

No. _____

20-5623

IN THE
SUPREME COURT OF THE UNITED STATES

MAKSIM M. STEFANYUK — PETITIONER
(Your Name)

vs.

ORIGINAL

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FILED
AUG 18 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MAKSIM M. STEFANYUK

(Your Name)

(Federal Correctional Institution)
Post Office Box 1000

(Address)

OXFORD, WISCONSIN, 53952

(City, State, Zip Code)

NA

(Phone Number)

RECEIVED

AUG 26 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

- 1.) When a defendant in Federal Criminal Court proceedings requests to review, prior to trial, the evidence that is in the government's possession that is used against him, and when that evidence is singularly important to him because that evidence may be impeaching/exculpatory, and when that evidence is destroyed prior to trial while in the government's possession and/or care, may the trial go on without the requested evidence, even if the evidence has been destroyed by the government?
- 2.) Is the government to be held responsible for destroying the said impeaching/exculpatory evidence prior to trial—evidence that may favor the defendant?
- 3.) Should the convictions that were rendered by such a compromised trial be vacated/dismissed or set aside?
- 4.) In a criminal case that is headed for trial, is it lawful and/or right for either party to remove and/or destroy evidence, prior to trial, in order to gain a legal advantage in/for the outcome of the trial, either intentionally or inadvertently?

LIST OF PARTIES

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

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

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APPENDIX E - NA

APPENDIX F - NA

TABLE OF AUTHORITIES CITED

CASES:

PAGE NUMBER:

1.) JOHN L. BRADY vs. STATE OF MARYLAND (1963).....	<u>10</u>
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STATUTES AND RULES:

NA

OTHER:

NA

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 944 F.3d 761; U.S. App. Lexis 36662; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district 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.

[] 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

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was DECEMBER 11th, 2019.

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: JUNE 10th, 2020, and a copy of the order denying rehearing appears at Appendix C.

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

NA (None Cited)

STATEMENT OF THE CASE

Maksim M. Stefanyuk was charged in a four-count indictment with two counts, ...receipt and distribution of child pornography, one count of receipt of child pornography, and one count of failing to register as a sex offender. The facts underlying the investigation and arrest were the subject of two separate evidentiary hearings—a hearing before the magistrate judge on Stefanyuk's motion to suppress, and a jury trial—and a pretrial conference. Maksim M. Stefanyuk was held primarily at the Yankton County jail in Yankton, South Dakota while in litigation, awaiting hearings and eventually a jury trial.

Stefanyuk was represented by the Federal Public Defender Jason J. Tupman.

Stefanyuk told Tupman that he did not live at the address where he was arrested and that the address at 2101 E. 31st St. was where his parents lived, where eventually his girlfriend at the time—Sarah Morales—also moved in.

Stefanyuk also explained that the internet service provider Midcontinent Communications was for his parents' home and was paid by him to help his parents financially. The same home had been Stefanyuk's home address at the time of his prior federal prosecution involving child pornography, he had explained, and that now he lived at, and registered, his current address in Hills, MN. Stefanyuk also confided in Tupman that he had opened up his own business with Erik Suborov called "eModdity, LLC", and that he and his girlfriend Sarah Morales were not getting along because Morales failed to pay rent to his parents throughout her entire stay with his parents in Sioux Falls, South Dakota, and Stefanyuk broke-up with Morales as a result.

During the course of Stefanyuk's prosecution, he unsuccessfully resisted admission of evidence derived from a continuously recording and remotely accessible camera monitoring his parents' home and because the surveillance camera's footage was lost and/or destroyed and was not recoverable.

The footage was never shown to Stefanyuk when he asked to review it and likely use it for trial and show it to the jury.

1.) Background

On January 13th, 2017, Minnehaha County Sheriff's Detective Derek Kuchenreuther, part of the Internet Crimes Against Children Task Force, was looking online using special law enforcement software for computers offering to share child pornography on a peer-to-peer network, Detective Kuchenreuther located a computer he suspected of sharing multiple child porn files.

South Dakota Division of Criminal Investigation (DCI) Agent Toby Russell, also a member of the Internet Crimes Against Children Task Force, was independently running a similar investigation on February 3rd, 2017. Agent Russell's search uncovered 48 video files. Of these, 42 were complete. The majority were child pornography.

