residence in Vista from a California Superior Court judge. Upon executing it on July 14, 2015, at 7:50 a.m., Detective Jackson and other Escondido Police Department personnel encountered only Petitioner in the residence. App. 123-24, 132-33, 136-37. Officers then concentrated their search on the house's "master bedroom" and an "upstairs office area that had a computer in it." App. 138.

One officer told Petitioner that they were searching for digital child pornography. App. 138-39, 205. While the search was ongoing, Petitioner engaged in what officers characterized as a "casual" conversation with Detective Jackson. App. 134.

Among other things, Petitioner denied having used a peer-to-peer network or Limewire, a type of software that persons often use to partake in that online activity. He did acknowledge having downloaded a pirated digital copy of the movie entitled "American Sniper." App. 141, 203. Petitioner also supposedly told Detective Jackson that, except perhaps for his stepson, he did not give his laptop's password to other people. App. 205.

Perhaps most significantly, Petitioner was surprised the police had appeared

at his house, and he denied knowing that there was sexually explicit content involving minors on his laptop's hard drive. App. 204. And he also told Detective Jackson about his son Billy's frequent visits to Petitioner's house. App. 237.

Petitioner compiled fully with all of the searching officers's requests. He did not attempt to flee his residence or obstruct anyone from executing the warrant. App. 135.

H. The Same Police Detective Forensically Examines a Seized Hard Drive, and He Discovers Sexually Explicit Content Involving Minors

After completing the search, Detective Jackson extracted a hard drive from a Dell laptop computer the police had seized from the office area in Petitioner's residence. App. 142-46. Detective Jackson then mirror-imaged the drive and used forensic software to analyze it. And he discovered that a user of that computer had accessed the Ares Network (a person-to-person network) between March 26 and May 22, 2015, to download 375 complete files involving minors engaged in sexually explicit conduct. App. 146-55. The file descriptions illustrated that at least some of the images contained girls younger than fourteen.[4] Whoever had

[4] Some of the file descriptions that Detective Jackson read to the jury were quite graphic, therefore not necessitating that the jury actually have viewed the images to understand what they contained. For example: "13 real childporn

used the computer to download images had done so 55 times, and then had made them available for others to access and download via peer-to-peer networks. App. 156-57, 167.

Additionally, Detective Jackson determined based on emails and computer registry information that he recovered during his forensic examination that Petitioner on March 16, 2015, apparently purchased, downloaded, and activated Lime Pro software on the Dell Laptop's hard drive. App. 157-67.[5] A user of that computer employed a VLC media player to watch illicit videos from the external device, then plugged into the laptop. App. 167, 186.

Further, Detective Jackson found additional images and video on the laptop that involved minors engaged in sexually explicit conduct. As he detailed during his testimony, Detective Jackson discovered forty-seven thumbnail-sized images "that were indicative of child pornography." App. 174-76. He also found an illicit video in the hard drive's unallocated space – in other words, no longer in the computer's active memory. App. 176.

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illegal preteen underage Lolita kiddy," and "kids sex, 13-year-old girlfriend shows super hard core incest preteen." App. 154 (internal quotation marks omitted).

[5] Detective Jackson also found evidence that a user employed the laptop to view sexually explicit conduct involving minors that had been stored in the external hard drive. App. 168-73.

I. A Federal Grand Jury Indicts Petitioner

A federal grand jury empaneled in the Southern District of California returned an indictment on May 19, 2017. The indictment alleged that Petitioner had violated 18 U.S.C. §§ 2252(a)(2) and (a)(4)(B) by supposedly distributing materials containing sexually explicit conduct involving minors on April 17 and May 7, 2015, and allegedly possessing it on July 14, 2015. App. 36-39.

J. Petitioner Moves Under Rule 403 to Preclude the Government from Introducing Images and Videos Depicting Sexually Explicit Conduct Involving Minors, but the District Court Denies it

Cognizant that five images and five videos in the government's prospective case-in-chief contained highly-inflammatory material that would prejudice reasonable jurors against him – before even considering the ultimate issue, whether Petitioner knowingly possessed and/or distributed it – Petitioner filed a motion in limine on February 7, 2018. Petitioner expansively offered not only to stipulate that the material at issue constituted sexually explicit conduct involving minors, under §§ 2252(a)(2) and (a)(4)(B), but also to permit the government to proffer detailed narrative descriptions of what the images and videos depicted. App. 15, 39-41.

