No. 21-5312

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Jose Reyes
(Your Name) — PETITIONER

People of the State of Illinois vs. (Kwame Raoul "et.al") — RESPONDENT(S)

FILED
JUL 27 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Illinois
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jose Reyes Y21933
(Your Name)

2500 Route 99 South
(Address)

Mt. [illegible], IL [illegible]
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1) Is the search of the cell phone valid when the complaint for the search warrant issued in this case showed no nexus between the cell phone recovered, and the offenses for which the defendant was arrested.

2) Is the two conviction and sentence for child pornography supported, If it is based on a single video recording.

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:

Kwame Raoul
Edward Rundall
Eric F. Rinehart

RELATED CASES

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER

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 _____ 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[ ] is unpublished.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 _____ 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[ ] is unpublished.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 A 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[✓] is unpublished.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[ ] is unpublished.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 _____.

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

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

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

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

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

The date on which the highest state court decided my case was 5/26/2021. A copy of that decision appears at Appendix A.

[ ] 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).

Jurisdiction

2020 IL App (2d) 170379

No. 2-17-0379

Opinion filed November 24, 2020

No. 126756

In The supreme court of Illinois

Constitutional and statutory Provisions involved

Whether the evidence found on the Huawei cell Phone should be suppressed where the complaint for the search warrant of the Phone included no evidence linking the underlying crimes to the Phone.

Motion to suppress Evidence

People v. Moser, 356 Ill. App. 3d 900, 908 (2005)
People v. Beck, 306 Ill. App. 3d 172, 178-79 (1999)

Appellate Brief

U.S. Const. Amends. IV, XIV
Ill. Const. of 1970, Art. I, §6
People v. Manzo, 2018 IL 122761
Zurcher v. Stanford Daily, 436 U.S. 547 (1978)
People v. Rojas, 2013 IL App. (1st) 113780
Illinois v. Gates, 462 U.S. 213 (1983)
United States v. Poldeauz-Wentz, 543 F.3d 954, 960 (7th Cir. 2008)
United States v. Zimmerman, 277 F. 3d 426 (3d Cir. 2002)
People v. LeYoun, 402 Ill. App. 3d 787 (1st Dist. 2010)
United States v. Brown, 828 F.3d 375 (6th Cir. 2016)
United States v. Leon, 468 U.S. 897 (1984)

Appellant Reply Brief

People v. Hlieber, 258 Ill. App. 3d 144, 148 (2d Dist. 1994)
Groh v. Ramirez, 540 U.S. 551, 557 (2004)
Riley v. California, 573 U.S. 373, 385 (2014)
People v. Manzo, 2018 IL 122761, ¶ 29
People v. Harmon, 90 Ill. App. 3d 753 (4th Dist. 1980)
United States v. Reilly, 76 F.3d 1271, 1280 (2nd Cir. 1996)
People v. LenYoun, 402 Ill. App. 3d 787, 796 (1st Dist. 2010)
People v. Manzo, ¶ 67
People v. Rojas, 2013 IL App (1st) 113780, ¶ 22
United States v. Zimmerman, 277 F.3d 426, 431, 437 (3rd Cir. 2002)
United States v. Brown, 828 F.3d 375, 379, 385 (6th Cir. 2016)

whether one child Pornography Count should be vacated under the one-act, one-crime doctrine where the Defendant was convicted of two counts of child Pornography based on filming one video.

