No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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KYLE EVAN PETERSON,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

1. The Sixth and Ninth Circuits are split on whether, during a plea colloquy in a child pornography case, the district judge must explain to the defendant the knowledge element as interpreted by this Court in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). The Sixth Circuit has answered in the affirmative, the Ninth in the negative.

2. Whether, after the district court has ordered evidence suppressed, the government can circumvent the exclusionary rule by obtaining a post-hoc warrant from a different judge.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner Kyle Peterson respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The court of appeals affirmed Mr. Peterson's conviction and sentence in a published opinion. *See United States v. Peterson*, 995 F.3d 1061 (9th Cir. 2021).[1] It then summarily denied his petition for rehearing en banc.[2]

[1] A copy of the opinion is attached at Appendix A (APP.A).

[2] A copy of the denial is attached at Appendix B (APP.B).

JURISDICTION

On May 3, 2021, the court of appeals filed its opinion. On August 2, 2021, the court of appeals denied Mr. Peterson's petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The searches.

In 2017, Mr. Peterson was serving a California sentence for possessing child pornography. To secure release, he signed parole conditions, including a waiver of his Fourth Amendment rights. ER:42.[3] Parole Officer Mekisha Buyard was assigned to supervise him. ER:200.

Officer Buyard learned from colleagues that Mr. Peterson allegedly had a cell phone. ER:200. On May 23, 2017, she conducted a parole compliance visit at his home. ER:200. While there, Officer Buyard found a Unimax u673c cell phone. ER:29. She searched it manually and allegedly found several images of naked prepubescent children, a violation of his parole conditions. ER:106. She seized the phone and submitted it for a forensic search. ER:29.

Officer Buyard arrested Mr. Peterson for the parole violation. ER:60. His

[3] "ER" is Excerpt of Record on file with the court of appeals.

parole was officially revoked on June 1, 2017. ER:67-70. And "[b]y June 16, 2017, HSI completed the forensic analysis of the Unimax cell phone," which revealed additional alleged child pornography. ER:29.

Around the same time, Mr. Peterson was again released on parole. On July 6, 2017, Officer Buyard saw him walking down the street with a cell phone. She stopped him and seized a silver LG MS210 phone. ER:30. She searched it and again allegedly found images of naked minors. ER:30. Like before, she arrested Mr. Peterson and sent the phone for forensic evaluation. His parole was again revoked, on July 14, 2017. ER:61. And "[b]y September 25, 2017, HSI completed its forensic analysis of the LG cell phone," which allegedly contained additional child pornography. ER:30.

Thereafter, federal authorities took over. On November 2, 2017, the government filed an indictment charging Mr. Peterson with receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2) (Count 1), and possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) (Count 2). ER:1-2.

B. The suppression motions and conditional guilty plea.

1. The first suppression motion.

Mr. Peterson moved to suppress the evidence found during the forensic searches. ER:8. He argued the searches violated the Fourth Amendment because

they were warrantless and "were conducted after Defendant's parole was revoked and the conditions of parole no longer in effect." ER:9.

The government initially opposed the motion, but then filed a non-opposition. ER:88-89. It agreed that, because the warrantless forensic searches were not conducted until *after* revocation of Mr. Peterson's parole, they could not be considered valid parole searches. As such, the agents had no legal authority to search the phones without a warrant. The government, therefore, did "not oppose defendant's motion to suppress with respect to HSI's forensic findings of either phone," ER:90, and indicated it would go to trial solely with the evidence obtained during the on-site parole searches by Officer Buyard. ER:88.

On January 24, 2019, the district court granted Mr. Peterson's motion: "the evidence analyzed by HSI from the cell phone searches (Model U673 and Model MS210) that occurred on May 23 and July 6, 2017 *is suppressed*." ER:326 (emphasis added).

