No. 21-6761

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK J. KILLEN, JR.
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,
/s/ Patrick Killen, Jr.
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QUESTIONS PRESENTED

Whether this Court should visit the issue of allowing law enforcement to gather information initiated by the United States to use a Mutual Legal Assistance Treaty ("MLAT") in lieu of a search warrant. In the instant case, Petitioner was unable to gather the same information, which according to Public Defender, Michael Caruso, is a violation of Defendant's Fifth Amendment Due Process right.

Whether this Court should visit the issue of allowing law enforcement to gather content and historical location information using IP (Internet Protocol) addresses without a search warrant. In the instant case, law enforcement gathered over four (4) months of IP (Internet Protocol) addresses of historical cell phone records that provided a comprehensive catalog of the Petitioner's past movements and locations without the Petitioner's knowledge and without a search warrant in violation of Petitioner's Fourth Amendment (U.S. CONST. IV) right.

Whether this Court should visit the issue of allowing law enforcement to gather evidence from a foreign entity without a search warrant and then allow the foreign entity destroy the original evidence. In the instant case, Petitioner was unable to ascertain the original evidence gathered from an MLAT as it had been destroyed and the records custodian did not testify in violation of Petitioner's Sixth Amendment right. Additionally, Petitioner was unable to examine evidence taken from his laptop as the laptop had been reimaged by the FBI and all original evidence had been destroyed.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Patrick Killen, Jr. respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINION AND ORDER BELOW

The order of the Eleventh Circuit Court of Appeals denying a certificate of appealability (Case No. 21-10888) appears at appendix A to this petition.

JURISDICTION

The Eleventh Circuit Court of Appeals (Case No. 21-10888) issued its order on September 8, 2021 (Appendix B). This Motion for Continuance was within 90 days of that order and this Court granted said motion to allow Petitioner to file no later than January 6, 2022. This Petition is being filed prior to January 6, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides that "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..."

The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment (U.S. CONST. VI) to the U.S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him."

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by indictment in the United States District Court for the Southern District of Florida with multiple counts of child pornography, in violation of 18 U.S.C. §2251 and 18 U.S.C. §2252, when Petitioner was merely 20 years old.

On May 14, 2013, a records request was made via Mutual Legal Assistance Treaty ("MLAT") which produced over four (4) months of IP (Internet Protocol) addresses of historical cell phone records that provided a comprehensive catalog of Petitioner's past movements and locations.

On August 26, 2013 the Kitchener Detachment after having received a Mutual Legal Assistance Treaty ("MLAT") request, without a search warrant, sent non-original evidence consisting of a thumb drive consisting of one (1) electronic folder, two (2) Word documents, one (1) photo of non-child pornography image of young boy's face and one (2) pdf document to FBI Charlotte. The orange thumb drive had been copied onto a DVD/CD and the orange thumb drive was then deleted which deleted all original evidence. The Canadian Constable never testified at trial.

In *United States vs. Warshak*, 631 F.3d 266 (6th Cir. 2010), the Court held that government agents violated the defendant's Fourth Amendment (U.S. CONST. IV) rights by compelling his Internet Service Provider (ISP) to turn over his emails without first obtaining a Search Warrant based on probable cause. In the instant case, the FBI obtained the records of Petitioner, not with a search warrant, but with a Mutual Legal Assistance Treaty ("MLAT"). MLAT's provide documents to law enforcement only and Defendant's cannot obtain that same information. There was no probable cause to obtain that information.

On December 23, 2015, in his testimony before the Honorable Kathleen Cardone, Public Defender, Michael Caruso stated that obtaining evidence in a foreign country using a Mutual Legal Assistance Treat ("MLAT") violates a Defendant's due process right.

> *Second, there is not an efficient and reliable method for criminal defense lawyers to obtain evidence in a foreign country. Mutual Legal Assistance Treaties (MLATs) are limited to law enforcement officials involved in criminal investigations. Access to evidence though an MLAT is, therefore, restricted to prosecutors, and governmental agencies that investigate criminal conduct. Criminal defense lawyers are constricted to using letters rogatory, a much less effective method, to secure evidence located abroad.* ***Due process dictates that each side in a criminal case have the ability and opportunity to access the same information. This is lacking.***
> (Page 12, para 1)
> Retrieved from: Microsoft Word - Cardone testimony - Caruso .docx (fd.org)

In the landmark case of *Carpenter vs. United States*, 138 S. Ct. 2206, 201 L. Ed 2d 507 (2018), the Supreme Court held that the government violated the Fourth Amendment (U.S. CONST. IV) of the Constitution by accessing historical records containing the physical locations of cell phones without a Search Warrant. "The Supreme Court held that the government's acquisition of Carpenter's cell phone location records constituted a search, and that the government should have first obtained a warrant."

