No. 21-5163

IN THE

SUPREME COURT OF THE UNITED STATES

Gregory Scott Stephen — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the Eighth Circuit's conclusion that a private citizen can never be established as a government agent absent the knowledge and acquiescence of the police correct for Fourth Amendment purposes?

2. Did the United States Court of Appeals for the Eighth Circuit correctly determine that the DCI Agents that searched petitioner's residences and the devices found within those residences was not in excess of the scope of the search warrant?

3. Did the United States Court of Appeals for the Eighth Circuit correctly determine that petitioner's sentence adequately accounted for his acceptance of responsibility by pleading guilty in a timely manner even though it made no change in the advisory Guideline sentence?

4. In child pornography cases, should all images and videos be subject to the Dost factors to define them as child pornography, and should the judge view the files to define them?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix B 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[ ] is unpublished.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 United States district court appears at Appendix C 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[ ] is unpublished.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[ ] is unpublished.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.

TABLES OF AUTHORITIES

ORGANIC

U.S. Constitution, Fourth Amendment

U.S. Constitution, Fifth Amendment, Due Process Clause

STATUTES

18 U.S.C. Section 2252

CASES

Boudette v. Barnette, 923 F.2d 754 (9th Cir. 1991)

Buonocore v. Harris, 65 F.3d 347 (9th Cir. 1995)

Green v. Scully, 850 F.2d 894 (2d Cir. 1988)

Skinner v. Ry. Labor Execs. Assn., 489 U.S. 602 (1989)

United States v. Badger, 925 F.2d 101 (5th Cir. 1991)

United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987)

United States v. Freeman, 914 F.3d 337 (9th Cir. 2019)

United States v. Inman, 558 F.3d 204 (2d Cir. 2013)

United States v. Starr, 533 F.3d 985 (8th Cir. 2008)

United States v. Wiest, 596 F.3d 906 (8th Cir. 2010)

United States v. Lohse, 797 F.3d 515, 520 - 521 (8th Cir. 2015)

United States v. Villard, 885 F.2d 117, 125 (3rd Cir. 1989)

United States v. Kemmerling, 285 F.3d 644, 646 (8th Cir. 2002)

United States v. Fiorrella, 602 F. Supp. 2d 1057, 2075 (N.D. Iowa 2009)

OTHER

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012)

The American Heritage Dictionary

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was January 4, 2021.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 5, 2021, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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).

STATEMENT OF THE FACTS/CASE

A federal grand jury indicted petitioner on charges of violating 18 U.S.C. Section 2252. In Mid 2018, petitioner filed a motion to dismiss, R. #11, motion to suppress, R. #12, motion for a Franks hearing, R. 41.

On September 27, 2018, the district court held an evidentiary hearing on those dispositive motions, R. 50, and on October 4, 2018 denied those motions.

On October 18, 2018, petitioner entered into a conditional plea agreement that reserved his right to appeal the above stated dispositive motions. The plea accepted responsibility for Counts 1 through 7 of the superseding indictment, and did not trigger any concessions in exchange for the plea, i.e., dismissal of counts, or the like.

In May 2019, petitioner was sentenced to an aggregate term of 2160 months imprisonment. The district court concluded the petitioner's offense level under the U.S. Sentencing Guidelines was 46, and reduced that level to 43 based on acceptance of responsibility pursuant to USSG, Section 3E1.1. The sentence was structured so that the maximum sentence for each count was imposed and ran consecutive to each other, despite being a single course of conduct/common scheme.

Petitioner filed a timely notice of appeal in May 2019, submitted his brief in September 2019, and the court of appeals issued its decision on the merits on January 4, 2021. On February 5, 2021, the court of appeals denied petitioner's request for rehearing by panel, and this petition follows.

REASONS FOR GRANTING THE WRIT

Was the court of appeals correct when it established that a private citizen can never be established as a government agent agent absent the knowledge and acquiescence of the police?

On direct appeal, Petitioner argued all of the incriminating evidence discovered at his residences that served as the basis for the charges against him should have been suppressed because it all stemmed from Vaughn Ellison's (petitioner's ex brother-in-law and paid contractor) unauthorized removal (later) viewing of a USB device containing incriminating images, which Ellison later turned over to law enforcement. There can be little doubt that Ellison's taking of the device from petitioner's home qualified as a seizure and that his subsequent viewing of the contents qualified as a search.