To give the Court a general sense of what such lengthy narratives would have involved, Petitioner presents the following summary of one downloaded

video that Petitioner's trial counsel read in open court on February 12, 2018, during a motion hearing:

> The video is one and forty seconds in length, and depicts a completely nude adult male lying on his back with a completely nude, very young girl, preteen, straddling him while facing away. The setting appears to be in a dark bedroom and the scene appears to be lit by a flashlight, with the concentration of the light on the adult and the child's genitals. In the first portion of the video, the male is inserting his erect penis into the child's vagina with the use of his hands, and uses both hands to forcibly move the child up and down on his penis as he continues to penetrate her.
>
> The video then changes to show the child lying down on her back with the male penetrating her vagina with his penis and pulling his penis out and ejaculates on the child's abdomen and genitals. The child then rubs the semen on herself with her hands as the male continues to penetrate the child's vagina. The video then cuts out. In this video, the adult and the child's faces are not shown.

App. 15-16.[6]

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[6] For purposes of brevity – and because of their graphic nature – Petitioner does not present them in the body of his petition, but will later furnish via footnotes the narrative descriptions that a government witness provided the jury during trial testimony on February 28, 2018, after publishing the challenged images and videos. See infra at 17-19 nn.10-13.

Undersigned appellate counsel for Petitioner apologizes to the Court for presenting this material in the body and the footnotes of this petition. He notes, however, that he believes it is necessary to do so to give the Court an exemplar of what the jury would have heard if the district court had granted Petitioner's motion to preclude and, alternatively, had adopted the evidentiary presentation that Petitioner had proposed.

Unwilling to accept Petitioner's offer, the government opposed. It contended that Old Chief v. United States, 519 U.S. 72 (1997), and United States v. Ganoe, 538 F.3d 1117 (9th Cir. 2008), gave it wide latitude to structure its evidentiary presentation in a § 2252 case as it wished. App. 13-14. The government further argued that it deemed the actual images and videos to be relevant to whether Petitioner not only possessed them, but also distributed them on the two occasions that the indictment alleged. App. 17.

After considering the parties' arguments, the district court agreed entirely with the government's position, and therefore denied Petitioner's motion in limine under Rule 403:

> See, I think Ms. Cabral articulates it quite well. It's more than just the images. It ties into the case in many ways, touching on a variety of the components here. And if we keep it to a discrete set, which appears to be what the government intends here with three-to-four pictures, five-to-six thumbnails, and snippets, 10-to-20 seconds of the five videos, I am going to allow it. I think that the probative value cutting across several issues outweighs any potential prejudice.

App. 17-18.

K. During Jury Selection, Several Prospective Jurors Express Actual and Implied Bias Toward Petitioner Because of the Case's Subject Matter, and Others, Including One Who Was Selected, Manifest Extreme Discomfort

During jury selection on February 27, 2018, the district court notified 60 prospective members of the panel after they convened in the courtroom that the indictment against Petitioner involved allegations that he had possessed and distributed sexually explicit content involving minors. App. 21, 44-46. Later that day, one of the government's prosecutors observed that giving even that cursory summary of the case's subject matter to the pool caused a visceral and noticeable emotional reaction:

> And the first time you heard it was a child exploitation case, your faces fell. And that is understandable. And a lot of you are uncomfortable with that. And that is okay to be. The fact that you don't want to be here on this type of case is okay.

App. 78-79 (emphasis added)).

Following up on that general description of what the case would involve, the district court then asked the assembled persons during court-directed voir dire whether they would be biased against Petitioner based on what the indictment charged. App. 47-48. Candidly, at least ten persons told the district court, the prosecutors, and Petitioner's defense counsel they would indeed be unable to

judge the government's case-in-chief impartially because it concerned sexually explicit conduct involving minors. App. 48-58, 66-67, 70-72. Fortunately for Petitioner, the district court struck all of them from the jury pool for cause.[7] App. 80-93.