2. The search warrant.

Shortly thereafter, the government obtained a warrant to search both phones forensically. ER:158. The warrant application, however, did *not* go to the district court judge assigned to Mr. Peterson's case, but to a magistrate judge. Additionally, the application did not disclose that the evidence from those phones

had already been ordered suppressed. Rather, the affiant included the following "prefatory note":

> In May 2017 and July 2017, the TARGET DEVICES were initially previewed by California Division of Adult Parole Operations, Parole Agent Mekisha Buyard, as a part of separate parole searches of PETERSON's person and property. Agent Buyard previewed the contents of the UMX cell phone as part of the May 2017 parole search, and previewed the contents of the LG cell phone as part of the July 2017 parole search. At the time, PETERSON was on parole pursuant to his release from prison pursuant to a 2015 conviction for possession of child pornography, in violation of California Penal Code, Section 311.11. By September 2017, the TARGET DEVICES were also subsequently analyzed by Special Agent/Computer Forensics Analyst Anthony Sims (Your Affiant) of the Bakersfield office of Homeland Security Investigations. No information obtained through the *subsequent* analyses of the TARGET DEVICES, namely any part of their respective examinations by SA Sims nor either of them, is being used in this warrant application, nor any of their supporting documentation.

ER:160 (emphasis in original). Instead, for probable cause, the application relied on a summary of Officer Buyard's on-site manual searches of the phones and cloud data. ER:172.

3. The second suppression motion.

Mr. Peterson responded by again moving to suppress, arguing the government could not circumvent the initial suppression ruling. ER:101-02. The district court denied the motion. ER:241.

4. The conditional guilty plea.

Mr. Peterson then entered a conditional guilty plea to count 1, preserving "the right to appeal the district court's denial of his motion to suppress evidence." ER:251. Before sentencing, however, he moved to withdraw the plea. He argued: "[T]he plea was not knowingly and intelligently entered into because the elements listed in the plea agreement are incorrect and before accepting Defendant's guilty plea, the court did not address the Defendant in open court and inform him of, and determine that he understood, the nature of the charge to which he was pleading." ER:271. In support, Mr. Peterson explained the elements listed in the plea agreement were:

1) the defendant knowingly received;

2) any visual depiction that had been produced using materials that were mailed, shipped, or transported in interstate or foreign commerce;

3) by any means, including by computer;

4) the producing of such visual depiction(s) involved the use of a minor engaging in sexually explicit conduct; and

5) the visual depiction was of such conduct.

The [] missing elements [included]:

1) that the defendant knew that the visual depiction was of a minor engaging in sexually explicit conduct;

2) that the defendant knew the production of the visual depiction involved the use of a minor in sexually explicit conduct[.]

ER:272.

He further explained that the missing elements did not appear in the text of the statute; rather, they were based on this Court's decision in *X-Citement Video*, *Inc*. ER:276.[4]

The district court denied the motion. ER:296. Thereafter, it sentenced Mr. Peterson to 162 months in custody.

C. The appeal.

On appeal, Mr. Peterson argued that the district court erred in taking his plea, because "neither the plea agreement nor the Rule 11 colloquy informed him of the offense's (18 U.S.C. § 2252(a)(2)) essential elements." AOB:13. He explained that, at no time, was he ever advised of the mens rea elements of the crime, as interpreted by this Court in *X-Citement Video, Inc*. AOB:18-20.

Mr. Peterson further argued, as to the forensic searches, "the government cannot use a warrant to circumvent a district court's ruling suppressing evidence. Otherwise, the practice would eviscerate the exclusionary rule. Any time a court

[4] As discussed below, in *X-Citement Video*, *Inc*., the Court interpreted section 2252 to include a mens rea element that did not clearly appear in the statutory text.

granted suppression, the government could simply seek a mulligan via a post-hoc warrant." AOB:14.

As discussed in more detail below, the panel issued a published decision affirming. APP.A. Mr. Peterson then filed a petition for rehearing en banc, which the court of appeals summarily denied. APP.B.

