Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

SCOTT T. WILBERT,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Should certiorari be granted because the Second Circuit Court of Appeals improperly affirmed the denial of Petitioner's Fourth Amendment suppression motion?

2. Should certiorari be granted because the Second Circuit Court of Appeals improperly affirmed the denial of Petitioner's motion for a *Franks* hearing?

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OPINIONS BELOW

There were five decisions below, four in the District of Connecticut, and one in the Second Circuit Court of Appeals. Each is attached to this petition. *See United States v. Wilbert*, No. 19-2173-cr, 2020 U.S. App. LEXIS 27578 (2d Cir. Aug. 28, 2020); *United States v. Wilbert*, 343 F. Supp. 3d 117 (W.D.N.Y. 2018)*; United States v. Wilbert*, No. 16-CR-6084-DGL-JWF, 2017 U.S. Dist. LEXIS 77818 (W.D.N.Y. Mar. 28, 2017)*; United States v. Wilbert*, No. 16-CR-6084-DGL-JWF, 2018 U.S. Dist. LEXIS 187515 (W.D.N.Y. Aug. 20, 2018)*; United States v. Wilbert*, No. 16-CR-6084L, 2017 U.S. Dist. LEXIS 77141 (W.D.N.Y. May 22, 2017).

JURISDICTION

The order of the Court of Appeals was decided on August 28, 2020, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States constitution.

STATEMENT OF THE CASE

Petitioner, Scott T. Wilbert, was charged, in a one-count Indictment, with violating Title 18, United States Code, Section 2252A(a)(2)(A), for knowingly receiving child pornography. After reserving the right to challenge the suppression court's ruling, he pleaded guilty and was sentenced to 180 months' imprisonment. The Second Circuit Court of Appeals affirmed his conviction. *United States v. Wilbert*, No. 19-2173-cr, 2020 U.S. App. LEXIS 27578 (2d Cir. Aug. 28, 2020).

STATEMENT OF FACTS

Prior to entering his plea, Petitioner moved to suppress physical evidence seized from a computer located in his apartment that was accessible to others, at 634 Garson Avenue, in Rochester, pursuant to a search warrant signed by Monroe County Court Judge Victoria M. Argento, on February 17, 2016.

The search warrant was based on an affidavit executed by New York State Police Investigator David A. Cerretto, who swore, on December 22, 2015, that he had received information from the National Center for Missing and Exploited Children ["NCMEC"] that an image containing child pornography had been uploaded to a computer using a specific Internet Protocol (IP) address.

The upload took place during the early morning hours of October 22, 2015 on Omegle.com. Omegle is a free online chat website that allows users to socialize with others without the need to register. It randomly pairs users in one-on-one chat sessions. The IP address was controlled by Frontier Communications. Frontier told Cerretto that, during the date and time of the upload, the IP address was assigned to Scott T. Wilbert, at 634 Garson Avenue, Rochester, New York 14609. According

to Frontier, that IP address also had an email address in the name of Scott T. Wilbert and a local phone number assigned as well. Cerretto averred in his supporting affidavit that a record check of Scott T. Wilbert revealed that Wilbert was a registered Level Two sex offender and, eleven years earlier, in 2004, had been investigated for uploading child pornography files. Yet no charges were filed at the time. Based on the information set forth in Cerretto's affidavit, Judge Argento found probable cause to search 634 Garson Avenue. In his affidavit, Investigator Cerretto described the premises as

> being a green and white colored, *multi-level residential building*. The building is identified by the numbers "634" above a maroon colored entrance door. Mentioned entrance door is on the north side of Garson Avenue, which is located in the City of Rochester, County of Monroe, State of New York. Leading to mentioned entrance door are fixed metal hand rails on both sides of a concrete stairway. 634 Garson Avenue is attached to the left of 636 Garson Avenue, which is utilized commercially as a hair salon. This search is to include the upstairs apartment of 634 Garson Avenue, the subject of this investigation (SCOTT T. WILBERT (08/21/1974)), and any out buildings, real property, vehicle(s), and curtilage utilized by the subject at the mentioned location. See attached photos of described building.