Many of the files Agent Russell downloaded were the same as those that were downloaded by Detective Kuchenreuther. At that time, Agent Russell learned that Detective Kuchenreuther had run his own investigation on January 13th, 2017, finding the same IP address with child porn.

Responding to a subpoena, Midcontinent Communications revealed that the IP address accessed by Detective Kuchenreuther and Agent Russell belonged to a subscriber/account holder by the name of Max Stefanyuk. The physical address associated with the IP address was 2101 E. 31st St. N., in Sioux Falls, South Dakota. This same home had been Stefanyuk's home address at the time of his prior federal prosecution involving child pornography, just as Stefanyuk had stated.

Homeland Security Special Agent Charla Aramayo, assigned to the Internet Crimes against Children Task Force in Sioux Falls, was referred the investigation of this case. She began her investigation by reviewing the download logs and materials Detective Kuchenreuther had collected to verify that there was child pornography under the federal definition. She also reviewed the information he obtained from Midcontinent Communications. Aramayo continued to try and verify that Stefanyuk resided at his parents' address at 2101 E. 31st St. N., in Sioux Falls. She drove by the location a number of times and searched an online law enforcement database for records associated with the address. She also checked the license plate numbers of the vehicles she saw at the address to find out whom the vehicles were registered to. None of them were registered to Stefanyuk, but some were registered to members of the Stefanyuk family. One was registered to his girlfriend Sarah Morales.

Aramayo found in-person surveillance to be impractical and sought digital assistance to achieve what in-person surveillance could not.

2.) Around-the-clock digital Surveillance

On February 8th, 2017, Agent Aramayo requested the South Dakota Division of Criminal Investigation (DCI) to install a pole camera. DCI Special Agent Chad Carpenter installed the camera, testified to its capabilities, and that the surveillance footage was later destroyed due to a major video management service change, and that it was unfortunately not recoverable. No one sought a warrant before the installation of the device.

The camera ran continuously for two weeks from February 8th through the 22nd, 2017. Agent Aramayo used the camera to monitor individuals coming and going in order to prove that Stefanyuk lived at the residence.

The recordings made by the camera were unfortunately destroyed and were not available for Stefanyuk to review and/or use at trial.

3.) Stefanyuk's Motion to Suppress

While detained at the Yankton County Jail in Yankton, South Dakota, awaiting hearings and eventually trial, Stefanyuk learned through his attorney that the DHS Special Agent Charla Aramayo had ordered DCI Special Agent Chad Carpenter to install a covert surveillance camera at his parents' home at 2101 E. 31st St. N., Sioux Falls, South Dakota. Stefanyuk, upon learning of the surveillance evidence in his Failure to Register allegation/charge, requested to view this video footage because it was the primary evidence in his Failure to Register allegation/charge.

Soon thereafter the request to view the footage, Stefanyuk's Public Defender Jason J. Tupman notified him that Carpenter had accidentally/inadvertently "...lost the video." The Public Defender then recommended that Stefanyuk should move to suppress any evidence derived from the pole camera as a result. The Public Defender told Stefanyuk, "We'll go to the Suppression Hearing under the guise of a 'Trojan Horse' to see what they reveal..." Thus, Mr. Stefanyuk agreed, and proceeded with the Suppression Hearing.

And so, on or about June 14th, 2019, at approximately 9:00 AM, Stefanyuk

(STATEMENT OF THE CASE CONTINUED...)

represented by appointed counsel Assistant federal Public Defender Jason J. Tupman, entered the Federal Court Building located in Sioux Falls, South Dakota, for the Suppression Hearing, with Honorable United States District Judge Karen E. Schreier presiding.

D.C.I. Special Agent Chad Carpenter testified that covert surveillance was installed by him at the residence 2101 E. 31st St. N., Sioux Falls, South Dakota, on February 8th, 2017, at 12:29 [P.M.?] (SHT Pg. 14, L. 5). Carpenter then testified that the covert surveillance camera was taken offline on February 22nd, 2017, at 8:00 A.M. (SHT Pg. 16, L. 7)..

Mr. Carpenter was then asked by the Prosecutor Jeff Clapper, "...Was the recording that this camera made from February 8th to February 22nd, was that saved?" (SHT Pg. 16, L. 22 & 23), to which Mr. Carpenter affirmed, answering, "Yes" (SHT Pg. 16, L. 24).