The holding of the Appellate Court in the instant case directly conflicts with the Supreme Court's decision in *Carpenter.*

The Court also held that only 7 days of content information can be obtained with a Search Warrant. In the instant case, 4 months and 25 days of historical content was obtained without a Search Warrant when 54 pages of bind logs were produced. In order to identify a client query, the bind log must first be enabled. In the instant case the bind logs were enabled without a search warrant. The Petitioner was never given the opportunity to examine the 54 pages of bind logs thereby also violating Petitioner's Fifth Constitutional Amendment Due Process (U.S. CONST. V) right.

On September 25, 2013, FBI Charlotte received the non-original DVD/CD from Canada pursuant to FBI Charlotte's MLAT request. FBI Charlotte obtained a folder that contained 25 images, 54 pages of bind logs with time stamps that included the internet protocol (IP) addresses from November 8, 2012 to March 25, 2013. And, they received two (2) pages of KIK chat logs with time stamps.

However, the KIK Guide for Law Enforcement makes it clear that KIK does not store chats, so it is not clear how Canada had KIK chat logs as they are only stored on the phones of KIK users and KIK was not found on Petitioner's mobile phone.

> "The text of KIK conversations is ONLY stored on the phones of the Kik users involved in the conversation. KIK doesn't see or store chat message text in our systems, and **we don't ever have access to this information**." (**Exhibit A** - KIK's Guide for Law Enforcement, page 5).

It would have been inherently impossible for Canada to have access to any chats or chat logs as KIK Interactive does not store this information. In the instant case, the original documents were destroyed and Petitioner was never given access to the original documents.

> *"Also reproduced / Copied on this DVD (item 7) un-encrypted, are entire contents of (remaining contents of orange Lexar USB thumb drive, item #5 above. This exhibit item 7 (DVD) will be sent to USA authorities in lieu of item #5 above, which will be **destroyed.**"* (**Exhibit B** - PJK 00058 – Handwritten after the fact note).

FBI Charlotte then examined the numerous IP addresses that spanned approximately five (5) months and identified three (3) of the mostly used IP addresses, but never confirmed that those three (3) IP addresses were actually part of a commission of a crime.

Gathering IP addresses and content information from the IP address also violates the Stored Communications Act 18 USC § 2703(a) as a Warrant was never issued.

> *A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and*

> *eighty days or less,* ***only pursuant to a warrant issued*** *using the procedures described in the Federal Rules of Criminal Procedure.*

Petitioner was also never given the opportunity to review the 54 pages of bind logs, which were obtained illegally without a warrant, thereby violating the Petitioner's Fourth (U.S. CONST. IV) (search warrant was not obtained), and Fifth (U.S. CONST. V) (due process was not afforded to the Petitioner), Amendments of the Constitution. See also, *Brady vs. Maryland*, 373 U.S. 83 (1963) (the prosecution must turn over all evidence that might exonerate the defendant including exculpatory evidence to the defense).

In *United States v. Agurs*, 427 U.S. 97 (1976) the Supreme Court redefined the *Brady* test deciding whether the due process clause requires a new trial when the government withholds exculpatory information from a criminal defendant.

> *"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt* ***or*** *to punishment, irrespective of the good faith* ***or*** *bad faith of the prosecution."*

On October 23, 2013, an Administrative Subpoena was sent to BellSouth for the three (3) mostly used IP addresses even though ***numerous*** IP addresses were found over a span of approximately four (4) months.

On October 28, 2013, BellSouth responded to the inquiry and identified the subscriber of the three (3) IP addresses to Patrick Killen who resides at 6880 Pinehurst Drive, Miami, FL 33015.

FBI Charlotte ran an accuint check of this address and learned that two (2) Patrick J. Killen lived at this address. Patrick John Killen, Sr. who was born on November 10, 1942 and Patrick J. Killen, Jr. who was born on May 31, 1993.

On **February 11, 2014**, after accessing Petitioner's cell phone records and IP address for over four (4) months without a warrant, two FBI agents then entered Petitioner's home without a

search warrant and without probable cause as it was never confirmed that Petitioner's IP address was part of a commission of a crime. Neither FBI agent held any papers in their hands when they entered the home and Petitioner was not asked to sign any papers when they entered violating Petitioner's Fourth Amendment right and violating 18 U.S.C. §2236 – Searches without a Warrant.