But perhaps more troubling for Petitioner, four other prospective jurors indicated following further questioning from the district court,[8] one of the prosecutors, and Petitioner's trial counsel that they had heightened discomfort about viewing the images and videos the government would be publishing during its case-in-chief. App. 59-66, 68. Indeed, at least one was so troubled that she could be exposed to that graphic evidence that she notified the district court she

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[7] The district court also struck a veteran prosecutor from the Orange County District Attorney's office for cause because she – as someone who had prosecuted cases involving sex crimes against children – exhibited implicit bias concerning the subject matter. App. 49, 69-70, 81. Further, the district court excused other jurors for cause because they had more generally exhibited some forms of pro-government bias, albeit not specifically derived from this case's subject matter. App. 73-77, 82, 90-91.

[8] The district court specifically stated and queried as follows: "Is there anyone here who feels that they would be uncomfortable having to see, in a limited form or fashion – only enough that is appropriate for the case – images or video clips allegedly depicting minors engaged in sexually explicit conduct, that isn't otherwise already biased?" App. 59. Further, the district court later responded to a prospective juror's nervous question by acknowledging that at least one of the victims at issue allegedly was a prepubescent minor, which particularly unnerved her. App. 64-65.

would not "view it" when the government displayed and played it at trial. App. 60-61.

Once again, Petitioner was fortunate that the district court struck for cause three of those pool members who openly mused about their discomfort. App. 80-93. But disturbingly, one of the twelve empaneled jurors was someone who had indicated expressly that it would make him uncomfortable to watch the images and video in open court during the government's case-in-chief.[9] App. 68, 82.

Having already ruled that the government was entitled to publish the graphic images and video to the jury (App. 17-18), the district court did not separately question the prospective jurors during the selection process about whether it would be different if the government at trial were limited to reading narrative descriptions of what its evidence depicted.

L. The Government Publishes a Total of 10 Graphic Images and Videos During its Case-in-Chief

Over Petitioner's continuing (but once again overruled, App. 192) objections, the government used Detective Jackson's direct examination to introduce as evidence five videos located in the suspect laptop computer's hard

[9] In particular, that juror stated as follows upon questioning: "So, after that clarification, I would be uncomfortable but I feel like I could still be impartial." App. 68.

drive in which minors participated in activities involving sexually explicit conduct. App. 192-95. The file names for them were as follows: (a) "!11 year strip #ptsc sdpa opva hussy fan kinder kutje #mpg"[10] (App. 192); (b) "!!! Dasha debut Russian pthc.avi"[11] (App. 193-94); (c) "new hussy fan Russian 8 yo blond"[12] (App. 194-95); (d) "2010 pthc baby shivid video"[13] (App. 195); and (e) an

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[10] The government played twenty-six seconds of that video file for the jury to view. Detective Jackson's narrative description for the record was as follows: "The video, in its entirety, is of a girl that was seen dancing in and out of various outfits. She takes the clothing completely off, and she dances in front of a camera in different outfits, where she is seen nude." App. 193.

[11] The government played twenty seconds of that video file for the jury to view. Detective Jackson's narrative description for the record was as follows: The girl that was viewed on there is completely nude. She is at various stages of masturbating herself, with the focal point being on her genitalia. Near the end of the video, she is approached by a clothed adult male, who then exposes his erect penis. And the girl pictured in the video then orally copulates that male in the video." App. 194.

[12] This is the same file that, as Detective Jackson testified, he downloaded from the suspect IP address on April 17, 2015. App. 194-95. The government played ten seconds of that video for the jury to view. Detective Jackson's narrative description for the record was as follows: "The girl that was pictured in that video was a prepubescent girl. The video is of her orally copulating the adult male pictured in the video, inside of what appears to be a vehicle." App. 195.

[13] This is the same file that, as Detective Jackson testified, he downloaded from the suspect IP address on May 7, 2015. App. 195-96. The government played ten seconds of that video for the jury to view. Detective Jackson's narrative description for the record was as follows: "This video depicts a female toddler being sexually penetrated by an adult male, who puts his erect penis inside of the child's vagina. There are several clips that essentially show that there are separate acts, what appears to be the same child, same male engaged in the same

unlabeled video that Detective Jackson found in the laptop's unallocated space[14] (App. 196).