Mr. Clapper immediately followed with another question about its availability today: "And is it available today?" (SHT Pg. 16, L. 25), to which Mr. Carpenter said, "No" (SHT Pg. 17, L.1).

Mr. Clapper shortly later asked Carpenter as to why the footage is no longer available, and Mr. Carpenter stated, "February 22nd sticks in my mind very clearly because at 8:00 A.M. I was in the process of making a major Video Management Service Change..." (SHT Pg. 17, L. 5,through 14).

Then, Mr. Clapper, following, asked Carpenter if that footage is recoverable, to which Carpenter said, "This particular recording was not recoverable" (SHT Pg. 17, L. 16).

Later, during cross-examination by Federal Public Defender Jason J. Tupman, Mr. Tupman asks Carpenter, "Okay. And is this an HD camera? Is it filming in HD?" (SHT Pg. 19, L. 3 & 4), where Mr. Clapper objects, "You're Honor, I'm going to object and claim the surveillance location privilege as to the details of the equipment used" (SHT Pg. 19, L. 5 through 7).

Mr. Clapper objects again during the hearing shortly later, stating, "Objection. Again, Your Honor, the surveillance location privilege" (SHT Pg. 24, L. 11 & 12).

Later in the Suppression Hearing, Mr. Clapper explains as to why the technical information and the camera location is privileged information, where Clapper states, "...the privilege is as to the nature and location of electronic surveillance evidence. That's privileged information" (SHT Pg. 24, L. 23 through 25).

The judge states to Mr. Clapper, "Right. And I don't think you can explore those issues without asking the agent to pinpoint where the camera was. And I think that's especially important in this case, Jeff, because we don't have the video. If we had the video, you would be able to surmise from the angle of view when you looked at the video how high up the camera was mounted, and whether it's at eye level from somebody passing by on the sidewalk or whether it's an overhead view. And that—I don't think that you would argue that the defendant had no right to view the video if it still existed" (SHT Pg. 26 & 27, L. 19 through 2).

Still argueing with Mr. Clapper, the judge says, "...if we had the video, certainly we'd be playing the video in open court..." (SHT Pg. 27, L. 16 through 18), and, "...Why is that information privileged now that we don't have the video?" (SHT Pg. 27, L. 21 & 22).

* Suppression Hearing Transcript citings are denoted as "SHT," followed by the Suppression Hearing Transcript Page and Line numbers.

I.E. (SHT Pg. #, L. #)

(STATEMENT OF THE CASE continued...)

Then, a bit later, the judge states, "The information does not seem to me to be privileged. Why is it privileged? If we had the video, we would be able to see these things" (SHT Pg. 28, L. 14 through 17).

Despite that Carpenter had admitted that the video is not available and not recoverable due to him making the major Video Management Service Change, the judge suddenly reassures Mr. Carpenter that he is not to blame; "...So now that we don't have the video, through no fault of Agent Carpenter's why is the information now suddenly privileged?" (SHT Pg. 28, L. 17 through 19).

Still arguing about privileged information, the judge proceeds to reassure Agent Carpenter a second time that it's not his fault that the footage has been destroyed and is missing: "...That information is gone here. Again, through no fault of Agent Carpenter's" (SHT Pg. 31, L. 18 & 19).

Later during the Suppression Hearing, D.H.S. Special Agent Charla Aramayo is called to the stand (SHT Pg. 48, L. 15); Special Agent Charla Aramayo testifies to using the surveillance camera and seeing an unidentified subject arrive at the 2101 E. 31st St. N., Sioux Falls, South Dakota residence (SHT Pg. 57 & 58, L. 12 through 23); She states, "I remember looking at it one other time, and I went to the house right after that to drive by..." (SHT Pg. 58, L. 20 through 23).

Then, about doing the physical drive-by of the Sioux Falls residence, Aramayo explains, "...I believe that was the single time I actually—I saw him in person outside the house" (SHT Pg. 59, L. 24 & 25).

Mr. Clapper followed up with the question, "Did you see anyone else?" (SHT Pg. 60, L. 1).

Aramayo answers that she in fact did see someone else with Stefanyuk; "Yes. There was another young man that I thought was his brother" (SHT Pg. 60, L. 2 & 3).