On October 25, 2015, Omegle's automated software flagged two images from IP address 50.49.31.78, which was a computer in

Petitioner's home. The first image, a jpeg file whose name ended in "a9e7" ("image a9e7"), was uploaded at 2:30:21 UTC. The second image, a jpeg file whose name ended in "c6d0" ("image c6d0"), was uploaded at 2:26:12 UTC. The founder of Omegle was certain a third party moderator viewed image c6d0 because it was flagged as unwanted content, but he is not certain whether the moderator viewed image a9e7. Because the two images came from the same chat session at around the same time, both were grouped together and sent to NCMEC, even though Omegle could only confirm that one was reviewed by a moderator and flagged as containing apparent child pornography.

NCMEC received a tip report on October 25, 2015 at approximately 2:38:58 UTC. A staff member viewed image c6d0, which appeared to be a series of four screenshots of what they claimed was an animal performing oral sex on a young girl.

David Cerretto, an investigator with the New York State Police, testified that, once NCMEC makes a report available to New York State Police Internet Crimes Against Children ("ICAC"), members of the police department are able to retrieve it and review its contents.

Cerretto testified that he accessed both images, even though he was aware that only image c6d0 had been viewed by Omegle and NCMEC. He said it does not "matter" if they have been opened by Omegle or NCMEC, because it is the "practice" of the NYSP to open "every image"--even if neither the New York State Police nor ICAC have a search warrant. He viewed the images seized from Petitioner's computer to "confirm [that] a crime ha[d] happened." Cerretto saw that the first image, in Exhibit 1, and claimed it depicted a canine performing oral sex on a white, unclothed female child of about four to seven years of age, while the second image, in Exhibit 11, was indiscernible.

He had no idea what was in the second image, and had no warrant, but decided to open it anyway. He explained "[n]o one said anything about a warrant, so I had no information on a warrant ...." He explained that the NYSP routinely opens every image that is a closed container, even if it has never been opened by a private party, without a search warrant. They do not "distinguish" between images that do and do not depict child pornography, preferring instead to "confirm that there's no child pornography on it" because that "will [then] direct [their] investigation."

In his search warrant affidavit, Cerretto told the Magistrate the canine depicted with the girl occurred at 2:30--and not at 2:36-- when it actually happened, because, he rationalized, it was an "ongoing incident," adding "[t]hat's [just] the way I do it." When the Magistrate Judge asked Cerretto why, when the "one that was not a crime was uploaded at 2:30:21" he told the warrant-issuing judge that "the image that was the crime was uploaded at 2:30:21," he admitted he made "a mistake," but insisted it was "all one ongoing incident."

SUMMARY OF ARGUMENT

Certiorari should be granted because the Second Circuit Court of Appeals erred when it upheld the District Court's suppression ruling. The New York State Police initially expanded the third-party private search of Wilbert's video chat, and then rummaged until it found incriminating evidence--all without a search warrant.

Notwithstanding the false claim by the police to the warrant-issuing magistrate, the claimed child pornography did not depict oral sex and was not child pornography.

The affidavit in support of the search warrant, and the search, which occurred some four months later, was also both overbroad and stale.

Certiorari should also be granted because the Second Circuit Court of Appeals again erred when it upheld the District Court's denial of Wilbert's motion for a *Franks* hearing. There were, in fact, intentional and material misrepresentations in the search warrant affidavit that were necessary to the probable cause finding and, therefore, the hearing should have been ordered.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT COURT OF APPEALS IMPROPERLY AFFIRMED THE DENIAL OF PETITIONER'S FOURTH AMENDMENT SUPPRESSION MOTION.

Certiorari should be granted because the Second Circuit Court of Appeals erred for four reasons when it affirmed the District Court's denial of Wilbert's suppression motion.

First, Wilbert's use of Omegle did not deprive him of a reasonable expectation of privacy in the images at issue. Second, the illicit image "c6d0" that provided a basis for the warrant did not constitute child pornography, so the warrant lacked probable cause. Third, the warrant authorizing the search of his residence was overbroad and stale. And fourth, the affirmance for the reasons in the district court's opinions are in error, because they violate the Fourth Amendment.