When Petitioner asked for a search warrant, the FBI agents threatened Petitioner with returning with SWAT and breaking down his door if he did not relinquish the electronic equipment violating 18 USC §872 - Extortion. An email was sent to Petitioner's attorney 10 days after the incident moralizing the threat by the two FBI agents.

> *"Q. You are **not** going with the search warrant, correct?*
> A. *Correct."* (**Exhibit C** - Evidentiary Hearing Direct Schwartzenberger, page 15, lines 23 – 24).

The two (2) FBI agents searched Petitioner's electronic equipment without a search warrant even though Petitioner asked for a search warrant.

> **Salzman**: *Its NOT voluntary when they threaten you like that!*
> **Salzman:** *It doesn't make sense why they did not get a proper Search Warrant. It would have taken them 30 minutes to obtain one. Something is completely out of whack.*
> **Killen**: *The two FBI agents also threatened us when we asked if they had a search warrant stating that it is better to voluntarily relinquish the items because we wouldn't want SWAT to knock down our door especially since we are in such a nice neighborhood we wouldn't want our neighbors to know.* (**Exhibit D** - Email to defense counsel dated February 21, 2014, 10 days after the FBI visit).

Neither FBI agent produced a Search Warrant even though the United States Attorney's Office makes it clear that when searching and seizing computers and obtaining electronic evidence in criminal investigations, a Search Warrant is required and the Fourth Amendment (U.S. CONST. IV) **prohibits** law enforcement from accessing and viewing information in a stored computer.

> *"To determine whether an individual has a reasonable expectation of privacy in information stored in a computer, it helps to treat the computer like a closed container such as a briefcase or file cabinet. The Fourth Amendment generally prohibits law enforcement from accessing and viewing information stored in a computer if it would be prohibited from opening a closed container and examining its contents in the same situation."* (**Exhibit E** – Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations)

In the landmark decision of *Katz v. United States*, 389 U. S. 347, 351, (1967) the U.S. Supreme Court redefined what constitutes a "search" or "seizure" with regard to the protections of the Fourth Amendment (U.S. CONST. IV) to the U.S. Constitution.. The decision expanded the Fourth Amendment's (U.S. CONST. IV) protections from the right of search and seizures of an individual's "persons, houses, papers, and effects", as specified in the U.S. Constitution, to include as a constitutionally protected area "what [a person] seeks to preserve as private, even in an area accessible to the public".

In *United States v. Ross*, 456 U.S. 798, 822-23 (1982), they also generally retain a reasonable expectation of privacy in data held within electronic storage devices. "Because individuals generally retain a reasonable expectation of privacy in the contents of closed containers."

In *United States v. Bradley*, 923 F.2d 362, 364 (5th Cir.1991), the government has the burden of proving by a preponderance of the evidence that a consent to search was voluntary. In the instant case the consent to search was not voluntary and, in fact, a request for search warrant was made by Petitioner. See also, *United States v. Yeagin*, 927 F.2d 798, 800 (5th Cir.1991); *United States v. Ponce*, 8 F.3d 989, 997 (5th Cir.1993) (The voluntariness of consent is a question of fact to be determined from a totality of the circumstances.) *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973).

Accordingly, accessing information stored in a computer ordinarily will implicate the owner's reasonable expectation of privacy in the information. See *United States v. Heckenkamp*,

482 F.3d 1142, 1146 (9th Cir. 2007) (finding reasonable expectation of privacy in a personal computer); *United States v. Buckner*, 473 F.3d 551, 554 n.2 (4th Cir. 2007) (same); *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) ("Individuals generally possess a reasonable expectation of privacy in their home computers."); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001); *United States v. Al-Marri*, 230 F. Supp. 2d 535, 541 (S.D.N.Y. 2002) ("Courts have uniformly agreed that computers should be treated as if they were closed containers."); *United States v. Reyes*, 922 F. Supp. 818, 832-33 (S.D.N.Y. 1996) (finding reasonable expectation of privacy in data stored in a pager); *United States v. Lynch*, 908 F. Supp. 284, 287 (D.V.I. 1995) (same); *United States v. Chan*, 830 F. Supp. 531, 535 (N.D. Cal. 1993) (same); see also *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) ("A personal computer is often a repository for private information the computer's owner does not intend to share with others. For most people, their computers are their most private spaces.")"