Further, also over Petitioner's continuing objection (App. 192), the government displayed five thumbnail images for the jury to view. As Detective Jackson described them, the first four were images that were from the fourth video that the government played for the jury. App. 197. And the fifth, as Detective Jackson described, "depicts an adult male wearing a multicolored shirt, that is on top of a young pre-pubescent girl who is nude." App. 197-98.

M. The Government and Petitioner Offer Dueling Evidence Regarding Whether He Was the Suspect Laptop's Exclusive User

During his testimony during the government's case-in-chief, Detective Jackson acknowledged that the online phase of his investigation could not

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type of act of the full sexual penetration. Near the end of the video, the male then removes his penis and ejaculates on the girl's abdomen, at which point you can see the toddler's hand come down and she is smearing the ejaculate on her abdomen while the male re-penetrates the child and then the video turns off." App. 195-96.

[14] The government played ten seconds of that video for the jury to view. Detective Jackson's narrative description for the record was as follows: "The prepubescent girl that was seen in the video, she fully undresses. The camera continues to focus in and zoom in on her genitalia. The video then transitions to another scene where the same girl is then inside of a bathtub with a girl that is maybe a couple of years older than her, another pre-teenage girl. The two are then showering with one another. The older girl is washing the younger girl and spraying her with a removable shower nozzle, using the nozzle as a device to spray the young girl in the genitals." App. 196-97.

determine that Petitioner (or any particular person, for that matter) was using a computer at the suspect IP address when the downloads occurred. App. 126-28. But he further testified that – based on his forensic analysis of a hard drive from a laptop used at the suspect IP address – that Petitioner apparently purchased two types of software commonly used for peer-to-peer encounters online. See, e.g., App. 181-84.

Detective Jackson noted that he found digital evidence that corroborated Petitioner's having acknowledged to have downloaded and watched a pirated copy of "American Sniper" via Bittorrent (a software used for file sharing) and a VLC media player.[15] App. 182-84, 232. Further, Detective Jackson noted that was the same player that someone had used to view videos of sexually explicit conduct involving minors via an external device plugged into the laptop. App. 185-87. Notably, however, Detective Jackson acknowledged that the police did not recover that device when it searched Petitioner's residence. App. 199-202.

Further, Detective Jackson testified that the registered user of the suspect laptop (named "Bills laptop" [sic]) used Petitioner's email address (the same one associated with the Limewire software purchase, see supra at 11). The laptop also

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[15] In total, users of that laptop employed Bittorent 61 times, and Limewire 55 times. App. 244. Petitioner testified that he used Bittorent only once, and did not use Limewire. ER 241-42.

contained only one password-protected account: "William." App. 165-66, 177. Petitioner testified that he did indeed purchase Limewire, but only because doing so entitled him to download an "unlimited" number of movies.[16] App. 232.

Moreover, Detective Jackson did not detect any logins that occurred without using that particular password. App. 177-78. He noted that someone who accessed the computer had used it to change Petitioner's Facebook password on May 6, 2015. App. 178-79, 238. Detective Jackson also located evidence that Petitioner had apparently purchased Turbo Tax on April 10, 2015, around the same time that someone using the laptop had employed the Ares person-to-person network to download files to the computer's hard drive.[17] App. 180-81. He also discovered that someone had logged onto social media websites (such as LinkedIn, Twitter, and Instagram) from that laptop. Id.

Additionally, during the period when Detective Jackson suspected someone had used the laptop to download illicit images and videos, Petitioner had apparently used the computer to write an employment letter. The hard drive also

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[16] Petitioner testified that Chisholm, as the account holder, received notice from Cox Communications that someone had illegally downloaded "American Sniper." And that prompted the Limewire purchase. App. 233-35.

[17] Petitioner acknowledged having purchased Turbo Tax, but only so that his son could use it to file his son's tax return. App. 238-39, 241-42.

contained documents regarding medical history and related issues. App. 181-82.

Detective Jackson further uncovered evidence that someone had used software programs on June 17, 2015, that potentially could have altered data in the computer. Those included a "browser cleaner, drive defragmenter, program deactivators, registry cleaners, and registry defragmenters." App. 190-91.