1. Wilbert's use of Omegle did not deprive him of a reasonable expectation of privacy in the images at issue.

Whether Wilbert had an expectation of privacy turns on two separate inquiries: first, he must demonstrate a subjective expectation of

privacy in a searched place or item, and second, his expectation must be one that society accepts as reasonable. *United States v. Paulino*, 850 F.2d 93, 97 (2 Cir. 1988), *cert. denied*, 490 U.S. 1052, 109 S. Ct. 1967, 104 L. Ed. 2d 435 (1989). Here, both questions are answered in the affirmative because the computer was in Wilbert's apartment. *See United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004)("Individuals generally possess a reasonable expectation of privacy in their home computers."). While the government claimed below that Wilbert was not entitled to an expectation of privacy because he had never admitted he had a privacy expectation in the child pornography, he later admitted, in a sworn affidavit, that the images were found on his computer, to which others in the residence had access. Significantly, even the Magistrate was rightly "... skeptical of the government's position that Wilbert may not challenge the search of his computer without first admitting he was using Omegle at the time the offending images were found ...." *United States v. Wilbert*, No. 16-CR-6084-DGL-JWF, 2018 U.S. Dist. LEXIS 187515, at *17 (W.D.N.Y. Aug. 20, 2018).

The Terms of Service on Omegle's website do you change the expectation of privacy calculus. Omegle's video chat component is a

peer-to-peer system, where the video stream is sent directly from one user to the other, rather than through Omegle's servers. This does not result in a diminished expectation of privacy, because it is a lodestar of Fourth Amendment jurisprudence that disclosing information to someone else does not automatically permit intrusion by law enforcement. *See United States v. DiTomasso*, 56 F. Supp. 3d 584, 591-92 (S.D.N.Y. 2014), *aff'd*, *United States v. DiTomasso*, 932 F.3d 58 (2d Cir. 2019)("On the government's logic, if DiTomasso were to disclose private information to a friend over the phone--which, by the nature of the act, would cause DiTomasso to 'assume[] the risk' that his friend might relay the information to law enforcement--he would have no expectation of privacy in the phone call, and no Fourth Amendment protection would apply. This reasoning was rejected by the Supreme Court in *Katz v. United States*, when it held that disclosing information to someone else does not automatically permit intrusion (in particular, wiretapping) by law enforcement. To this day, Katz remains a 'lodestar' of Fourth Amendment law.").

The very characteristic of the peer-to-peer network like Omegle, where users can talk and share directly between systems on the network,

without the need of a central server, engender an expectation of privacy because they involve one-on-one interactions that citizens clearly expect to be kept private. This type of computer contact is no different than an e-mail or telephone call, because both parties are excluding everyone but themselves and thus have an expectation it will remain private. *See DiTomasso*, 56 F. Supp. 3d at 592 (" ... the whole point of Omegle's service is to allow two strangers to chat anonymously, and only with one another. For Fourth Amendment purposes, there is no distinction between an Omegle chat and an email correspondence--or for that matter, between an Omegle chat and a phone call. Both involve one-on-one interactions that users clearly expect to be kept private.").

Even if it can be argued there is a diminished expectation of privacy for information an individual chooses to "share" on a peer-to-peer network, *see, e.g.*, *United States v. Brooks*, No. 12-cr-166, 2012 U.S. Dist. LEXIS 178453, 2012 WL 6562947, at *2 (E.D.N.Y. Dec. 17, 2012), that does not strip Wilbert of all expectations of privacy. The Magistrate correctly noted this was a "developing" and "very, very difficult area for courts" because every application has a TOS that would "eviscerate [one's] privacy interests." He thus did not believe "courts are

going that far" to say that "law enforcement can have [all TOS] information] without any search warrant, without any reason whatsoever[.]" He believed said that, even when a website warns an anonymous participant he "could be monitored," that required "analysis" and was certainly not a "slam dunk." He was correct.

Judge Larimer, however, disagreed with Magistrate Feldman. He found that, " ... on the facts here, as to the two video screenshots, defendant failed to demonstrate that he had a legitimate expectation of privacy. The items at issue were shared with an anonymous third-party according to the Omegle program [sic], and Wilbert, in my view, had no reasonable privacy expectation that that person might not share the images with another or with law enforcement." *United States v. Wilbert*, 343 F. Supp. 3d 117, 121 (W.D.N.Y. 2018).

