No. _____

SUPREME COURT OF THE UNITED STATES

JEREMY SCHENCK,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

1. Are allegations in a warrant application entitled to lesser scrutiny when the district court concludes that the allegations are essential to the probable cause analysis, but contain "benign information?"

2. May a reviewing court base a probable cause determination on the structure of the paragraphs in the warrant application?

3. Does the mere fact that an image was described by a witness using "vulgar slang" for female genitalia establish probable cause without even mentioning the specific slang word in question?

PARTIES TO THE PROCEEDING

The parties to these proceedings are Jeremy Schenck and the United States.

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Petitioner, Jeremy Schenck, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in this action on July 2, 2021, and the order denying the petition for rehearing entered on August 13, 2021.

OPINIONS BELOW

The decision of the district court is not published. The decision of the court of appeals is published at *United States v. Schenck,* 3 F.4th 943 (7th Cir. 2021). The decisions of the court of appeals and district court are reproduced in the appendix to this petition.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on August 13, 2021, when the court of appeals denied Schenck's petition for rehearing. This Court has jurisdiction to review this judgment pursuant to Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

> 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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4th Amendment, United States Constitution.

STATEMENT OF THE CASE

The grand jury charged Jeremy Schenck with using a minor to produce sexually explicit images on a Seagate 1 TB hard drive in violation of Title 18, U.S.C. § 2251(a) and with distribution of an image of a minor engaged in sexually explicit conduct in violation of Title 18, U.S.C. § 2252(a)(2). Schenck moved to suppress the results of a warrant search that led to the seizure of the Seagate 1 TB hard drive. The district court denied Schenck's motion to suppress.

Schenck pleaded guilty to using a minor to produce sexually explicit images, reserving the right to appeal the denial of the motion to suppress. The court of appeals, however, affirmed the denial of the motion to suppress.

The warrant application in the present case sets forth probable cause only if the application includes sufficient information about the alleged victim's age. The problem is that the allegations in the warrant application about the victim's age are wholly conclusory. The district court circumvented this flaw by concluding that the allegations about the victim's age qualify as "benign information," and therefore are apparently entitled a lesser scrutiny. The district court also went beyond the plain language of the warrant application and analyzed the structure of the paragraphs to

support the probable cause finding. The court of appeals ignored the district court's faulty reasoning and applied a set of rules that essentially dispenses with the need for the warrant to set forth the basis of knowledge for the information in the warrant application.

The court of appeals also held that where a warrant application uses a "vulgar slang" to describe female genitalia, the slang word automatically establishes probable cause to believe that the image qualifies as sexually explicit. The court made this declaration without asserting the specific "vulgar slang" word that triggered the probable cause finding.

REASONS FOR GRANTING THE WRIT

I. *The court of appeals has decided important questions of federal law in a way that conflicts with the relevant decisions of this Court.*

a. There is nothing "benign" about allegations that are essential to the probable cause determination.

The district court dubbed the information about the alleged victim's date of birth and parentage as "benign information." The court did not explain what it meant by "benign information," but the clear implication is that the district court viewed the "benign information" as less important than the rest of the allegations in the affidavit, and therefore less in need of a reliable source.

There is no legal or logical basis for the district court's finding that the allegations about the victim's age are "benign information." In the present case, the court of appeals acknowledges that proof of the alleged victim's age is an essential part of the warrant application. (Opinion at 7)("The [victim's age] is significant because if ABC were an adult at the relevant times, then the photos of her would not be criminal (or at least not child pornography)." Equally, there is no legal or logical basis for treating an allegation that is essential to the probable cause inquiry differently based on the district court's erroneous conclusion that the information qualifies as "benign information."

This Court's well established precedent prohibits a finding of probable cause based on a "conclusory" statement in the warrant application. *See Illinois v. Gates,* 462 US 213, 239 (1983). This Court has never suggested that this standard relaxes for any reason. In fact, the Court emphasizes that reviewing "courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Id.*

The court of appeals blessed the district court's expansion of the law without scrutiny or comment. Thus, the district court's special treatment of allegations in the warrant application that it considers "benign information" opens the door to a new rule that allows the warrant reviewing court to lower the probable cause standard whenever the part of the probable cause analysis includes "benign information." In creating this rule, however, the court failed to provide what criteria lower courts should apply in deciding whether the information in question is "benign" enough to qualify for the reduced standard.

The novel approach applied by the district court, and silently approved by the court of appeals, directly conflicts with this Court's precedent, and therefore merits this Court's attention. Unless this Court intervenes, henceforth an affidavit based on "wholly conclusory" statements

will suffice as a factual basis for probable cause so long as the court declares the allegation "benign information."