The Computer Crime & Intellectual Property Section of the US Department of Justice states:

> *"To determine whether an individual has a reasonable expectation of privacy in information stored in a computer, it helps to treat the computer like a closed container such as a briefcase or file cabinet. The Fourth Amendment generally prohibits law enforcement from accessing and viewing information stored in a computer if it would be prohibited from opening a closed container and examining its contents in the same situation."*

Not only did the two (2) FBI agents search Petitioner's electronic equipment without a search warrant, they also searched his home and personal effects without a search warrant.

> *"Q. Is it your testimony that Agent Ginther was in Patrick's room was just before you left when he went in there and searched for the Galaxy 5"*
> A. *Yes, that is correct."* (**Exhibit F** - Evidentiary Hearing Direct Ginther, page 83, lines 10 – 13 and Direct Schwartzenberger, page 87, lines 20 - 24).

And, Special Agent Jason Ginther testified during trial

> *A. "Just looking through his drawers and trying -- the closest just looking for where this phone might be.*

Q. Did you find it?
A. No." (**Exhibit G** - DE:140, page 178, lines 1 – 4).

The extensive warrantless search of Petitioner's home did not fit within the exception rule the courts have upheld, because it was not needed to protect officer safety or to preserve evidence. See *Riley vs. California*, 573 U.S. 373 (2014).

On that same day, February 11, 2014, Petitioner was interrogated for hours. Petitioner repeatedly told SA Schwartzenberger that he did not know Rebecca Till, but she continued to question him.

"Killen was asked if he has ever heard of REBECCA TILL or the account name rebeccatill05, to which ***he stated he had not.*** *"* (**Exhibit H** - FD-302a, para 2).

"A. I asked him if he ever heard the name Rebeccatill or the Kik user name rebecatil05.
A. What was his response?
A. ***He said he had not.*** *"* (**Exhibit I** - Evidentiary Hearing Direct Schwartzenberger, page 26, lines 15 – 18).

Additionally, according to the testimony of SA Laura Schwartzenberger, she told him numerous times he would not be arrested that day.

"A. To the best of my knowledge, no because I advised him several times both prior to going out to the back patio and while we were out to the back patio that we were not going to take them that day, that ***he was not under arrest.*** *"* (**Exhibit J** - Evidentiary Hearing Direct Schwartzenberger, page 82, lines 22 - 25).

Knowing his father had heart condition, knowing his mother had emergency surgery later that day due to breast cancer complications, knowing he had to be in class, under duress and forced, involuntary confession Petitioner told the FBI agents what they wanted to hear just to make them go away. The two FBI agents were in Petitioner's home for over four (4) hours.

In *United States vs. Lall*, 607 F.3d 1277, 1284 (11th Cir. 2010), the Supreme Court explained that . . . "even a mild promise of leniency," though not "an illegal act as such," undermines the voluntariness of a confession." See also, *United States vs. Caster*, 937 F.2d 293 (7th Cir. 1991),

where citing *Lall*, the Court held that even if *Lall* was not in custody and *Miranda* was not required, a determination of the voluntariness of his confession was still required pursuant to the Due Process clause; and *United States vs. Rutledge*, 900 F2d 1127 (7th Cir. 1990), "he observed that through promises of non-prosecution, 'the government had made it impossible for the defendant to make a rational choice as to whether to confess – has made it in other words impossible for him to weigh the pros and cons of confessing and go with the balance as it appears at the time." Thus, 'if the government feeds the defendant false information that seriously distorts his choice . . . then the confession must go out."

According to the testimony of FBI agent Jason Ginther, Petitioner was sequestered from his parents, thereby holding Petitioner in custody.

> *"A. He was an adult. We generally like to do our interviews in private so he doesn't feel outside influences when he talks to us."* (**Exhibit K** - Evidentiary Hearing Direct Ginther, page 115 lines 20-22).

This coerced and involuntary confession is a clear violation of 18 U.S.C. §3501 - Admissibility of Confessions

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, **shall be admissible in evidence if it is voluntarily given** and (b) (2) whether such defendant **knew the nature of the offense** with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant **was advised or knew that he was not required to make any statement and that any such statement could be used against him**, (4) whether or not such defendant had been advised prior to questioning of his **right to the assistance of counsel**; and (5) whether or not such defendant **was without the assistance of counsel when questioned** and when giving such confession.