REASONS FOR GRANTING THE PETITION

I.
Review is warranted to address the split of authority between the Sixth and Ninth Circuits as to whether, during a plea colloquy in a child pornography case, the district judge must explain to the defendant the knowledge element as interpreted by this Court in *X-Citement Video, Inc.*

A. Underlying legal principles.

The issue here involves the district court's obligations in connection with guilty pleas in child pornography cases. The inquiry begins with Federal Rule of Criminal Procedure 11, which requires the district court "personally" to "inform the defendant of, and determine that the defendant understands, . . . the nature of each charge to which the defendant is pleading." Fed. R. Crim. P. 11(b)(1)(G).

As this Court made clear more than fifty years ago, "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Thus, to

comply with Rule 11, the defendant must be advised of the crime's elements. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) ("Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid.").

B. 18 U.S.C. § 2252 and *X-Citement Video, Inc.*

The crime at issue here is 18 U.S.C. § 2252(a)(2) (receipt of child pornography). The statute provides: "Any person who . . . knowingly receives . . . any visual depiction … that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer . . . if . . . (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct" is guilty of a felony. 18 U.S.C. § 2252(a)(2).

In *X-Citement Video, Inc*., 513 U.S. at 78, this Court considered the statute's mens rea requirement. At issue was how the "knowingly" element applied to the prohibited conduct. Ultimately, the Court rejected "the most grammatical reading of the statute," in favor of importing "broadly applicable scienter requirements," despite the fact that "the statute by its terms does not contain them." *X-Citement Video*, *Inc.*, 513 U.S. at 70. In doing so, it held "the term 'knowingly' in § 2252

extends both to the sexually explicit nature of the material and to the age of the performers." *Id.* at 78. Thus, the Court concluded that, for a violation of section 2252, the essential elements include: (i) the defendant *knew* that the visual depiction was of a minor **and** (ii) the defendant *knew* the visual depiction showed that minor in sexually explicit conduct. *Id.*

This brings the matter back to Rule 11. The question is whether the district court must inform the defendant of the mens rea as interpreted by *X-Citement Video, Inc.*

C. The Sixth Circuit's approach.

The Sixth Circuit answers, yes. Based on *X-Citement Video, Inc.*, it has held that, during a plea colloquy for a child pornography offense, the district court must advise the defendant that the knowledge element applies "not only as to the act of receipt itself, but also as to the fact that the material he is receiving features minors engaged in explicit sexual conduct." *United States v. Szymanski*, 631 F.3d 794, 795 (6th Cir. 2011).

In support, the Sixth Circuit reiterated that, under *X-Citement Video, Inc*,. "scienter or knowledge as to both the sexually explicit nature of the material and the age of the depicted subjects is an *element* of the offense. In other words, the Supreme Court interpreted § 2252(a)(2) to mean that a defendant convicted of

receiving child pornography must have known, not just that he was receiving something, but that what he was receiving was child pornography." *Id.* at 799 (emphasis added).

Turning to the case before it, the Sixth Circuit found that the plea colloquy "completely omit[ted] the Supreme Court's substantive gloss, which requires that Szymanski, at the time he 'did knowingly receive,' knew that what he was receiving was child pornography." *Id*. The court continued, "it seems possible that a layperson such as Szymanski, being informed of the nature of this charge in this manner, would simply assume that the receipt statute covered *any* situation where someone possessed but did not produce child pornography, since bare receipt, without the added requirement recognized by *X-Citement Video* of knowledge as to what is being received, would be logically entailed in every possession of this sort." *Id.* at 800 (emphasis in original). Given this error, the court vacated the defendant's conviction and sentence. *Id*. at 802.

D. The Ninth Circuit's approach.

In this case, the Ninth Circuit reached a contrary conclusion on nearly identical facts. As in *Szymanski*, during the Rule 11 colloquy, the district court failed to inform Mr. Peterson of the knowledge element, as set forth in *X-Citement Video*. ER:262. Nor did the plea agreement. ER:250.

Instead, as to knowledge, the plea agreement tracked *only* the first element – that "the defendant knowingly received" child pornography – but did not provide notice of the "knowing" mens rea for the remaining elements. ER:250. Thus, just like *Szymanski*, Mr. Peterson was *never* advised by the court (or the plea agreement) that the elements included not only knowing receipt, but more specifically, actual knowledge of the sexually explicit nature of the material as well as the minority status of the persons depicted.