Appellate Brief

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720 ILCS 5/11-20.1 (a)(1)
People v. Dryden, 363 Ill. App. 3d 447, 453 (2nd Dist. 2006)
People v. Artis, 232 Ill. 2d 154, 170 (2009)
People v. Hagler, 402 Ill. App 3d 149, 152 (2d Dist. 2010)
People v. King, 66 Ill. 2d 551, 556 (1977)

Appellate reply Brief

People v. Grimes, 215 Ill. App. 3d 182, 185 (4th Dist. 1991)
720. ILCS 5/11-20.1 (2017)
Grimes, 215 Ill. App. 3d at 185
People v. Maas, People v. Myers
In re Rodney S., 402 Ill. App. 3d 272, 283 (4th Dist. 2010)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

STATEMENT OF FACTS

Initial Charges

On October 2, 2013, officers arrested the defendant, Jose Reyes, and filed three complaints charging him with kidnaping, aggravated kidnaping, and unlawful restraint. (C. 8-10) The charges alleged that at approximately 5:30 p.m. on September 30, 2013, Reyes took three-year-old M.G. from outside her residence, placed her in his car, and drove off. (C. 8-10) He would return her 20 minutes later. (E. 9-10) Upon her return, M.G. exhibited signs of sexual assault, namely, blood in her underwear and redness around her vagina. (E. 10)

Search Warrant

On October 8, a week after the incident, Mundelein detective Marc Hergott presented a complaint for a warrant seeking to search a Huawei cell phone, a Garmin GPS unit, and a media player found in Reyes' car following his arrest. (E. 6-12) Hergott stated in his complaint that he believed these items contained evidence related to the offenses of predatory criminal sexual assault and abuse and aggravated kidnaping. (E. 11) His complaint was seven pages long and consisted of two sections. The first section discussed, in general terms, cell phones and GPS units known as Garmins. (E. 6-8) The second section recounted evidence that had been collected against Reyes showing that he had committed the kidnaping and sexual assault of M.G. (E. 8-12)

Cell Phones and Police Investigations

Hergott began the complaint by explaining his experience. (E. 6) He said he had worked for the Mundelein Police Department for 23 years as someone

who "investigat[ed] violations of state criminal laws and regulations." (E. 6) In that time, he had received "ongoing training" in the area of "child abuse and computer crimes involving children." (E. 6)

The next paragraph explained the relationship between cell phones and police investigations. (E. 6-7) For half a page, the complaint detailed how difficult it is to permanently delete old data from cell phones. (E. 6-7) For instance, according to the complaint, data "can be recovered months or even years after downloaded, deleted or viewed via the internet," and noted that cell phones are "ideal repositor[ies] for many types of evidence." (E. 7)

The final paragraph of this section described how computers revolutionized the way child pornography is viewed, produced, distributed and utilized. (E. &) According to the complaint, offenders no longer need a darkroom to develop images. (E. 7) Now, offenders can trade child pornography via computers and store their images on "computer disks, CD=s [sic], DVD's, and ZIP disks." This allows offenders to keep images for long periods of time. (E. 7)

Probable Cause for the Underlying Offenses

The second part of the complaint recounted the evidence uncovered by the police during the course of their investigation into the kidnaping and assault of M.G., as follows:

According to the complaint, two witnesses saw an Hispanic male take M.G. from the front steps of an apartment building at 555 Deepwoods in Mundelein. (E. 9-10) The man placed M.G. in a black car, buckled her seat belt, and drove away. (E. 9-10) Approximately 20 minutes later, officers received a

911 call from a woman who found M.G. in the apartment building parking lot. (E. 10) The apartment building from which M.G. was taken had video cameras at the front and rear from which police obtained recordings from the relevant time period. The recordings showed a man matching the description given by witnesses coming to the front of the building, picking up M.G., and running away with her. They also showed a vehicle matching a description given by witnesses of the man's car pulling into the parking lot a short time later, the passenger door opening, and M.G. running out. (E. 10) From the witnesses' description of the vehicle and the man driving it, officers were able to track down the defendant and his car, which was parked at the defendant's place of employment, on October 2, 2013. (E. 11) On October 3, 2013, the police conducted a search of the car pursuant to a warrant. (E. 11) During the search, officers recovered a cell phone, a Garman GPS unit, and a media player. (E. 6, 11)