Petitioner did not know the nature of the offense, was not advised that he was not required to make any statement and that such statement could be used against him, did not have assistance of counsel, did not have assistance of his parents as they were sequestered from him, and *Miranda* was not read.

Although Petitioner asked repeatedly why the two (2) FBI agents were there, the two (2) FBI agents refused to state specifically why they were there, only to state they were investigating a lead out of North Carolina.

> *"I reiterated that we are pursuing a lead out of North Carolina and a lead on the Internet"* (**Exhibit L** - Evidentiary Hearing Direct Schwartzenberger, page 28, lines 23 - 24).

Petitioner did not have assistance of counsel, his parents were sequestered from him thereby placing him in custody, *Miranda* was not read.

> *"Q. By the way, you testified about a statement that he made; is that right?*
> *A. That is correct, yes.*
> *Q. You didn't advise him of his rights under Miranda before he made that statement, did you?*
> ***MR. EMERY**: Objection. This issue was dealt with before.*
> ***THE COURT**: Overruled.*
> A. ***No, I did not advise him of his rights pursuant to Miranda.*** *"* (**Exhibit M** - DE:114 page 32, lines 14 - 22).

The two FBI agents took Petitioner's Apple laptop, iPhone, and thumb drives where they remain in FBI custody and control to this day. The Bate Stamped evidence the government produced made it clear that no illegal activity was found on any of the electronic equipment seized on February 11, 2014.

1. **Apple MacBook Pro**

Q. What about with respect to the Macbook Pro, did you find anything on that computer?
A. *Yes, during the time I am multi-tasking, trying to perform the Cellebrite, looking a at the iPad, trying to do a basic search, on the Macbook Pro, one thing I saw was a file sharing program on there that **looked like Gigatribe.*** *"* (**Exhibit N** - Evidentiary Hearing, Direct Ginther, page 113, lines 20 – 23; page 114 lines 1-6).

2. **Apple iPhone**

"Q. On the defendant's iPhone, did the FBI find the Kik messenger on his phone?
A. *No, **we did not**"* (**Exhibit N** - Evidentiary Hearing, Direct Schwartzenberger, page 61, lines 14-16).

3. **Kingston Datatraveler USB**

"There was no data of investigative value located on the thumb drive" (**Exhibit N** - FD 302 Date of Entry 03/02/2014).

In *Weeks vs. United States*, 232 U.S. 383 (1914), the Supreme Court held that letters taken from the accused without a search warrant resulted in a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, the Court found prejudicial error was committed. In the instant case, the laptop, iPhone, thumb drive, which had no incriminating evidence, were not returned to Petitioner, but continue to remain in FBI custody and control to this day. See also *Bryars vs. United States*, 273 U.S. 28 (1927).

On **June 13, 2014**, the government parsed the Gigatribe evidence, meaning the data from the computer was compiled into a readable format, but Petitioner was not arrested until March 6, 2015, (9 months after the evidence was parsed) because no incriminating evidence was found on the parsed Gigatribe evidence.

Additionally, Petitioner's name is not on the Gigatribe evidence, but the names of Karusem, johnnywalker602, charmender789, and SDefender were found on the Gigatribe evidence produced by the government. None of those individuals were listed as alleged victims in the Superseding Indictment, and they never testified at trial, so it is not clear why this evidence was produced and should have been stricken from the record and a mistrial should have occurred. (**Exhibit O** – Gigatribe Evidence produced by the government).

Further, the Report by Constable Sabin Ozga lists two (2) individuals who chatted with rebeccatill05; jeteriam and kylerj723, yet jeteriam and kylerj723 were not listed as alleged victims in the superseding indictment (**Exhibit P** – Report by Constable Sabin Ozga).

All evidence produced by the Canadian Constable was produced with an MLAT, produced without a search warrant, was destroyed prior to Petitioner being able to ascertain the evidence, and the evidence lists the names of jeteriam and kylerj723 who had nothing to do with the

Petitioner as they were not listed in the superseding indictment so all of the evidence from Canada should have been stricken from the record and a mistrial should have occurred.

During her testimony before the Grand Jury, SA Laura Schwartzenberger failed to disclose pertinent information to the Grand Jury including the fact that the deleted child pornographic videos later found on Petitioner's computer were ***automatically downloaded by default*** from Gigatribe onto Petitioner's computer without his permission, knowledge or consent.