Judge Larimer's finding, which was adopted by the Second Circuit Court of Appeals, is incorrect because it misapprehends the purpose of the Omegle platform. Here, Wilbert clearly had an expectation of privacy when he used the Omegle website. Indeed, the *raison d'être* of Omegle's service is to allow two strangers to chat anonymously--and only with one another--to the exclusion of the entire world. This sense of willful

anonymity and privacy, where users can develop online companionship with strangers, is fostered by a direct computer-to-computer contact, that is solely between two users, and does not pass through Omegle's servers.

For Fourth Amendment purposes, there is no distinction between what Wilbert did on Omegle and what he could have done either in e-mail or on the telephone. At its core, both involve one-on-one interactions that are clearly expected to be kept private.

Judge Larimer also found that Wilbert failed to demonstrate a reasonable expectation of privacy because " ... the Omegle website had a clear warning that the 'chats' are subject to monitoring for offensive content as part of Omegle's moderation process." *United States v. Wilbert*, 343 F. Supp. 3d 117, 121 (W.D.N.Y. 2018). Again, he is incorrect. Omegle's Terms of Service did not diminish Wilbert's expectation of privacy because. If such acquiescence were enough to waive his expectation of privacy, that would result in the chilling of social interaction and the evisceration of the Fourth Amendment.

The government argued below that, because the Omegle website advised that video chats are subject to monitoring for offensive content, the warning, standing alone, eliminated Wilbert's expectation of privacy

in the content of his chats and constituted a binding consent by Wilbert to allow Omegle to search and reveal the content of his video communications. It is incorrect. In fact, the Court in *United States v. DiTomasso*, 56 F. Supp. 3d 584 (S.D.N.Y. 2014), expressly rejected the government's privacy argument on the ground that

> it would subvert the purpose of the Fourth Amendment to understand its privacy guarantee as 'waivable' in the sense urged by the government. In today's world, meaningful participation in social and professional life requires using electronic devices--and the use of electronic devices almost always requires acquiescence to some manner of consent-to-search terms. If this acquiescence were enough to waive one's expectation of privacy, the result would either be (1) the chilling of social interaction or (2) the evisceration of the Fourth Amendment. Neither result is acceptable.

The *DiTomasso* Court also correctly found that the language in Omegle's Terms of Service was not so clear that it destroyed the defendant's expectation of privacy. It held:

> Omegle took snapshots of DiTomasso's chats and parsed them for content. Although that form of monitoring is referenced in the policy, it is mentioned exclusively as a means of "monitoring for misbehavior"—by which the policy clearly means violations of Omegle's rules, not criminal activity—and of improving Omegle's internal monitoring system. A reasonable person, having read carefully through the policy, would certainly understand that by using Omegle's chat service, he was running the risk that

> another party—including Omegle—might divulge his [s]ensitive information to law enforcement. But this does not mean that a reasonable person would also think that he was consenting to let Omegle freely monitor his chats if Omegle was working as an agent of law enforcement. When Omegle's policy refers to the 'law enforcement [purpose]' behind maintaining IP address records, it is unclear whether this 'purpose' is motivated (1) by Omegle's independent desire to aid criminal investigations, or (2) by Omegle's obligations under state or federal law. In other words, it is plausible to interpret the policy as implying that OMegle [sic] is required to keep IP address records. So construing the policy, a reasonable user would be unlikely to conclude that Omegle intended to act as an agent of law enforcement. And such a user would be even less likely to conclude that he had agreed to permit such conduct. *DiTomasso*, 56 F. Supp. 3d at 596-97.

The District Court, which conclusorily found Wilbert had no reasonable expectation of privacy because " ... the Omegle website had a clear warning that the 'chats' are subject to monitoring, *Wilbert*, 343 F. Supp. 3d at 121, never cited, let alone distinguished the compelling reasoning in *DiTomasso*.

2. The illicit image ("Image c6d0") that provided the basis for the warrant did not constitute child pornography, so the warrant lacked probable cause.

Investigator Cerretto swore in his affidavit that he sought a search warrant because he observed child pornography. Under the factors in *United States v. Dost*, 636 F. Supp. 828, 829-30 (S.D. Cal. 1986*),* which

has been approved by the Second Circuit, *see United States v. Rivera*, 546 F.3d 245, 252-53 (2d Cir. 2008), the image in question was not, however, child pornography. While the Second Circuit Court of Appeals ruled that "[t]he government's warrantless review of Image a9e7 does not mandate suppression ... because Image c6d0 was sufficient on its own to establish probable cause," *Wilbert*, 2020 U.S. App. LEXIS 27578, at *3, it is incorrect.