N. Petitioner Denies That He Possessed and Distributed Sexually Explicit Content Involving Minors

Testifying in his defense, Petitioner categorically denied viewing or downloading sexually explicit content involving minors on the Dell laptop computer or any other electronic device, including external hard drives. App. 231-32. Petitioner acknowledged that the laptop was password protected (the "last four digits of my Social Security number"). App. 225-26.

Further, Petitioner testified that his son, Billy, would often visit his house in 2015, sometimes with as many as 5-10 friends in tow. Because Billy and his friends were adults, Petitioner added, neither Petitioner nor Chisholm supervised them; Petitioner also would have been sleeping during the day following his "graveyard" shift at Camp Pendleton. App. 223-24.

Additionally, Chisholm testified in Petitioner's defense that their house in Vista had frequent visitors in 2015, including Petitioner's stepson, Nicholas

Chisholm – Chisholm's then 24-year-old son. App. 209. Chisholm also noted that Petitioner's son, Billy, would visit their home that year approximately twice a month, often with some of his friends. App. 211-12.

Further, Chisholm noted that she and Petitioner often wrote down wifi passwords on paper for guests who wished to access the Internet at their home. App. 214-15. She also testified that Petitioner would log onto the laptop computer so that other persons in their home could use it. App. 218-19; but see App. 239-40. And they included Petitioner's son and Chisholm's son. App. 220-21.

O. The Jury Convicts Petitioner, and the District Court Then Offers Free Psychological Counseling to Any Jurors Disturbed By What They Had Viewed

In his closing argument, Petitioner's trial counsel noted what would not be apparent from a transcript of the second trial day. That is, when the government published images and videos during its case-in-chief that depicted sexually explicit conduct involving minors, some jurors understandably – as Petitioner's attorney characterized it – began "tearing up." App. 246. Neither of the government's prosecutors objected to the attorney's remarks. Id.

Following deliberations, the jury convicted Petitioner on all three counts that the indictment charged. App. 33-34. Perhaps acknowledging the obvious, however, the district court told the jurors before dismissing them that – if

necessary – they could receive free psychological counseling to heal emotional wounds that the images and video may have inflicted:

> I want to thank you for your service here. That has been a case where we've had to look at some unpleasant material. Everybody agrees to that. And so thank you for being patient and hearing all the evidence. You were very attentive, and I appreciate it.
>
> Because the evidence was unpleasant, if any of you feel that having to view it has caused you some distress where it's affecting you such that you'd like counseling or someone to talk to about it to deal with reactions, the Court would provide that. You just need to let me know that yeah, you'd like to talk it over with someone. You're relieved of your obligation to discuss the facts and the circumstances in the case. You can speak with a counselor on that all at government expense. Okay?

App. 29-30 (emphasis added)).

P. The District Court Sentences Petitioner to a 210-Month Custodial Term

During a sentencing hearing on May 21, 2018, while discussing Petitioner's Guidelines range, his counsel once again acknowledged the obvious: that the images and videos containing sexual explicit conduct involving minors that the government had published to the jury during its case-in-chief were "uncomfortable to watch." App. 249.

After determining that Petitioner's adjusted base offense level was 37,

coupled with a Criminal History Category I, that yielded an advisory Guidelines range of 210-240 months. App. 249-42. Petitioner then declined to allocute, and the district court – concurring with the government's recommendation – imposed a 210-month custodial term. It also sentenced Petitioner to a ten-year period of supervised release. App. 255, 262-65.

Q. The Court of Appeals' Disposition

In a short unpublished memorandum disposition on November 21, 2019, a three-judge panel of the Ninth Circuit affirmed Petitioner's conviction. App. 1-5. Without even discussing the Court's majority opinion in Old Chief regarding Rule 403's applicability when a defendant in a criminal case offers to stipulate to essential elements of an indictment's count, the Ninth Circuit determined that this case's fact pattern fell within the scope of Ganoe.[18] App. 2-4. Notwithstanding the fulsome detail about the images and videos at issue that Petitioner would have permitted the government to convey narratively to the jury through a case agent (see supra at 12-13), the Ninth Circuit essentially determined that distinction to be immaterial. App. 4.