At the risk of stating the obvious, there is no evidence Ellison obtained a warrant prior to taking these actions given that he was not employed by any law enforcement. At the same time, however, such actions only implicate the Fourth Amendment if they are taken by a government actor. United States v. Starr, 533 F.3d 985, 994 (8th Cir. 2008). The central threshold question in this petition, therefore is whether Ellison was acting as a de facto government actor even though he was a private citizen.

By determining Ellison was not a government actor, the court of appeals relied in large part on the fact that police did not encourage Ellison or even know what he was up to at the time he took and subsequently viewed the device. In doing so, it, in effect, established a blanket rule that a private citizen can never be deemed a government actor absent some knowledge or acquiescence on the part of the police. Petitioner respectfully disagrees with this conclusion. For one thing, it flies in the face of the fact the question of government actor by private citizen turns on a totality-of-the-circumstances test. One of those factors is the intent of the private individual. United States v. Inman, 558 F.3d 742, 745 (8th Cir. 2009); United States v. Wiest, 596 F.3d 906, 910 (8th Cir. 2010).

If a governmental agency in the context of the Fourth Amendment can never exist without police knowledge or acquiescence, then this factor (the intent factor) is essentially a moot point. Put differently, the court of appeals holding implies that the intent factor - even if it overwhelmingly shows a law enforcement intent on the part of the private citizen - can never establish that a private citizen can be a government actor. Yet, appellate courts have been clear when a totality-of-the-circumstances test if employed in whatever capacity, to observe that a single factor can indeed support a finding. Green v. Sully, 850 F.2d 894, 902 (2d Cir. 1988)("a single factor or combination of factors considered together may inevitably lead to a conclusion that under the totality of circumstances a suspect's will was overborne ...").

Therefore, to conclude that a governmental agency on the part of a private citizen can NEVER be established absent knowledge and acquiescence on the part of the police, even if the private citizen clearly intended to help law enforcement, undermines the very notion of a totality of circumstances analysis itself. Along the same lines, the court of appeals determination that there must always be government knowledge and acquiescence in order to find that a private citizen was acting as an agent also contravenes the rule that no single factor or combination of factors is required under the totality of circumstances test. United States v. Freeman, 914 F.3d 337, 342 (9th Cir. 2019); United States v. Badger, 925 F.2d 101, 104 (5th Cir. 1991); United States v. Chalan, 812 F.2d 1302, 1307 (10th Cir. 1987). Two of the three factors announced by the court of appeals in determining whether a private citizen is acting as an agent of the government are whether the government had knowledge of, and acquiesced in the intrusive conduct and whether the citizen acted at the government's request. See, Inman, 558 F.3d, Id. at 745.

Essentially, the court of appeals mandated that these two factors be present in order to establish government agency even though a totality of circumstances test should not require that any particular factor or combination of factors be found true in order for a conclusion to be drawn. More importantly, the notion that government knowledge and acquiescence must always be present in order for a private citizen to be deemed a state actor is at odds with this Court's precedent. In Skinner v. Ry. Labor Execs. Assn., 489 U.S. 602 (1989), the Court held "[t]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." Id. at 614. Yet this is exactly what the court of appeals' decision establishes.

The court of appeals went on to hold that even if governmental agency could be established by the private actor's intent, that was not the case here because the evidence of Ellison's sole intent to assist law enforcement was lacking. Specifically, the

court of appeals concluded that Ellison took the USB device and viewed its contents as much out of "curiosity" as he did out of an interest to assist law enforcement. The two intents/motives CANNOT constitutionally be divorced in such a manner. On the contrary, whatever "curiosity" Ellison may have had about the contents of the USB device went hand-in-hand with his intent to assist law enforcement. Ellison was curious because he was "concerned" that some nefarious activity might have been occurring inside petitioner's home. Evidentiary Hearing Transcripts, September 27, 2018, Id. at Page 35.

In other words, Ellison's claimed "curiosity" was part of his interest in helping law enforcement. It was just another way of expressing that interest. This is why the court of appeals' reliance on Inman, supra, is misplaced. In Inman, the private citizen's curiosity truly had nothing to do with law enforcement. The individuals in Inman that searched the defendant's computer were fellow paramedics who had been talking to the defendant about his new girlfriend. One of the paramedics opened the laptop to see if he could find the girlfriend's name, only to find child pornography instead. Inman, Id. at 744. Under these circumstances, the district court in Inman was correct in drawing a distinction between idle curiosity and an intent to help the government.