In *Dost*, the Court said that "[t]he critical issue in this case is whether the pictures depict the minors engaging in sexually explicit conduct as defined in 18 U.S.C. § 2255: For the purposes of this chapter, the term – . . . . (2) 'sexually explicit conduct' means actual or simulated – (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic; abuse [sic]; or (E) lascivious exhibition of the genitals or pubic area of any person." In *Dost*, the 21 of the 22 photographs depicted a 14-years-old girl in "various supine and sitting poses," while one photograph depicted a 10-year-old girl "nude and sitting on the beach." On these facts, the Court ruled that "[t]he photographs at issue here do

not meet the definitions contained in subsections (A), (B), (C), or (D). These photographs depict 'sexually explicit conduct' only if they contain a 'lascivious exhibition of the genitals or pubic area' under subsection (E)."

Here, too, the photograph of the K-9 and the girl do not depict sexually explicit conduct because there is no actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse.

That leaves only one possibility: the lascivious exhibition of the genitals or pubic area. While there is no statutory definition for a "lascivious exhibition," *United States v. Spoor*, 904 F.3d 141, 148 (2d Cir. 2018)("The statute does not define a 'lascivious exhibition'"), here, the focal point of the picture was not the child's genitals or pubic area. Indeed, the young girl's genital and pubic area is not even displayed in the picture.

The setting of the picture was not sexually suggestive either. The picture was not taken in a place or pose generally associated with sexual activity. For example, the picture was not taken on a bed in a bedroom.

The picture also did not suggest sexual coyness or willingness to engage in sexual activity, through expression of demeanor. And, finally, the picture of the K-9 and the girl were not intended or designed to elicit a sexual response from the viewer.

In his affidavit, Investigator Cerretto averred the picture was child pornography to obtain a search warrant to seize the computer in Petitioner's home, which yielded the evidence upon which the government rested its case. Yet he never showed the Magistrate the picture, and his subjective impression is not determinative. Under the factors in *Dost*, the image in question was not, objectively, child pornography.

3. The information contained in the affidavit in support of the search warrant was, in any event, also overbroad and stale.

The Second Circuit Court of Appeals also held that " ... the warrant was not stale or overbroad." *Wilbert*, 2020 U.S. App. LEXIS 27578, at *4-5. It found the " ... warrant was sufficiently particular to identify Wilbert's upstairs apartment as the premises to be searched, and it therefore was not overbroad." It is incorrect. The warrant did not describe the place to be searched. The affidavit described 634 Garson Avenue as

a "multi-level residential building." *Id*. In fact, it is not. Rather, it is a multiple unit residence, in which Wilbert–the target of the investigation--occupies only one unit, the upstairs apartment. In other words, although the affidavit linked the defendant to 634 Garson Avenue, it did not specify the specific portion of the building he occupied. Cerretto's use of the word "multi-level" was intended to obfuscate rather than illuminate its true occupancy, to allow him to search the entire building rather than only one apartment. This rendered the search warrant overbroad and lacking in probable cause to believe that contraband or evidence of a crime would be found in the place searched.

Significantly, even Magistrate Judge Feldman found "[i]t is true that paragraph A(1) of the warrant stated that '[t]his search is to include the upstairs apartment of 634 Garson Avenue,' but that language is imprecise." *United States v. Wilbert*, No. 16-CR-6084-DGL-JWF, 2017 U.S. Dist. LEXIS 77818, at *7 n.2 (W.D.N.Y. Mar. 28, 2017).

Here, the issue is not simply that the affidavit in support of the search warrant is technically imprecise or poorly drafted, but, rather, that it does not state sufficient facts to support an independent determination by the issuing magistrate that probable cause existed to enter and search

Wilbert's home. *See, e.g., Whiteley v. Warden*, 401 U.S. 560, 564, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971). Accordingly, the search warrant was facially invalid.