Based on the foregoing, Hergott sought the issuance of a warrant to "search, seize and analyze: any and all records of incoming and outgoing phone calls; any video recordings, memory/speed dial-redial features, contacts, voicemail features, images and metadata, videos, address book, text messages, any passwords, maps, GPS locations, computer and cell phone applications, documents, emails, internet activity and searches and all items which have been used in the commission of or which constitute evidence of" the sexual assault and kidnaping offenses for which Reyes was arrested. (E. 6) The court issued a warrant to search all the items, including the Huawei cell phone. (E. 5)

On the cell phone, officers discovered two recordings that prosecutors would later introduce at trial. (R. 716-19) The first video showed M.G. sitting in the front seat of Reyes' car, while the car passed by various buildings. It also showed the Garmin GPS unit on the dashboard. The second video showed M.G., naked from the waist down, sitting on the defendant's lap with his exposed penis touching her vagina. Both of these videos were put onto a single disk and played for the court at trial. (R. 719, P. Ex. 85)

Subsequent Charges

On November 6, 2013, Reyes was charged by indictment with one count each of aggravated kidnaping, kidnaping and predatory criminal sexual assault, along with two Class X counts of recording child pornography and one Class 2 count of possessing child pornography. (C. 21-27) On January 28, 2015, Reyes' trial counsel filed a motion to suppress the evidence found on the Huawei cell phone. (C. 93-94) Counsel argued that probable cause to search the cell phone was completely lacking because there was no nexus shown between the offenses listed in the complaint for the warrant and the phone.

A hearing was held on the motion on March 12, at which the parties presented only argument based on the four corners of the complaint. (R. 132-60) The judge said he had reviewed the complaint and had "considered carefully [defense counsel's] suggestion about nexus not having been met between what is alleged in the complaint" and the item searched. Nevertheless, the judge denied the motion to suppress, stating:

> there certainly is no suggestion that has [been] offered that there is any type of lack of somehow sufficiency of evidence

> that a crime had been committed; there is no suggestion that in any way that the detective or any representatives of the police had in any way falsified or enhanced any of the representations that were made; certainly no allegations there were any misrepresentations in the affidavit; there certainly can be no question that the complaint for search warrant in the first sentence request[s] a warrant to search, cease [sic], and analyze describe[s with] particularity three items; having reviewed all of this, given the nature of, the offenses alleged, the assertions that were supported by the affidavit, the fact that this was reviewed and authorized by a neutral and detached Judge, the Defense request to suppress the evidence is respectfully denied[.]

(R. 156-57)

Bench Trial

The case proceeded to a bench trial on all counts. (C. 145) At trial, M.G.'s nine-year-old sister, D.G., testified that on September 30, 2013, she was playing with her sisters outside their apartment when a man exited a black car and offered her a lollipop. (R. 302-304). The person was a tall Hispanic male with some facial stubble, who wore jeans and a t-shirt. (R. 306). After asking D.G. for her sisters' names, the man picked up M.G., placed her in his car, and drove off. (R. 309-311) Two days after the incident, D.G. identified the defendant in a photographic lineup. (E. 20-21)

Angelica Cervantes, whose apartment had a view to the building's front entrance, testified that on September 30, she saw a black car stop at the apartment building and honk its horn. (R. 352, 356-357). The car left, but returned again and parked. (R. 358-359). A man exited the car, walked toward the apartment's entrance, and left carrying a child. (R. 359-363). Three days later, Cervantes viewed a six-photo lineup and selected the defendant as the

man she saw take the child. (R. 366-371)

Chenel Vandenberk, a nurse trained in treating sexual assault patients, examined M.G. on September 30. (R. 423-424, 445) She took a urine sample and noticed that as M.G. urinated, she was in pain. (R. 447-448) Vandenberk noted that M.G.'s thighs were discolored, with redness on the exterior and internal area of her vagina. (R. 448) She saw a brown stain in M.G.'s underwear which she suspected was dried blood. (R. 449) Based on the injuries she observed and the medical history gathered from talking to M.G.'s mother, Vandenberk concluded that M.G.'s injuries were consistent with an act of penetration. (R. 478-479, 495) Dr. Dolan, an attending physician, testified that M.G. had redness in the internal area of her vagina. (R. 742). He had viewed video of the encounter between the defendant and M.G. and concluded that the actions shown on the video were consistent with M.G.'s injuries. (R. 750) Sarah Owens, a scientist at the Northeastern Illinois Regional Crime Lab, testified that the defendant's DNA from a buccal swab matched DNA found on sperm recovered from M.G.'s underwear. (R. 760, 774)