Clearly, the paramedics in Inman had no suspicions at the time they opened the defendant's laptop and thus no intent to assist the government. Their curiosity truly had nothing to do with helping law enforcement. Ellison, by contrast, did have his suspicions. He recognized the device in the bathroom for what it was - a surreptitious recording device - and thus was concerned. Evid. Hr. Tr., September 27, 2018, Id. at Page 35. Indeed, Ellison already had his suspicions because he had previously seen petitioner in possession of photographs of nudity in the past. Evid. Hr. Tr., September 27, 2018, Id. at Pages 59, 74. Therefore, unlike in Inman, where the coworkers' curiosity that caused them to open the laptop truly was devoid of any intent to assist law enforcement, Ellison's curiosity was driven by his concern that criminal activity was afoot. In this regard, Inman is distinguishable, and its distinction between curiosity and law enforcement is inapposite.

The court of appeals also did not believe that Ellison "had a gung-ho attitude to help law enforcement" as evidenced by the fact that he waited two days, pondering what to do with the USB device. However, petitioner is not aware of any case law requiring that a private citizen be "gung-ho" in his interest in helping law enforcement before he qualifies as a state actor. The question is whether or not he intended to assist law enforcement. Ellison may have taken his time to view what was on the device, but that does not mean his decision to take the device to the police had changed. He was driven by his suspicions of petitioner and by his interest in ensuring any criminal activity was dealt with. Regardless of how enthusiastic Ellison's actions may have appeared, his intent to help law enforcement was established by the record.

Petitioner agrees with the court of appeals that altruism does not equal agency and that not every good Samaritan is a government agent. Ellison's actions went beyond altruism. This was not a situation where he was seeking to help a specific person or group of people. This was a situation where Ellison was attempting to thwart what he suspected was criminal activity. Based on his own suspicions that criminal activity may have been afoot, he took a device from petitioner's home without permission and then viewed its contents. The police officer testified at the evidentiary hearing on September 27, 2018 that Mr. Ellison contacted later even promised that he would "make sure" Ellison "got paid" by petitioner for Ellison's construction efforts on petitioner's home before the case went any further. For these reasons, petitioner respectfully urges the Court to grant certiorari, and hold that Vaughn Ellison was a state actor for Fourth Amendment purposes.

Did the court of appeals correctly determine that the DCI Agents that searched petitioner's residences and the devices found within did not exceed the scope of the warrant?

In addition to challenging the seizure and search of the USB device by Vaughn Ellison on the grounds that he was acting as an agent of the government, petitioner has also argued in his direct appeal that even if Ellison was not a governmental agent, the evidence from the USB device as well as all of the other evidence subsequently discovered should have been suppressed because the search conducted by the DCI agents exceeded the scope of the warrant that gave them the authority to conduct the searches. Specifically, the warrant only authorized the "extracting and cloning" of data. It did not provide the DCI agents authority to open and view the files. R. 54-3, at Page 1. Since the opening of the video files exceeded the scope of the warrant, the images on those files should have been suppressed.

In rejecting this argument, the court of appeals seized on the warrant's use of the word "include". Citing the case of United States v. Reingold, 731 F.3d 204 (2d Cir. 2013) and the book "Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012)", the court of appeals held that the word "include" connotes a non-exhaustive list. And since the warrant stated that the forensic examination "may include extracting and cloning data" from the devices, extraction and cloning were nothing more than examples of what the DCI agents could do and not limitations on other actions they also might take, such as opening and viewing the contents of the device. Petitioner respectfully disagrees with this conclusion and asks this Court to consider it. Both the Reingold case and Justice Scalia's book involved statutory interpretation, not the interpretation of the terms contained within search warrant, which, by the Fourth Amendment's own terms, requires a degree of particularity and specificity. See Buonocore v. Harris, 65 F.3d 347, 353-354 (9th Cir. 1995).

Therefore, while it may be appropriate to interpret a legislature's use of the word "include" as connotating a non-exhaustive list in a particular statute, it would not be appropriate to do the same thing when interpreting a warrant. Otherwise law enforcement would be able to sidestep this particularity requirement of a warrant by using the word "include" and allow the execution of the warrant to be broader than its wording. Because warrants require a unique degree of particularity and specificity, petitioner submits that to the extent the court of appeals utilizes a rule of statutory construction to interpret the breach of a warrant, it should rely on the doctrine of expressio unius est exclusio alterius. This "creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." Boudette v. Barnette, 923 F.2d 754, 756-757 (9th Cir. 1991). Because the warrant in this case expressly referenced extracting and cloning, but did not mention opening and viewing, these latter actions were beyond the scope of the actions allowed by the warrant. Accordingly, the agents' search of the device exceeded the scope of the warrant.