The District Court is again incorrect. Despite Judge Argento's description of the dwelling to be searched, she wrote "[t]his search is to *include* the upstairs apartment of 634 Garson Avenue ... and any out buildings, real property, vehicle(s), and curtilage utilized by the subject ...." (emphasis added). Read in its entirety, this language does not limit the scope of the search to anything less than all of 634 Garson Avenue. The Magistrate did not say the police could only search Wilbert's apartment; on the contrary, she said the search should *include* Wilbert's apartment. Yet by implication, that did not mean the police could not search anything else at 634 Garson Avenue. Technically, it meant the police could search all of 634 Garson Avenue–*including* Wilbert's apartment. As such, the search warrant was overbroad, because it gave law enforcement too much discretion and not enough meaningful restrictions on the search.

Even if the warrant were not overbroad, it was still stale. The Second Circuit Court of Appeals disagreed, but it is incorrect. It held that,

"[i]n light of the indicia identified in the Cerretto Affidavit suggesting that Wilbert was a collector of child pornography--including a prior sex offense and a previous investigation for uploading child pornography--we conclude that the four-month period between when the images were uploaded and the warrant was issued did not render the warrant stale." *Wilbert*, 2020 U.S. App. LEXIS 27578, at *5-6.

As a preliminary matter, the District Court's rejected Wilbert's staleness claim based on a misapprehension of critical facts. It mistakenly believed the interval between the offense and the warrant was "several weeks" when, in fact, it was nearly four months. The Second Circuit ignores that error, and simply found that even the four-month delay did not render the warrant stale. Contrary to its finding, however, Wilbert's background does not impact the staleness of the warrant. Wilbert's 26-year-old conviction, in 1991, occurred when he was only 16-years-old. In finding that Wilbert was a level two rather than a level three risk, pursuant to the Sex Offender Registration Act, the Supreme Court, Appellate Division, Fourth Department, found, in *People v. Wilbert*, 35 A.D.3d 1220, 1220 (4th Dept. 2006), that "[t]he evidence presented at the redetermination hearing established that defendant's behavior[,] while on

probation and thereafter[,] was exemplary ....” Such exemplary behavior, from a man convicted over two decades ago, as a teenager, cannot reasonably provide sufficient evidence to overcome the staleness of the evidence relied upon for this search warrant.

No other evidence overcame the staleness either. Cerretto never alleged Wilbert had been diagnosed with Pedophilia, had a large stash of child pornography or had a paid subscription to a child pornography site. Nor did he allege Wilbert had to take complicated steps to download the suspected images; indeed, he claimed Wilbert accessed Omegle.com with a simple click of the mouse. The image Wilbert allegedly had did not depend on a series of sufficiently complicated steps that reflected a willful intention to view the files. Cerretto never claimed Wilbert first accessed a single file of child pornography, but subsequently redistributed it to other users. Nor did he allege Wilbert had joined an internet group devoted to child pornography.

Absent any indicia Wilbert hoarded child pornography, the single alleged incident does not create a fair probability child pornography would, some four months later, still be found on a computer in his home.

This, therefore, cannot defeat a staleness challenge. Accordingly, the warrant issued in this case was not supported by probable cause.

4. The Second Circuit Court of Appeals erred when it Affirmed for the Same Reasons as the District Court.

The Second Circuit Court of Appeals ruled that, "[f]or substantially the reasons set out in the district court's opinions, we conclude that Wilbert's arguments on appeal are without merit." *Wilbert*, 2020 U.S. App. LEXIS 27578, at *3. It is incorrect. Certiorari should be granted to address these vital Fourth Amendment issues.

Investigator Cerretto testified, for example, that it is the practice of the New York State Police to rummage through everything that NCMEC sends them--without a warrant--until they find incriminating evidence. Yet the rummaging search violates the very essence of the Fourth Amendment to the United States constitution. It is akin for the police to enter a house and open all the drawers without a warrant and finally find evidence of criminality to ultimately justify the issuance of a warrant from a Magistrate.

When Magistrate Feldman claimed one of the images " ... was never utilized [and] never formed the basis for any Fourth Amendment

violation," defense counsel explained that it was "part of an[] illegal search [where] you ultimately get to evidence to support the charge ...." In other words, the New York State Police searched, without a warrant, until they found incriminating evidence to support its affidavit to obtain a warrant to search the computer in Wilbert's apartment. Magistrate Feldman accepted the premise of this argument, noting he was troubled by the "cavalier" attitude of the New York State Police, which " ... says, [']hey, we don't care [how careful NCMEC was], we're going to open everything' ... which * * * had never been viewed by anyone before without the benefit of a search warrant'"