Clapper then asked Aramayo if she identified the other "young man": "Okay. You didn't positively identify the other person?" (SHT Pg. 60, L. 4 & 5). Aramayo answered, "No," to his question (SHT Pg. 60, L. 6).

4.) Execution of Search Warrant on Feb. 22nd, 2017

Based on her investigation, Aramayo obtained a search warrant for Stefanyuk's parents' home at 2101 E. 31st St. N. in Sioux Falls on February 22nd, 2017. The search was conducted the same day. Stefanyuk was present along with his girlfriend Sarah Morales, mother, and grandmother. Aramayo found Stefanyuk's driver license, which listed his parents' address in Sioux Falls.

A number of computers were found in an office across from the bedroom. Agents seized these computers. The primary computer was on. When agents moved the mouse on the primary computer, the screen turned on and displayed the login screen—the title displayed "eModdity, LLC" in blue words on a white background, and "Max Stefanyuk" as the email address that was linked to the user account. EModdity was Stefanyuk's new company. The bedroom door had a cipher lock and a broken alarm.

The primary computer tower was a white computer with the words "Stark Enterprises" labeled on it in black wording. Aramayo removed the drives to preview and prioritize them for forensic examination by Detective Kuchenreuther. Kuchenreuther eventually found child pornography on the hard drives.

The same day, with the consent of Stefanyuk's father, Agent Aramayo also searched a residence in Hills, Minnesota associated with where Stefanyuk registered as his home as a sex offender.

Mail belonging to Stefanyuk and others and clothing was found in this house. The refrigerator was full of food, and dirty dishes were in the kit-

(STATEMENT OF THE CASE continued...)

chen. Both the Hills, Minnesota and Sioux Falls homes were owned by Stefanyuk's parents. Nothing was found at the Hills, Minnesota address. Later a check of the Minnesota and South Dakota sex offender registration revealed that Stefanyuk had indeed registered at the Hills, Minnesota address, and not at the Sioux Falls address.

5.) Stefanyuk's Resistance to Admission of Prior Crimes Evidence

Prior to trial, the government filed its Notice pursuant to Federal Rules of Evidence 404(b) and 414. The government sought admission of evidence and testimony regarding the previous child pornography investigation of Stefanyuk in 2011 and his subsequent conviction for that conduct in 2014. Specifically, the government sought to introduce (1) the judgement of conviction; (2) the factual basis statement from his plea agreement; and, (3) testimony from Detective Kuchenreuther about the prior investigation he conducted at the Sioux Falls residence with Stefanyuk as the target, which included testimony regarding the forensic examination of Stefanyuk's computer and his statement.

Stefanyuk resisted via a motion in limine, because the footage intended to be used as his primary evidence was destroyed, and without the surveillance footage he would be unfairly prejudiced if such evidence was admitted during trial.

The district court denied Stefanyuk's motions in limine, finding the evidence was both relevant and more probative than prejudicial. The court ordered that a limiting instruction be read prior to introduction of any of the prior crime evidence and also included within the final instructions to the jury.

6.) Trial and Sentencing

Stefanyuk was forced to proceed through trial without ever seeing the surveillance footage, and/or ever having the option of presenting it to the jury to show that he was not even at the scene or the time of the crime, even though Aramayo knew his work schedule, and should be able to see him on the footage—if (1) he actually lived at the Sioux Falls residence; (2) how often he frequented the Sioux Falls residence; (3) who came and went to and from the Sioux Falls residence; and, (4) whether the times and dates of when the crime occurred matched his work schedule, or others that frequented the residence.

Stefanyuk's trial began on July 17th, 2018 and lasted until July 19th, 2018 when the jury returned a verdict of guilty on all counts. The district court sentenced Stefanyuk at the low end of his guideline range to 262 months on each of counts 1, 2, and 3, running each of these sentences concurrently, and 120 months on his count 4 conviction for failing to register (the Sioux Falls address) as a sex offender, to run concurrently with his sentences on counts 1 through 3.