> *"Yes. We found many images and videos with a GigaTribe download folder pathway, meaning that these images and videos were in GigaTribe downloads folder, typically a file sharing program. When you install certain programs in your computer it will set up peer folders and* ***download folders automatically by default,*** *"* (**Exhibit Q** - DE:144, page 17, lines 21 – 25 and page 18, line 1).

Petitioner did not want the illicit videos on his computer and permanently deleted over 44,000 of them prior to the FBI visit on February 11, 2014.

> *"Well, what I did was I carved for permanently deleted graphic files. Find only graphic files.*
> *Q. And did you find any?*
> *A. Yes, I found approximately 44,000."* (**Exhibit R** – DE:143, page 75, lines 1 – 4)

Permanently deleting 44,000 files prior to the FBI visit and Petitioner had no knowledge the FBI were visiting on that day, means Petitioner did not want these files and had no intention of keeping them. Having no intent violates the basic tenets of *mens rea.*

On **March 5, 2015**, in her Application for Search Warrant, SA Laura Schwartzenberger listed an MLAT request but neither Petitioner, nor his attorneys have ever seen the documents produced by that request. It must also be noted that the Application for Search Warrant does not list an Arrest Warrant, so no arrest warrant was produced and Petitioner was never given an arrest warrant on the date Petitioner was arrested on March 6, 2015.

On **March 5, 2015**, a Sealing Order was signed by Magistrate Judge William Turnoff, which included a Motion to Seal; Search and Seizure Warrant; Application and Affidavit for Search Warrant dated March 5, 2015; and, This Order. An Arrest Warrant was not listed in the Sealing Order. (**Exhibit S** – PJK 00332 - Sealing Order).

On **March 6, 2015**, Petitioner was arrested without probable cause and without an Arrest Warrant and a Dell laptop and thumb drive were seized on that day. According to FBI testimony, the Dell laptop was reimaged by the FBI so all original evidence had been lost and destroyed. The thumb drive was never produced. On the date of his arrest, the government had no evidence against Petitioner.

> *"Q. Now, were you the first examiner to take a look at the Dell?*
> *A. No, I was not.*
> *Q. And were you asked to* ***reimage*** *the Dell laptop?*
> *A. Yes, I was.*
> *Q. Why was that?*
> *A. There was an administrative matter with the previous supervisor, and my supervisor tasked me with doing a reexamination."* (**Exhibit T** - DE:142, page 214, lines 2 – 10).

On **March 6, 2015** Petitioner entered a plea of not-guilty but was sentenced to pretrial detention where Petitioner remained in pretrial detention for 122 days which violated 18 U.S.C. §3161 (trial must commence within 70 days when there is a not-guilty plea). See *United States vs. Hurtado*, 779 F.2d 1467 (11th Cir. 1985), procedural safeguards were not met when Defendant was placed in pretrial detention. In the instant case, no probable cause existed at the time Petitioner was placed in pretrial detention and, in fact, 25 days after Petitioner's arrest, the prosecution was still seeking evidence.

In *United States vs. Kachkar*, No. 17-10050 (11th Cir. 2017) the district court erroneously applied a district-wide standard for imposing pretrial detention instead of deciding whether

detainment was warranted based on the facts of his case. In the instant case, the district court made the same error.

On **March 13, 2015** (25 days after Petitioner's arrest) FBI sent a request to Canada without a search warrant with a deadline of April 17, 2015 seeking evidence as they still had no evidence that Petitioner had committed any crime. This request was made via a Mutual Legal Assistance Treaty ("MLAT") which only sends requested information to law enforcement. Defendants and their counsel cannot access or request this information which violates a Defendant's Due Process right. (**Exhibit U** – PJK 00412)

On **April 13, 2015** (38 days after Petitioner's arrest) the government still did not have evidence that Petitioner committed any crime per the testimony of AUSA Emery. Even though the Gigatribe evidence was parsed on June 13, 2014 – 10 months prior to Petitioner's arrest) on April 13, 2015 AUSA Emery made the following statement.

> **MR. EMERY**: *He was accessing GigaTribe.* ***We don't know what he was doing on GigaTribe*** (**Exhibit V** - Bond Hearing April 13, 2015, page 13, lines 9-10)

On **April 13, 2015** – AUSA Emery violated a Court Order.