In a finding that was upheld by the Second Circuit, Judge Larimer ruled that " ... the untainted evidence — c6d0 — was certainly sufficient to establish probable cause that child pornography was displayed on the chat video, putting aside any alleged tainted evidence * * * Such evidence provided ample basis for issuance of the warrant which led to the discovery of the child pornography images which formed the basis of the present indictment." *United States v. Wilbert*, 343 F. Supp. 3d 117, 121 (W.D.N.Y. 2018). Yet this ruling fails to address the Magistrate's concerns and the defendant's argument. It should have, because it was

precisely the cavalier attitude of the New York State Police, in rummaging through everything sent to it, to try to find incriminating evidence, upon which to seek a search warrant, that ran afoul of the Fourth Amendment. This is, after all, the chief evil that prompted the framing and adoption of the Fourth Amendment, to wit, the "indiscriminate searches and seizures" conducted by the British "under the authority of 'general warrants.'" *Payton v. New York*, 445 U.S. 573, 583, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Arizona v. Gant*, 556 U.S. 332, 345, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)("[T]he central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.").

When all the tainted allegations are set aside, there was no independent and lawful information in the search warrant affidavit that sufficed to show probable cause. *United States v. Giordano*, 416 U.S. 505, 555, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974)("The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the

independent and lawful information stated in the affidavit suffices to show probable cause.").

When the Magistrate said the warrant had both "legal and illegally obtained evidence," defense counsel correctly argued the search warrant affidavit itself was false, because in order to obtain the warrant, the Investigator "referred to [the one] at 2:30[,] [which] is not the one that was viewed ...." He added that there "isn't anything about 2:36 in the affidavit" and there was nothing in the affidavit about "two images." On the contrary, he added, "[a] review on the four corners of the affidavit is one image at 2:30:21" Even the Magistrate said that the " ... image downloaded at 2:30 ... did not contain evidence of child pornography ...." There was, therefore, no probable cause to issue the warrant.

Finally, Judge Larimer " ... conclude[d] that the good faith exception rule[,] enunciated in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)[,] applies. Investigator Cerretto provided a state court judge with the image involved depicting child pornography. The officer, therefore, was entitled to reasonably rely on the decision of the state court judge to issue the warrant." *United States v.*

Wilbert, 343 F. Supp. 3d 117, 122 (W.D.N.Y. 2018). Judge Larimer and the Second Circuit are both incorrect.

In *Leon*, this Court held that the Fourth Amendment exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was based on "objective good faith," even though the warrant might ultimately be found defective. *Leon*, 468 U.S. at 918-23. Evidence seized pursuant to a warrant for which actual probable cause does not exist or which is technically deficient is admissible if the executing officers relied on the warrant in "objective good faith." *Leon*, 468 U.S. at 922 (test of objective good faith is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."). The rationale for the good faith exception is that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id*. at 919. Here, the good faith exception does not apply because the warrant issuing magistrate was knowingly misled for two reasons.

First, the search warrant affidavit was false, because the image referred to was at 2:30, yet that image did not contain child pornography.

Critically, there was nothing in the affidavit about the image at 2:36. Nor was there any mention of two images. Significantly, even the Magistrate noted the " ... image downloaded at 2:30 ... did not contain evidence of child pornography ...." Absent the correct image, the application was also so lacking in indicia of probable cause as to render reliance upon it unreasonable. The warrant also so facially deficient that reliance upon it was unreasonable.

Second, the good faith exception is also inapplicable because Investigator Cerretto knowingly misled the issuing magistrate in his search warrant affidavit. He claimed he viewed an image of a "prepubescent female engaged in oral sex with a K-9." That is false. There is no depiction of oral sex in the picture. Nor is there any indication of actual physical contact between the tongue of the dog and the vagina of the girl. Indeed, the photograph does not even show the vagina or pubic area of the girl, let alone whether it was covered or uncovered. On the contrary, the most Investigator Cerretto admitted he could see was the face of a dog "*in the area of a child's vagina.*" Yet that, contrary to the Second Circuit's finding that this " ... arguably constitutes child pornography for purposes of 18 U.S.C. § 2256(8) because it depicts

'graphic or ... *simulated* bestiality,' 18 U.S.C. § 2256(2)(B)(ii)," *Wilbert*, 2020 U.S. App. LEXIS 27578, at *4 (emphasis added), does not, in fact, constitute actual or simulated oral sex. As a result, his claim, in the search warrant application, that the CyberTipline contained a complaint of a K-9 engaging in oral sex with a prepubescent female is false, which knowingly misled the issuing magistrate.