The State introduced surveillance video taken from a camera in the apartment building's lobby. (R. 566). The video showed a man wearing a white shirt bending on his knees. (P. Ex. 46). After a few minutes, the man took one of the girls, lifting her from under her shoulders, and walked away with her. (P. Ex. 46). Daniel Ragusa, a computer forensics expert, searched the defendant's Garmin GPS unit. (R. 649). Data from the Garmin showed that defendant drove around M.G.'s apartment building twice on September 30 before M.G. was

taken. (R. 649). The State also played the two videos recovered from the Huawei cell phone, which showed the encounter between the defendant and M.G., as described above. (P. Ex. 85)(R. 719)

Following closing argument, the judge found Reyes guilty on all counts. (R. 918-919) On April 26, 2017, he sentenced the defendant to 30 years imprisonment for predatory sexual assault, 30 years for aggravated kidnaping, and 30 years on each of the Class X child pornography counts, with all the sentences to be served consecutively, for an aggregate sentence of 120 years. (C. 234-235, R. 981-982). The judge imposed a concurrent sentence of seven years imprisonment on the final count of possession of child pornography. (R. 234)

On appeal, the defendant raised two issues: 1) the trial court erred in refusing to suppress the recording found on the defendant's cell phone, as the complaint for the search warrant lacked any showing of a nexus between the phone and the offenses for which the defendant had been arrested, and the complaint was so lacking otherwise in indicia of probable that the police could not rely on the "good faith" exception to justify the use of the warrant; and 2) the trial court erred in entering convictions and sentencing the defendant on both Class X counts of child pornography because those counts were based on a single recording of the encounter between Reyes and M.G.

A majority of the appellate court held that, because police had probable cause to search the cell phone for "location" data, that showing of probable cause also granted them the authority to search the video and photographic files of the phone, under the "plain view" doctrine. *People v. Reyes*, 2020 IL App (2d)

170379, ¶¶ 69, 74. The appellate court also found that the trial judge properly entered convictions and sentenced defendant on both Class X child pornography counts, because the recording in question portrayed "two distinct pornographic images," i.e., an image of M.G.'s vagina, and an image of a penis touching her vagina. *Reyes*, ¶ 86.

Justice Birkett, concurring in the majority's affirmance of the trial court's denial of the motion to suppress, concluded that because it was "common knowledge" that individuals who molest children have an interest in and are likely to possess child pornography, the facts set forth in the complaint which showed the police had probable cause to believe Reyes had sexually assaulted M.G. also provided probable cause for the police to search the video and photographic files of the cell phone. *Reyes*, ¶ 92 (Birkett, J., concurring). Justice Birkett acknowledged the absence from the complaint of any direct information or independent evidence that these files would contain evidence of the underlying offenses, *Reyes*, at ¶¶ 93, 109, but surmised that "in the instant case, a reasonable police officer or issuing judge could have inferred that defendant might have viewed child pornography to whet his sexual appetite before abducting M.G. and might have recorded the sexual act on his cell phone." *Reyes*, ¶ 131 (Birkett, J., concurring).

ARGUMENT

I. Because the complaint for the search warrant issued in this case showed no nexus between the cell phone recovered from the defendant's car and the aggravated kidnaping and predatory criminal sexual assault offenses for which he was arrested, the warrant allowing the search of the phone was invalid, and the video recordings recovered from the phone should have been suppressed.