> **THE COURT**: *"Well, one way or the other, assuming he does, he is going to get counseling when it is available, and I will make that a court order."*
> **THE COURT**: *"It is the responsibility of the Assistant United States Attorney and Pretrial Services."* **(Exhibit W** - Bond Hearing, April 13, 2015, page 10)

> *"the chief psychologist at FDC advised they are willing to see the defendant. . . while his case is pending."* (**Exhibit W** - Email from Roberto Garcia to LaKeshia Williams)

Had the assistant US attorney not violated the court order and made certain Petitioner received the psychological services, he would have realized that Petitioner's mental state is not consistent with the crimes charged.

On **May 10, 2015** (65 days after Petitioner's arrest) Petitioner was placed in solitary confinement after another inmate threatened to kill Petitioner. The inmate who threatened Petitioner should have been placed in solitary confinement and Petitioner should have been moved to another floor or unit. In *Bell v. Wolfish, 441 US 520 (1979)* the Supreme Court held that pretrial detainees cannot be punished. "A court may permissibly infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees."

On **May 11, 2015** (66 days after Petitioner's arrest) Arrest Warrant was finally filed with the Court. (**Exhibit X** – Arrest Warrant).

On **May 15, 2015** trial should have commenced pursuant to Petitioner's Sixth Amendment (U.S. CONST. VI) right and 18 U.S.C. §3161 (trial must commence within 70 days when there is a not-guilty plea) but trial did not commence until July 6, 2015 as the government still did not have any evidence against Petitioner.

On **May 27, 2015** (82 days after Petitioner's arrest) an evidentiary hearing was held but the lower court erred and abused its discretion when it allowed the involuntary confession to stand knowing *Miranda* had not been read stating Petitioner was not in custody. See *Commonwealth of Pennsylvania vs. Koch*, 39 A.3rd 996 (2011).

> *"You didn't advise him of his rights under Miranda before he made that statement, did you?*
> *MR. EMERY: Objection. This issue was dealt with before.*
> *THE COURT: Overruled.*
> ***No, I did not advise him of his rights pursuant to Miranda."*** (**Exhibit Y** - DE:144 page 32, lines 14 - 22).

However, Petitioner was in custody as he did not have counsel present, was not allowed to make a phone call and he was sequestered from his parents.

> *"A. He was an adult. We generally like to do our interviews in private so he doesn't feel outside influences when he talks to us."* (**Exhibit Z** - Evidentiary Hearing Direct Ginther, page 115 lines 20-22).

On **July 6, 2015** (122 days after Petitioner's arrest) trial commenced but the government still did not have any evidence against Petitioner.

On **July 7, 2015** FBI agent Melisa Starman testified that the evidence was manipulated, fabricated and falsified as the Bate Stamped evidence produced by the government did not even include Petitioner's name. And, according to KIK Interactive, all KIK chats can only be accessed from a user's phone. KIK was not found on Petitioner's phone. Petitioner never used a mobile sync backup so it is not clear where the evidence came from except that it was manipulated, altered, falsified and fabricated.

> *"Q. On the defendant's iPhone, did the FBI find the Kik messenger on his phone?*
> **4.** *No,* ***we did not"*** (**Exhibit AA** - Evidentiary Hearing, Direct Schwartzenberger, page 61, lines 14-16).

> **Melisa Starman**: *"A. Again, I took the information and put it into an Excel spreadsheet. And from that point, I was able to filter the conversation between Chanel Izzabel and Masonlikescake and then I* ***created this summary chart*** *so that it would present more like the Kik chats with the bubbles.*
> ***Q. But this is not exactly how it appears on Kik, correct?***
> ***A. No, but it's a similar representation.*** (**Exhibit BB** - DE:141: page 212, lines 9 – 12; page 232, lines 16 – 22).

Summaries are not allowed in criminal proceedings and the government had no right to use altered and fabricated evidence that had been manipulated into an Excel spreadsheet and then added bubble chats and in so doing violated 18 USC §1519 (destruction, alteration or falsification of records in Federal investigations – 20 years imprisonment) and *Brady v. Maryland*, 373, U.S. 83 (1963) but the government chose to use the altered and fabricated evidence at trial knowing they had no evidence against Killen.

> **Melissa Starman**: *"Q. And you organized it on a Excel spreadsheet for organizational purposes?*
> *A. That's correct.*
> *Q. Now, in the KIK chat room, were there – was it often a public chat room with two, three, four, five people having accesses to the conversations?*

A. ***There were nearly 33,000 messages. . . we isolated those conversations.*** *And instead of flipping through 131 pages to piece that conversation together, it was easier to present it in a* ***summary chart*** *using Excel."* (**Exhibit BB-** DE141: page 220, lines 4 – 20).