Investigator Cerretto also claimed the photograph of the K-9 and the girl violated several sections of the New York Penal Law, including section 263.15, promoting a sexual performance by a child, section 263.16, possessing a sexual performance by a child, and "sexual bestiality" and section 263.00(3),which defines "oral sexual conduct." The photograph does not, however, depict any of the above, but, rather, only depicts a dog in the general vicinity of a girl's body, and does not even show her vagina or private parts.

Significantly, New York State Penal Law § 130.00(2), defines "oral sexual conduct" as conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina." The photograph, however, shows no such

contact. Nor does the picture depict simulated sexual conduct. On the contrary, the image depicted a dog and a girl.

In his affidavit, Cerretto misled the warrant issuing magistrate--who was never provided with the image in question--as both a legal and factual matter, by falsely claiming the photograph depicted oral sex, when, in fact, it did not. Accordingly, the *Leon* good faith exception does not apply.

Taken together, certiorari should be granted to address the Fourth Amendment rummaging violation by the New York State Police.

POINT II

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT COURT OF APPEALS IMPROPERLY AFFIRMED THE DENIAL OF PETITIONER'S MOTION FOR A *FRANKS* HEARING.

Certiorari should be also granted because the Second Circuit improperly affirmed the District Court's denial of Wilbert's *Frank* hearing.

The Second Circuit Court of Appeals ruled no *Franks* hearing was warranted, under *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), because that "[t]here is, ... extensive evidence in the record that the description of the image in the Cerretto Affidavit was substantially accurate or, at the very least, not recklessly false. And minor discrepancies such as a time stamp that is six minutes off fall far short of the substantial preliminary showing of deliberate or reckless falsity that a defendant must make before the Fourth Amendment requires a *Franks* hearing." *Wilbert*, 2020 U.S. App. LEXIS 27578, at *6-7. It is incorrect.

"To invoke the *Franks* rule, a defendant is required to show: (1) 'that there were intentional and material misrepresentations or omission[s]' in the warrant affidavit, and (2) that the 'alleged falsehoods

or omission were necessary to the ... probable cause finding.'" *United States v. Mandell*, 752 F.3d 544, 552 (2d Cir. 2014)(*quoting United States v. Awadallah*, 349 F.3d 42, 65 (2d Cir. 2003)). Here, Wilbert made a substantial preliminary showing because there were intentional and material misrepresentations in the warrant affidavit, and those falsehoods were necessary to the finding of probable cause.

Investigator Cerretto obtained the warrant by intentionally and materially misrepresenting two critical issues. First, the affidavit referred to an image at 2:30, but that did not contain child pornography. Magistrate Feldman acknowledged as much, even noting the " ... image downloaded at 2:30 ... did not contain evidence of child pornography ...."

Second, Cerretto knowingly and intentionally misrepresented the claimed image of child pornography. He swore he viewed an image of a "prepubescent female engaged in oral sex with a K-9." That is false. There is, in fact, no depiction of either oral sex or simulated sex in the picture. Critically, at the hearing, Investigator Cerretto was only able to testify that the face of a dog was "in the area of a child's vagina." That however, is not oral sex and is not a crime. His averments in the affidavit do not establish his claim that a K-9 was engaged in oral sex with a

prepubescent female. Given the knowing and intentional misrepresentations in the affidavit, a *Franks* hearing should have been ordered. Certiorari should be granted to address this issue.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: September 11, 2020
Manhasset, New York

Respectfully Submitted,

Arza Feldman
Arza Feldman

UNITED STATES
SUPREME COURT

SCOTT T. WILBERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on September 11, 2020, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney, Western District of New York, 100 State Street, Rochester, New York 14614, on the Solicitor General, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001, and on Scott T. Wilbert, 27018-055, FCI Allenwood Low, Rt. 15, Allenwood, PA 17810. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court and are filing one copy of the petition, instead of 10, with this Court, pursuant to its April 15, 2020 order regarding the Covid-19 pandemic.

Arza Feldman
Arza Feldman