7.) Appeal to the 8th Circuit Court of Appeals

Stefanyuk discussed what he wanted to present to the Court of Appeals for the Eighth Circuit with his Federal Public Defender Jason J. Tupman. Stefanyuk stressed that he wanted Tupman to prepare his appeal premise on the grounds that the government had removed and/or destroyed exculpatory /impeaching surveillance evidence that would prove his innocence; and, that by removing and/or destroying the footage the government had caused him to lose his trial.

Stefanyuk also stressed—quite adamantly via telephone and mail correspondence from Oxford FCI—that Tupman not file any appeal brief without showing mailing the draft of the brief to Stefanyuk first for review, and then only file it when/if Stefanyuk approved via a written approval and sent it by mail.

Despite Stefanyuk's wishes/directives, Tupman filed the Appeal Brief with the Court of Appeals for the Eighth Circuit without first showing/ mailing the brief to Stefanyuk, consulting with Stefanyuk first, and/or receiving Stefanyuk's approval to go ahead and file the brief.

Tupman instead founded the Appeal's grounds in the brief to be on Stefanyuk's expectation of privacy—that Stefanyuk is to be free from continuous remote electronic surveillance, that the district court erred in accepting and adopting the magistrate's report, that the district court also erred in permitting the prosecution to offer evidence informing the jury about the facts and circumstances of his prior conviction beyond the stipulated agreement to admit the judgement and statement of factual basis attendant to that offense, and, that the court—over Stefanyuk's objection—permitted the detective to testify about his previous investigation of Stefanyuk for possessing child pornography, his search (at the time) of Stefanyuk's residence, his interrogation of Stefanyuk, and statements made by Stefanyuk—that all of this additional evidence was cumulative of other propensity evidence admitted and was unfairly prejudicial to Stefanyuk as the similarities between the two investigations could tend to confuse jurors.

Stefanyuk finally received a copy of the Appeal Brief that Tupman had prepared only after it had already been filed with the court without his review and consent. None of the grounds Tupman had listed in the brief were what Stefanyuk had asked Tupman to present the Court of Appeals.

Stefanyuk proceeded and filed his Motion for a Rehearing and Rehearing En Banc, illustrating what Mr. Tupman had intentionally neglected to include in the Appeal Brief. Stefanyuk included a cover letter and all the surviving correspondence with Mr. Tupman (correspondence listing Stefanyuk's wishes) with his motion.

Unfortunately, Stefanyuk's motion for a Rehearing and Rehearing En Banc was simply denied, and Stefanyuk's true appeal arguments were never voiced or filed with the court.

* Some surviving correspondence with Tupman, with Stefanyuk's directives to him, can be found in Appendix D.

(STATEMENT OF THE CASE continued...)

The prosecution's removal of the surveillance footage was in direct violation to its affirmative duty to disclose and present evidence favorable to a defendant, as most prominently is associated with the court's decision in Brady v Maryland, 373 US 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), where Brady held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Had the destroyed surveillance evidence been presented and/or safeguarded and made available for Stefanyuk to review and present it to the jury at his trial, there is reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding[s] would have been different;" United States v Bagley, 473 US 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

In Stefanyuk's trial, it would be very probable that, had he been able to present the pole-camera surveillance footage to the jury, he would have been found NOT guilty on all counts rather than guilty, because the footage would demonstrate ample proof against the prosecution's narrative that Stefanyuk (1) was at the scene and the time of when the crime occurred, (2) that Stefanyuk lived at the 2101 E. 31st St. N., Sioux Falls address; and, (3) the footage would show who and when was actually at the residence when the crime had occurred.

8.) (Current) Appeal to the Supreme Court

Stefanyuk now petitions the Supreme Court of the United States for the Writ of Certiorari on behalf of the issues presented.

REASONS FOR GRANTING THE PETITION

- 1.) Government agents and agencies should be held accountable when they intentionally, or even inadvertently, destroy and/or remove exculpatory evidence of the accused, especially those heading to stand trial.
- 2.) If this kind of behavior by the Government is allowed—where the Government can pick and choose what evidence the defendant can have and use at trial, then citizens of the United States of America will lose their constitutional right to a fair trial, and/or their right/expectancy to due process.
- 3.) The petition for a writ of ceriorari should be granted because Stefanyuk was obstructed from receiving a fair trial by the Government removing key exculpatory/impeaching evidence that should have been shown to the defense and the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Maksim M. Stefanyuk

Date: August 18th, 2020