Did the court of appeals correctly determine that petitioner's sentence adequately accounted for his acceptance of responsibility by pleading guilty in a timely manner, even though it made no change in his Guideline sentence?

Applying a presumption of reasonableness, the court of appeals had upheld the district court's sentencing decision even though petitioner pled guilty, and thus spared the government the expense of trial as well as spared the victims the distress of having to come into court to testify. In the court of appeals' view, the district court sufficiently accounted for the fact that petitioner pled guilty as a factor in mitigation and it was purportedly reasonable for the district court to conclude that any acceptance of responsibility on petitioner's part was "half-hearted" because he focused on his own achievements and the blemishes to his basketball team's reputation over the harm to the victims during his allocution. As an initial matter, petitioner strongly disagrees with the notion that his acceptance of responsibility was "half-hearted" just because he also lamented the loss of his profession and good reputation. Both could have been true. A person in petitioner's position could have felt sad about the damage to his career as a basketball coach and still, at the same time, felt remorse over the harm he caused to the victim. The two were not mutually exclusive.

In fact, that was exactly what occurred here. Petitioner, in addition to lamenting the loss of his profession, also expressed, in no uncertain terms, his remorse over the harm he caused the victims. He told the district court "It's nearly impossible for me to express the depth of my sadness and remorse for the crimes I've committed. I'm ashamed. I'm embarrassed." Sentencing Hearing Transcripts, May 2, 2019, Id. at Page 198. Then, later, he added: "The things I've done are repulsive and they're wrong. It makes me sick to my stomach to look back and know I was capable of those things." Sent. Hr. Tr., May 2, 2019, Id. at Page 200. These are not the words of a man who only half-heartedly recognized the gravity of his actions. They reflected a profound

understanding of the nature of what he did and the harm he caused. There, petitioner believes it is incorrect, as the district court believed, to characterize his acceptance of responsibility as only half-hearted.

More importantly, even to the extent the district court considered petitioner's decision to plead guilty as a factor in mitigation, the fact remains that it had no effect on his sentence. It cannot be overlooked that petitioner's act of pleading guilty - which spared the government and the victims the cost and emotional distress associated with a trial - effectively counted for nothing when it came to the sentence imposed. Therefore, while petitioner agrees with the court of appeals that the district court had wide latitude to weigh the sentencing factors, the district court nonetheless abused its discretion by imposing a de facto life sentence that was completely unaffected by the fact that he pled guilty and accepted responsibility for his actions. For these reasons, petitioner urges this Court to vacate the district court's sentencing decision.

In child pornography cases, should all images and videos be subject to the Dost factors to define them as child pornography and should the judge view the files to define them?

Ryan Kedley of the Iowa Department of Safety testified at petitioner's pretrial detention hearing. He testified that a hidden recording device containing pictures of underage, nude minors was brought to law enforcement by Vaughn Ellison, who found it in petitioner's home. It is very important to consider whether the files on that recording device are legally defined as "child pornography." This device, and the contents of it, initiated the investigation into petitioner, and was used to acquire additional search warrants for petitioner's residences. Additionally, Count 7 of the superseding indictment, transportation of child pornography, is also based on the videos that were taken from the initial recording device that Ellison stole from petitioner's home while performing construction work.

Ellison's description of what the videos showed was "boys disrobing, going into the shower dry, and coming out wet." The video did not actually show the boys showering. The hidden recording device was embedded in a USB-cellphone-type charger and had been plugged into the wall of a bathroom at a hotel in Lombard, Illinois (thus the transportation charge for taking it from Illinois across state lines to Iowa). The camera on the recording device could not be aimed, and recorded the far wall of the bathroom except when the boys moved directly in front of it. No videos had been edited and the camera could not zoom or focus on a certain area. Petitioner asserts that these images do not fall within the definition of child pornography, making the warrant for the Thursday, February 22, 2018 search invalid. Petitioner further contends that if the images do not fall within the definition of child pornography, Count 7 of the superseding indictment is equally invalid.