Nevertheless, the Ninth Circuit affirmed. It acknowledged *X-Citement Video Inc.*, but held, "[t]he indictment, which the district court read in open court to Peterson and which tracked the language of 18 U.S.C. § 2252(a), adequately set forth the elements of the crime of receipt of materials involving the sexual exploitation of minors." *Peterson*, 995 F.3d at 1066. The court reasoned, "the indictment in this case was sufficient because it tracked the language of 18 U.S.C. § 2252(a)(2)[.]" *Id*. Thus, there was no obligation to advise Mr. Peterson that the knowledge element included knowing the subject images were child pornography. *See id.*

This analysis ignores the holding of *X-Citement Video* and directly conflicts with the Sixth Circuit's decision in *Szymanski*.

As noted, in *Szymanski*, the Sixth Circuit held the statutory language was *not* enough because "being informed of the nature of this charge in this manner, would

simply assume that the receipt statute covered *any* situation where someone possessed but did not produce child pornography, since bare receipt, without the added requirement recognized by *X-Citement Video* of knowledge as to what is being received, would be logically entailed in every possession of this sort." *Szymanski*, 631 F.3d at 800. The district court, therefore, was required to expand on the statutory language and explain to the defendant that, "at the time he 'did knowingly receive,' he knew that what he was receiving was child pornography." *Id.* at 799.

Yet, that is exactly what the Ninth Circuit held was *not* required.[5] Instead, the district court need only read the statutory language to the defendant. The Circuit split, therefore, can be summarized as follows: In the Sixth Circuit, reading the statutory language alone is insufficient to set forth the essential elements. In the Ninth Circuit, however, merely reciting the statutory language is enough.

These holdings cannot be harmonized. Accordingly, to mend the split and ensure uniformity in the law, the Court should grant certiorari.

[5] The Ninth Circuit tried to distinguish *Szymanski* because "[u]nlike Peterson, Szymanski 'waived indictment,' and did not enter into a plea agreement." *Peterson*, 995 F. 3d at 1067. But this is an irrelevant distinction. In both cases, the operative facts were the same. Both defendants pleaded guilty without being advised of the mens rea as interpreted in *X-Citement video, Inc*. Nothing else matters.

II.

Review is warranted to determine whether, after the district court has ordered evidence suppressed, the government can circumvent the exclusionary rule by obtaining a post-hoc warrant.

Review is also warranted to determine whether the government can circumvent the exclusionary rule by obtaining a post-hoc warrant.

The Fourth Amendment requires a warrant. The exclusionary rule is its enforcer. The rule safeguards the warrant requirement by "prohibit[ing] introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search[.]" *Murray v. United States*, 487 U.S. 533, 536 (1988) (citations omitted).

Thus, once a judge invokes the rule by granting suppression, the matter should be at an end. The subject evidence is inadmissible. But that is not what happened here. Instead, after suppression, the government obtained a search warrant from a different judge and was then allowed to use the previously suppressed evidence against Mr. Peterson. The Ninth Circuit approved. It allowed the government to get a second bite at the apple and avoid the exclusionary rule by obtaining a post-hoc warrant.

This ruling, if permitted to stand, would gut the exclusionary rule. Law enforcement officers would be incentivized to avoid the perceived inconvenience

and inefficiency of obtaining a warrant with impunity. *See United States v. Camou*, 773 F.3d 932, 943 (9th Cir. 2014) ("'[i]f evidence were admitted notwithstanding the officers' unexcused failure to obtain a warrant . . . then there would never be any reason for officers to seek a warrant.'") (citation omitted; emphasis in original). They will know that, if the evidence were ever suppressed, a post-hoc warrant would restore it. Such a rule turns the warrant requirement on its head.

The Court, therefore, should grant review to consider the constitutional validity of the Ninth Circuit's ruling.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: September 15, 2021

s/ Devin Burstein

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