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[18] Ganoe essentially held, after construing Old Chief, that the government need not accept rote stipulations regarding § 2252's "sexually explicit conduct" element when the government instead wishes to prove it by publishing the images and videos at issue to the jury. See Ganoe, 538 F.3d at 1123-24

The Ninth Circuit later summarily denied Walsh's petition for panel rehearing on December 10, 2019. App. 35.

ARGUMENT

1. Although the Court in Old Chief concluded that Rule 403 permits the government to prove an essential element of an indictment's count by proffering specific evidence during its case-in-chief – rather than accepting the defendant's offer to stipulate generally to that element – Old Chief did not create a categorical rule to that effect. Indeed, in Old Chief, the Court reversed a felon-in-possession conviction under 18 U.S.C. § 922(g) because the evidence that the government ultimately published to the jury regarding the defendant's criminal conviction was substantially more prejudicial than probative, therefore contravening Rule 403. Old Chief, 519 U.S. at 190-92.

2. Here, by overlooking Old Chief's nuanced holdings regarding Rule 403 altogether, the Ninth Circuit disposition conflicted squarely with that case. This is particularly so because – unlike even in Old Chief itself, which involved a rote stipulation without particulars that the defendant had been convicted of a felony – Petitioner stipulated to the district court that he was indeed willing to permit the government's case agent to read detailed narratives of what the images and videos at issue depicted. Further, Petitioner's case presents an ideal vehicle to

resolve that conflict because the material that the government proffered in its case-in-chief was unquestionably prejudicial. And this precise scenario – namely, the government's rejecting even the most-fulsome stipulation regarding sexually explicit conduct involving minors – likely will recur frequently in cases involving § 2252 counts.

The Court should therefore grant Petitioner's petition for a writ of certiorari. See Sup. Ct. R. 10(c).

I. OLD CHIEF DID NOT GIVE THE GOVERNMENT FREE REIGN UNDER RULE 403 TO REJECT FULSOME STIPULATIONS FROM DEFENDANTS REGARDING ESSENTIAL ELEMENTS OF CHARGED COUNTS.

Under Rule 403, a district court cannot admit evidence whenever its "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403 (emphasis added). As the Court described in Old Chief, "[u]nfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Old Chief, 519 U.S. at 180 (internal quotation marks omitted, emphasis added).

Thinking deeply about what should occur during a Rule 403 inquiry, the

Court opined that if a defendant's proposed evidentiary "alternative" such as a detailed stipulation regarding an essential element of the charged offense, were found to have substantially the same or greater probative value but a lower danger of unfair prejudice" than the government's proffer, "sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk." Id. at 182-83 (emphasis added). And although the Court noted that "a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the [g]overnment's choice to offer evidence showing guilt and all the circumstances surrounding the offense," id. at 183 (emphasis added), it later qualified that presumption substantially.

That is, the Court then discussed how it "would be a strange rule" and "very odd for the law of evidence to recognize the danger of unfair prejudice only to confer a degree of autonomy on the party subject to temptation . . . ." Id. at 183-84. But, as it went on to conclude, "the Rules of Evidence are not so odd." Id. at 184.

Examining next Rule 403's advisory committee notes, the Court ultimately concluded that they "leave no question that when Rule 403 confers discretion by providing that evidence 'may' be excluded, the discretionary judgment may be

informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives." Id. at 184-85 (emphasis added).

Thus, at bottom, although Old Chief creates a presumption that the government can ignore a defendant's willingness to stipulate to an essential element of its case-in-chief, the Court made plain that it is not an insuperable one. Rather, in a particular case, the prejudicial impact from the government's evidentiary proffer could be so austere that Rule 403 would instead require the defendant's alternative approach – one that nevertheless would permit the government to prove an essential element.

And, indeed, Old Chief's nuanced rule resulted in the Court's reversing the Ninth Circuit's judgment, which had affirmed the district court's having rejected the petitioner's proffered stipulation to one of the essential elements underlying 18 U.S.C. § 922(g)(1): he had committed an earlier predicate felony offense that made it unlawful for him to have possessed a firearm. Old Chief, 519 U.S. at 174-75. The Court reversed, however, determining that "the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available." Id. at 191-92.