18 U.S.C. Section 2252(a)(1) criminalizes the transportation of images which depict, and whose production involved, "a minor engaging in sexually explicit conduct." The definition of "sexually explicit conduct" for the purposes of Section 2252 includes "lascivious exhibition of the genitals or pubic area of any person." The American Heritage dictionary defines "lascivious as "of characterized by lust, lewd, lecherous." It is not surprising that courts have universally held that mere nudity is not included in the category of "lascivious exhibition of the genitals or pubic area." The court of appeals considers a non-exhaustive list called the "Dost Factors" in determining whether a depiction meets the category of lascivious exhibition of the genitals or pubic area." The factors include (1) whether the focal point is on the minors genitals or pubic area; (2) whether the picture's setting is sexually suggestive, i.e., in a place associated with sexual activity; (3) whether considering the minor's age, the minor is depicted in an unnatural pose or in inappropriate attire; (4) whether the minor is fully or partially clothed; (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the picture is intended or designed to elicit a sexual response in the viewer; (7) whether the picture depicts the minor as a sexual object; and, (8) any captions on the images. United States v. Lohse, 797 F.3d 515, 520-521 (8th Cir. 2015).

Applying these Dost Factors, it becomes clear that the videos on the USB device did not fit the definition of "lascivious". (1) The genitals are not the focus of the videos. The boys are off-screen during most of their time in the bathroom, and only for a few seconds do they step into the view of the camera while disrobed. The camera could not be pointed, aimed, angled, or zoomed. (2) The setting is in a bathroom, which is not an area typically associated with sexual activity. (3) The boys are not depicted in any unnatural or inappropriate attire. (4) The boys are seen at time to be partially or fully nude. (5) As they were not aware they were being recorded, the boys obviously suggest no sexual coyness or willingness to engage in a sexual activity. (6) The image was not designed to elicit a sexual response in the viewer. (7) The videos do not portray the minors as sexual objects. And, (8) there were no captions on the images (they had not been modified or edited in anyway).

The only two factors that may appear to be questionable are Dost factors four and six. Regarding factor four, the boys were temporarily nude in some videos, which by itself does not exhibit lasciviousness. Regarding factor six, although the district court did rule in petitioner's motion to suppress that "otherwise innocent behavior COULD be construed as sexually explicit conduct, that is not the case here." In a different case, the court of appeals observed "[w]e emphasize that the relevant factual inquiry in this case is not whether the pictures in appealed, or were intended to appeal, to the defendant's sexual interest but whether, on the face, they appear to be out of sexual character." United States v. Kemmerling, 285 F.3d 644, 646 (8th Cir. 2002). Also, "[w]e

must, therefore, look at the photograph, rather than the viewer. If we were to conclude that the photographs were lascivious merely because (the defendant) found them to be sexually arousing, we would be engaging in conclusory bootstrapping rather than the test at hand - a legal analysis of the sufficiency of the evidence of lasciviousness." United States v. Villard, 885 F.2d 117, 125 (3rd Cir. 1989). These videos would not pass the Dost factors in any form or fashion whatsoever.

Additionally, if the district judge wanted to determine if the videos were lascivious, he should have viewed the items himself. He did not. In the footnotes of the order denying petitioner's motion to dismiss, Appendix [redacted], Judge Williams writes: "Exhibit 1 is a copy of videos from a USB device depicting minors in various states of nudity and using a bathroom and shower. According to the government, it constitutes contraband, and, therefore, the exhibit has been retained by the government. The court finds it unnecessary to view the videos to reach a decision on the merits of the pending motions." Appendix [redacted] D .

According to other cases in the northern district of Iowa, Judge Williams should have viewed the images himself to determine if they met the statutory definition. "Thus, the Court implores any reviewing Court to personally examine the images at issue and not simply rely on a written description of their contents." United States v. Fiorella, 602 F. Supp. 2d 1057, 2075 (N.D. Iowa 2009). For these reasons, the images should not have been considered child pornography, which would likely make the Thursday, February 22, 2018 search warrant void, and would dismiss Count 7 of the superseding indictment as a matter of law.

CONCLUSION

Wherefore the petitioner prays that this Honorable Court grants this petition, issues the writ, and reverses and/or vacates the judgment below. Alternatively, petitioner respectfully requests that the Court grant, vacate, and remand ("GVR") for further consideration to the court of appeals for the foregoing reasons.

Respectfully Submitted,

x Gregory S. Stephen Date: 7/5/21

Gregory S. Stephen