> b. The court applied a paragraph structure test to the warrant application that creates a dangerous and erroneous precedent.

The lower courts acknowledge that the application fails to set forth a factual basis for the alleged victim's age. To remedy this flaw, the district court went beyond the plain text of the application and claimed to decipher the drafter's intent based on paragraph structure. The court of appeals blessed this foray away from the plain language of the affidavit without citing a single case in support. The ruling clearly conflicts with the rule that requires the warrant reviewing court to limit its review to the face of the warrant application. *See Giordenello v. United States*, 357 U.S. 480, 487 (1958)("an adequate basis for [probable cause] ... [has] to appear on the face of the complaint.").

The lower courts' faulty reasoning merits this Court's attention because it ignores the fact that wholly conclusory assertions in a warrant application are not entitled to any weight. Once it is clear that a particular assertion in the application is conclusory, the assertion must be rejected without further ado. It is error for the district court to speculate about the source of the information based on the structure of the paragraphs.

It is also worth noting that the paragraph structure analysis that the court utilized is illogical. Paragraph 2 explicitly references a particular officer (Buccellato) as the source of some of the information in the paragraph. The other paragraphs also reference the specific source of the information contained therein. Notwithstanding these explicit assertions about sources, without stating a source, paragraph 2 also states that

> Christina D. is the mother of three small children, the above-referenced ....[alleged victim] (dob xx/xx/2016)...
>
> ...
>
> Jeremy Schenck is the biological father of [alleged victim].

Where the affiant clearly states a source for most of the allegations, the logical inference is that the affiant understands the importance of stating a source to the allegations. Thus, where it is clear that the affiant understands the importance of stating the source, but states no source for other allegations in the paragraph, the most logical conclusion is that the affiant has no reliable source for the allegations. The district court and court of appeals turn this logic on its head and essentially declare that where a paragraph states a source for some allegations in the paragraph, but not for others, the inference is that all of the allegations came from the same source.

c. The court of appeals decision waters down the prohibition against relying on conclusory allegations.

The court of appeals proposes to replace the rule it gutted with its own version of a "common sense" test that goes like this. A mother is mentioned as a source for some information in the application. A child's mother likely knows that child's date of birth. Thus, since the mother likely knows the child's date of birth and since the date of birth is set forth in the affidavit, common sense tells us that the mother must have been the source of the information about the child's date of birth. Under this reasoning there is no need to assert a factual basis so long as it is fair to assume that someone mentioned in the affidavit likely knew the information in the allegation. This is novel reasoning that eviscerates this Court's precedent that requires the warrant application to provide an adequate factual basis for its allegations.

d. The court of appeals created an erroneous rule of law that requires a reviewing court to find that where "vulgar slang" is used to describe genitals, the description necessarily establish probable cause to believe that the image is sexually explicit.

Another issue addressed in this appeal is whether the description of a particular image suffices to establish probable cause to believe that the image qualifies as child pornography. The image in question is described in

the application as a "picture of (alleged victim) pussy." This language, however, does not appear in the court of appeals decision. Without addressing the specific language used in the warrant application, the court of appeals rejects as "frivolous the argument that an image so labeled would not likely be sexually explicit." (Opinion at 10). The Court reaches this conclusion by reasoning that the word used is "vulgar slang," which according to the Court, necessarily means that description refers to an image that meets the definition of lewd. (*Id.*).

The major flaw with this reasoning that merits this Court's attention is that the lower court's decision never states what word was used to describe the photo. Rather, the opinion merely refers to the word as "vulgar slang" for "female genitalia." This creates a new rule that opens the door to issuing a warrant to search for sexually explicit materials without a description of the materials sufficient to inform a neutral magistrate that the image in question qualifies as sexually explicit. Such a rule conflicts with this Court's well-established precedent that requires the reviewing court to focus on the specifics of the image to decide if the image qualifies as sexually explicit. *See New York v. P. J. Video, Inc.*, 475 U.S. 868, note 5, (1986)("we think that a reasonably specific affidavit describing the content of a film generally provides an adequate basis for the magistrate to

determine whether there is probable cause to believe that the film is obscene…"). If that is the rule that this Court decides to establish, there should be some analysis about why a particular slang word necessary establishes that the image in question amounts to sexually explicit.

CONCLUSION

For the reasons stated herein the Petitioner urges this Court to grant the Petitioner's writ of certiorari.

Dated this 10th day of November 2021.

Respectfully submitted,

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