Here, therefore, although Old Chief disapproved of using Rule 403 to preclude proffered evidence "when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried," id. at 192 (emphasis added), Petitioner's proposed stipulation would not have hindered the government's case-in-chief whatsoever. Indeed, Petitioner would have permitted the government to have used a "coherent narrative" – namely, a recited one from the case agent – to demonstrate that a computer in Petitioner's home possessed and distributed images and videos concerning "sexually explicit conduct involving minors."

Certiorari therefore is warranted to reconcile Old Chief's nuanced – but protective – approach with the Ninth Circuit's contrary disposition here.

II. THE NINTH CIRCUIT'S DISPOSITION OVERLOOKED OLD CHIEF'S NUANCED APPROACH UNDER RULE 403, THEREFORE CREATING A CONFLICT THAT THE COURT SHOULD RESOLVE.

At bottom, the Ninth Circuit's disposition surprisingly overlooked Old Chief's substance altogether, much less that case's rule regarding how Rule 403 should apply when a defendant offers to stipulate to an essential element. This is particularly so because Petitioner's survey of post-Old Chief jurisprudence in

cases involving offenses under § 2252 evidences only one published opinion from a federal court of appeals concerning a stipulation that allowed the government to publish a detailed narrative description of images and videos to the jury. See United States v. Sewell, 457 F.3d 841, 843-44 (8th Cir. 2006). Every other case arose from perfunctory defense concessions that the material at issue contained "sexually explicit conduct involving minors," and they did not have the fulsome concession that Petitioner was willing to make, but the government and the district court unfortunately rejected. See, e.g., United States v. Luck, 852 F.3d 615, 620, 624 (6th Cir. 2017); United Sates v. Finley, 726 F.3d 483, 488 (3d Cir. 2013); United States v. Alfaro-Mocada, 607 F.3d 720, 725, 731 (11th Cir. 2010); United States v. Polouizzi, 564 F.3d 142, 152 (2d Cir. 2009); United States v. Schene, 543 F.3d 627, 632, 642 (10th Cir. 2008); United States v. Ross, 837 F.3d 85, 88, 91 (1st Cir. 2006).

Consequently, given the novelty of the evidentiary approach that Petitioner proposed in the district court, the Ninth Circuit should have scrutinized the district court's denial of Petitioner's underlying motion under Old Chief's core principles. Simply put, Petitioner was willing to stipulate to everything except his knowledge that a particular laptop at his house contained sexually explicit conduct involving minors. See supra at 12. But by not doing so, the Ninth Circuit essentially gave

the government free reign to proffer even the most inflammatory material to the jury in a § 2252 prosecution – even if, as occurred here, Petitioner was willing to allow the government's case agent to read a graphic narrative description to the jury, one that left little to the imagination.

As Petitioner discussed supra (at 29-30), Old Chief does not permit the government to proffer highly inflammatory evidence in its case-in-chief if a substitute approach would offer it the same resonance within the courtroom. Much like the precise details about the felony criminal conviction at issue in Old Chief, ones that were so inflammatory that Old Chief held that it was reversible error under even an abuse-of-discretion standard for them to have been admitted as evidence, images and videos of sexually explicit conduct involving minors are functionally similar. That is, a § 2252 defendant such as Petitioner who deems the visual evidence to be so prejudicial that the jury would invariably blame him for it – rather than focusing on precise evidentiary questions such as whether he had the requisite criminal scienter under § 2252 – therefore allowing it to wash over the other essential elements that the government must prove beyond a reasonable doubt.

Thus, much as in Old Chief, a defendant facing charges under § 2252 should be permitted liberally to proffer stipulations that preclude the government

from introducing the inflammatory visual evidence. And this is particularly so when – as occurred here – the defendant accedes to the government's case agent's reading a detailed narrative to the jury of what the images and videos actually depicted.

Consequently, because the Ninth Circuit's disposition here directly conflicted with Old Chief's core holdings, the Court should grant certiorari to resolve it.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Although the Ninth Circuit elected not to publish its disposition, there are at least three reasons why this case represents a suitable vehicle to resolve this question – one that, as Petitioner discussed earlier, recurs frequently in federal criminal cases concerning § 2252.