At Jose Reyes' trial, the State introduced into evidence a video recording found on a cell phone recovered from Reyes' car, depicting the sexual assault of three-year-old M.G. This video was found in the execution of a warrant authorizing a search of the phone for evidence of the aggravated kidnaping and predatory criminal sexual assault offenses for which Reyes had been arrested. The complaint for this warrant, however, showed absolutely no nexus between the offenses for which Reyes was arrested and the cell phone. Despite this fact, the Second District Appellate Court, in both majority and concurring opinions, found that the trial court correctly denied Reyes' motion to suppress the video recording. *People v. Reyes*, 2020 IL App (2d) 170379.

This Court should grant leave to appeal to address whether: 1) as the majority opinion concluded, the existence of probable cause to search the location data file of a cell phone grants carte blanche authority to search all other files of the phone, including those containing video and photographic evidence; and 2) as the concurring opinion concluded, despite the absence of any direct or independent evidence connecting the commission of a sex offense against a child to the offender's cell phone, police may nevertheless obtain a warrant to search the phone based on the "commonsense" belief that child sex offenders use their cell phones in the execution of such offenses.

In affirming the trial court's denial of the defendant's suppression motion, the majority of the appellate court found that the police had probable cause to search the defendant's cell phone for GPS or "location" data because it appeared that both the kidnaping and subsequent sexual assault of M.G. took place in Reyes' car, the spot where the phone was found two days later. *Reyes*, ¶¶ 60-61. Accordingly, the majority reasoned, because the police had probable cause to search the phone for location data, that gave them probable cause to search any and all other files on the phone, including the video and photographic files, under the "plain view" doctrine. *Reyes*, ¶¶ 69, 74. Justice Birkett, in a concurring opinion, reasoned that because it was "common knowledge" that people who molest children have an interest in child pornography, that "commonsense" knowledge gave rise to probable cause to search Reyes' phone "for images capturing the sexual assault of M.G. or of other children engaging in sexual activity." *Reyes*, ¶ 92 (Birkett, J., concurring). Neither of these conclusions justify denial of the defendant's suppression motion.

In this case, neither the information contained in the complaint for the warrant filed by Mundelein detective Marc Hergott nor any reasonable inferences arising from that information showed any relationship between Reyes' cell phone and the offenses for which he was arrested. (E. 6-11) Even assuming the complaint provided probable cause to search the phone for location data, however, no basis was provided for believing that additional evidence relating to the offenses of aggravated kidnaping and predatory criminal sexual assault would be contained on the phone's video and photographic files.

While Illinois reviewing courts have not previously addressed the issue presented here, a number of federal court decisions have found that the fact that an individual is suspected of the sexual molestation of a child does not provide probable cause to search that individual's files, computer or otherwise, for child pornography. In *United States v. Doyle*, 650 F. 3d 460 (4th Cir. 2011), the Circuit Court reversed the district court's denial of the defendant's motion to suppress evidence of child pornography discovered on the defendant's computer during the execution of a search warrant. The Court noted that while the warrant sought evidence of the crime of child pornography, there was "scant evidence" in the officer's affidavit to support the belief that the defendant possessed child pornography. *Doyle,* at 472. The bulk of the information set forth in the complaint for the warrant concerned allegations of sexual assault, not child pornography. The Circuit Court found that "evidence of child molestation alone does not support probable cause to search for child pornography." *Id.* The Court further found that the warrant application was "so lacking in indicia of probable cause" that officers could not have relied on it in good faith. *Doyle* at 463. See also *United States v. Hodson*, 543 F.3d 286, 292-94 (6th Cir. 2008), a case referenced in Justice Birkett's concurring opinion (while the officer's affidavit established probable cause for one crime, child molestation, it requested a warrant to search for an entirely different crime, child pornography, for which probable cause was lacking; the warrant therefore did not authorize a search of the defendant's residence and computers for child pornography, and the good faith exception to the police reliance on the warrant did not apply).