First, Petitioner offered a robust, fulsome stipulation that would have permitted the government not only to prove its essential elements automatically regarding "sexually explicit conduct" involving minors, but also to have conveyed the fundamental essence of the images and videos to the jury. Simply put, this is not a garden-variety case involving only a rote admission that the images and videos satisfied the statutory definition. Thus, it would present the Court with

compelling factual pattern to delineate how Old Chief operates in the § 2252 context, and also to craft principles for how a district court should approach a situation in which a defendant is willing to stipulate comprehensively to avoid the substantial prejudice that inexorably results from publishing shocking material to the jury.

Second, although the government surely would contend that harmless error applies even if the district court violated Rule 403, that argument fails here. At bottom, as Petitioner has already discussed (see supra at 23), his trial counsel remarked during his closing argument that some jurors were "tearing up" when the government published the illicit material during its case-in-chief. Further, the district court was acutely aware of how disturbing the pornography was to the jurors – so much so that it not only remarked during the sentencing hearing about how "uncomfortable" it was to view, but also notified the jurors after they rendered a verdict that they could receive free psychological counseling from the district court to cope with the emotional aftermath. See supra at 23-24.

Additionally, the district court did not give any special "cautionary" instructions to the jury regarding the images and video. Consequently, the categorical absence of one here further amplified the substantial prejudice that Petitioner sustained from the district court's Rule 403 error.

And finally, that prosecutions for § 2252 offenses – and, in state courts, their analogues – have become commonplace therefore increases prosecutors' willingness to push the probative evidentiary envelope past its prejudicial breaking point. Indeed, there is an appreciable difference not only between written and visual content, but also between child pornography and the highly graphic violent content jurors routinely see via different types of media.

To proffer a hypothetical such contrast, movie producers can lift even the most hideous forms of violence from literary classics – such as Mario Puzo's novel The Godfather – and depict them on the silver screen, knowing that the First Amendment protects them from criminal prosecution and their audiences are somewhat inured to the brutality. But any producer who distributes a feature-length version of Vladimir Nabokov's novel Lolita – and, indeed, the Court can take judicial notice under Rule 201(b)(2) of the Federal Rules of Evidence that there have been two of them[19] – that actually shows the sexual relations between the protagonists would risk a federal prosecution under § 2252.

Thus, quite simply, a typical juror exposed to that visual material simply cannot compartmentalize the raw emotion that would flow. And the outlet for that

[19] "Lolita," IMDb, https:///www.imdb.com (search for "Lolita") (last visited on March 9, 2020).

necessarily would be the defendant sitting in the courtroom, who at least theoretically – even if the government could not prove all necessary elements beyond a reasonable doubt – possessed and distributed the material.

Consequently, this case is a suitable vehicle for the Court to promulgate limiting principles in this evidentiary context, ensuring that Old Chief's rule does not give the government carte blanc under Rule 403 to introduce highly prejudicial images and videos in a § 2252 case, even if the defendant agreed to permit the government's testifying agent to read a detailed narrative to the jury of what transpired in them. See Sup. Ct. R. 10(c).

IV. CONCLUSION.

The Court should grant the petition for writ of certiorari.

Dated: March 9, 2020

Respectfully submitted,

s/David A. Schlesinger

DAVID A. SCHLESINGER
JACOBS & SCHLESINGER LLP
The Douglas Wilson Companies Building
1620 Fifth Avenue, Suite 750
San Diego, CA 92101
Telephone: (619) 230-0012
david@jsslegal.com

Counsel for Petitioner

No._____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM F. WALSH, IV,

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

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PROOF OF SERVICE

I, David A. Schlesinger, declare that on March 9, 2020, as required by Supreme Court Rule 29, I served Petitioner William F. Walsh, IV's MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition in the United States mail (Priority, first-class), properly addressed to him, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

The Honorable Noel J. Francisco, Esq.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

Additionally, I mailed a copy of the motion and the petition to my client, Petitioner William F. Walsh, IV, by depositing an envelope containing the documents in the United States mail, postage prepaid, and sending it to the following address:

William F. Walsh, IV
Register No. 61220-298
FCI Seagoville
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 9, 2020

s/David A. Schlesinger
_____
DAVID A. SCHLESINGER
Declarant