The Court reached a similar conclusion in *Virgin Islands v. John*, 654 F.3d 412 (3rd Cir. 2011). In that case, the Third Circuit upheld the district court's order suppressing evidence of child pornography seized from the defendant's home pursuant to a warrant. The affidavit of the detective who applied for the warrant established only probable cause to believe the defendant had committed sexual assaults against children at the school where he taught. The affidavit did not allege any direct evidence of the defendant's possession of child pornography, or establish any nexus between the assaults and the defendant's alleged possession of child pornography. *John*, at 419-20. Even though in her affidavit the detective averred that "persons who commit sex offense crimes involving children customarily hide evidence of such offenses . . . in their homes and on their computer[s]," the Court found this averment was not sufficient to establish probable cause to search the defendant's home. *Id.*

Quoting from then-Circuit Court judge Sotomayor's decision in *United States v. Falso*, 544 F.3d 110, 122 (2nd Cir. 2008), the *John* Court remarked that "it is an inferential fallacy of ancient standing to conclude that, because members of group A (those who collect child pornography) are likely to be members of group B (those attracted to children), then group B is entirely, or even largely comprised of, members of group A." *John*, at 419. In short, the Court reasoned, the bare fact that a person is suspected of a sexual offense against a child does not provide probable cause to believe that evidence of that offense would be found on any computer files related to that person. Nor, the *John* Court found, could the warrant be salvaged by the officers' good faith belief

in its validity where the affidavit was so lacking in showing a nexus between the charged offenses and files within the possession or control of the defendant. *John*, at 418-19.

The foregoing cases demonstrate the fallacy of the majority's finding that a showing of probable cause that the defendant kidnaped a child and committed a sex offense against her in his car necessarily granted the police the authority under the warrant to search all of the defendant's cell phone files for evidence of those offenses. It further demonstrates the fallacy of Justice Birkett's reasoning that, if a person is suspected of a sex offense against a child, that necessarily establishes probable cause to believe he possesses evidence of the offense on his cell phone under the theory that, because "members of group A (those who collect child pornography) are likely to be members of group B (those attracted to children), then group B is entirely, or even largely comprised of, members of group A." The defendant asks that this Court grant leave to appeal to address these weighty issues and go on to find that his motion to suppress should have been granted.

II. This Court should grant leave to appeal to determine whether two convictions and sentences for child pornography may be entered against a defendant based upon a single video recording.

Jose Reyes was convicted of two Class X offenses of child pornography and sentenced to consecutive terms of 30 years imprisonment on each conviction, based upon a single video recording which depicted the child's unclothed vaginal area and a penis touching that area. The appellate court rejected the defendant's argument that the entry of two convictions and sentences violated one-act, one-crime principles, stating that "[W]hile there is certainly a common act – recording - defendant produced two distinct pornographic images by recording the victim's vagina and a penis touching the victim's vagina. Either act, standing alone, would support a conviction." *Reyes,* ¶ 86.

In reaching its conclusion, the appellate court focused on whether the video depicted more than one pornographic image, not on whether those images were contained on a single or on multiple recordings. However, the statutory subsection under which the defendant was charged, 720 ILCS 5/11-20.1(a)(1) (2013), focuses on the act of recording as the conduct being penalized, not the number of pornographic images the recording portrays. Here, Reyes was charged in one count of child pornography with "film[ing] or videotap[ing] or otherwise depict[ing] *** said child *** engaged in any act of sexual penetration with any person in that there was a penis on the vagina of the victim," and in a second count with "film[ing] or videotap[ing] or otherwise depict[ing] *** said child *** in that the video depicts the unclothed vagina of the victim." (C. 24, 25)

In *People v. McSwain,* 2012 IL App (4th) 100619, the Court held that four

of five of the defendant's convictions for child pornography had to be vacated where the convictions were based on the defendant's act of sending one email containing five different pornographic images of one child. The Court found the language of the child pornography statute prohibiting the possession of "any" film, videotape or photograph was ambiguous as to the "allowable unit of prosecution" and, construing the statute in favor of the defendant, found that only one conviction was permitted because the five different images of a single child were all contained in a single email. *McSwain*, ¶¶ 57-64. But see *People v. Murphy*, 2012 IL App (2d) 120068, ¶¶ 9-10 (defendant's simultaneous possession of multiple pornographic images depicting multiple children supports more than one conviction for child pornography).

Notably, the child pornography statute was amended in 2014 to include section (a-5), which provides that '[t[he possession of *each individual film, videotape, photograph, or other similar visual reproduction* or depiction by computer in violation of this Section *constitutes a single and separate violation.*" See P.A. 98-437, eff. Jan. 1, 2014, adding section (a-5) to the child pornography statute (emphasis added). The addition of this language would seem to further support the conclusion that the legislature saw the "allowable unit of prosecution" as being directed at each recording, not at different acts contained in a single recording. This Court should grant leave to appeal to determine whether a single video recording can be used to support two convictions and sentences for child pornography simply because the recording depicts more than one pornographic image.

Reasons for Granting the Petition

A. The Court should grant certiorari because the search of the cell phone is unconstitutional. The constitution Prohibits any search without the existence of Probable cause. Probable cause requires a sufficient nexus between the the offense and the Phone. Any evidence that the Phone was used in the commition of any offense is absent. Furthermore, the Phone was found two days after the alleged offense and miles away from the location where the offense was believed to have been committed. People v. Beck, 306 Ill. App. 3d 172, 178-79 (1999)

The lower courts decision in this case was erroneous. And the error is in violation of the U.S. Constitution. Quoting from then-Circuit Court Judge Sotomayor's decision in United States v. Falso, 544 F.3d 110, 122 (2nd Cir. 2008), the John court remarked that "it is an inferential fallacy of ancient standing to conclude that, because members of group A [those who collect child Pornography] are likely to be members of group B (those attracted to children), then group B

is entirely, or even largely comprised of, members of group A". John, at 419. In short, the court reasoned, the bare fact that a person is suspected of a sexual offense against a child does not provide probable cause to believe that evidence of that offense would be found on any computer files related to that person. Nor, the John court found, could the warrant be salvaged by the officers good faith belief in its validity where the affidavit was so lacking in showing a nexus between the charged offenses and files within the possession or control of the defendant. John, at 418-19.

The "plain view doctrine" is inapplicable where, Article II, section 6 of the 1870 constitution stated: The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized. People v. Moser, 356 Ill. App. 3d 900, 908 (2005)

Conclusion

The foregoing cases demonstrate the fallacy of the majority's finding that a showing of probable cause that the defendant kidnaped and committed a sex offense against her in his car necessarily granted the Police the authority under the warrant to search all of the defendant's cell phone files for evidence of those offenses. It further demonstrates the fallacy of Justice Birkett's reasoning that, if a person is suspected of a sex offense against a child, that necessarily establishes probable cause to believe he possesses evidence of the offense on his cell phone under the theory that, because "members of group A (those who collect child pornography) are likely to be members of group B (those attracted to children), then group B is entirely, or even largely comprised of, members of group A." The Defendant asks that this Court grant certiorari to address these weighty issues and go on to find that his motion to suppress should have been granted.

B This court should grant certiorari because the two convictions and sentences for child Pornography that are based upon a single video recording. The lower courts decision in this case was erroneous. And the error is in violation of the one-Act, one-Crime Doctrine. the Doctrine Prohibits multiple offenses that arise from a **single act.** In People v. McSwain, 2012 IL APP (4th) 100619, the court held that four of five of the defendant's convictions for child Pornography had to be vacated where the convictions were based on the defendant's act of sending an email containing five different Pornographic images of one child. The court found the language of the child Pornography statue Prohibiting the Possession of "any" film, videotape or Photograph was ambiguous as to the "allowable unit of Prosecution" and, Construing the statue in favor of the defendant, found that only one conviction was Permitted because the five different images of a single child were all contained in a single Email. McSwain, ¶¶ 57-64.

Conclusion

The Defendant asks that this court grant certiorari to address this issue and go on to find that a single video constitutes a single act.

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