Out of 33,000 messages where numerous individuals were chatting simultaneously FBI Agent Melissa Starman somehow telepathically was able to determine which chat belonged to Petitioner even though Petitioner's name is not on any of the Bate Stamped KIK evidence and KIK was not found on Petitioner's phone violating 18 USC §1519 (destruction, alteration or falsification of records in Federal investigation – 20 years imprisonment); Federal Rules of Evidence 1002; *Brady vs. Maryland*, 373 U.S. 83 (1963).

The Supreme Court, has also explained the provision of Fed.R.Civ.P. 60(b), not so much in terms of whether the alleged misconduct prejudiced the opposing party but more in terms of whether the alleged misconduct "harms" the integrity of the judicial process:

> *"Tampering with the administration of justice in the manner undisputedly shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."*

See also, *Cox vs. Burke*, 706 So. 2d 43 (Fla. 5th DCA 1998); *O'Vahey vs. Miller*, 644 So. 2d 550 (Fla. 3d DCA 1994) "holding that the plaintiff's repeated lies in discovery, uncovered only by the "assiduous efforts of opposing counsel," "constituted such serious misconduct" that dismissal of the case was required."

Not only was Petitioner's name completely missing from the KIK evidence belonging to frosty2499 and jacksoncook10, but the KIK evidence for masonlikescake was never produced to Petitioner and Petitioner was not allowed to view the evidence at the FBI building because he was in pretrial detention, thereby violating Petitioner's due process right. (**Exhibit CC** – KIK evidence of frosty2499 and jacksoncook10 produced by government).

Additionally, in the instant case the three (3) alleged victims, frosty2499, jacksoncok10, and masonlikescake, in the Superseding Indictment refused to testify at trial and Petitioner was not given the opportunity to question the alleged victims violating his Sixth Amendment (U.S. CONST. VI) right. See *Crawford vs. Washington*, 541 U.S. 36 (2004) wherein the Supreme Court held hearsay testimony is a clear violation of the Sixth Amendment (U.S. CONST. VI). Also, in *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court held that the prosecution's failure to inform the jury that a witness had been promised not to be prosecuted in exchange for his testimony was a failure to fulfill the duty to present all material evidence to the jury, and constituted a violation of due process, requiring a new. In the instant case it is clear the alleged victims did not testify as they were promised immunity.

On **January 11, 2018** (almost 3 years after Petitioner's arrest), oral argument was heard and AUSA Wu testified that the government had a very incomplete set of records and the government did not know who said what to whom acknowledging that the government still had no evidence against Petitioner (which clearly indicates the evidence they did produce was fabricated).

> *"I'm glad you asked me that Judge Martin, they did not, so this goes to part of my point about why* ***we have a very incomplete set of Mr. Killen's victims*** *in this case is because a large portion of the records are from the company directly,* ***they did not store the chats*** *they only stored images and metadata so in other words* ***we do not know what Mr. Killen said to many of these people and we do not know what they said to him."*** (AUSA Wu, Killen Oral Argument)

On **March 29, 2018**, the Court of Appeals for the Eleventh Circuit reduced Petitioner's sentence to 50 years in prison citing the decision on *United States v. Kapordelis*, 569 F.3d 1291, 1315 (11th Cir. 2009) where Mr. Kapordelis had a 20-year history of drugging and molesting young boys but was only given a 35-year sentence which was an upward variance and a much lower sentence compared to Petitioner's 50-year sentence. This is a clear violation of

Petitioner's Eighth Constitutional right and a violation of 18 USC §3553 - imposition of a sentence.

Petitioner never came in contact with any young boys and never wanted the child pornography on his computer which had been automatically downloaded without his permission or consent. Unbeknownst to Petitioner, even after permanently deleting over 44,000 files, every time Petitioner turned on his computer the shared file program, Gigatribe continued to download unwanted files. The FBI testified that all images and videos had been deleted by Petitioner ***prior*** to the FBI seizing the electronic equipment on February 11, 2014, which proves there was no intent and a violation of the basic tenet of *mens rea.* Petitioner was not found guilty of destruction of evidence.

On November 26, 2019, Petitioner filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255, raising multiple grounds of constitutional violations including the violation of Defendant's Fourth, Fifth, Sixth and Eighth constitutional rights.

On December 3, 2019 the lower court Ordered Petitioner to reduce the number of pages from 288 page to 30 pages.

On December 26, 2019 Petitioner filed an amended motion to vacate reducing the number of pages to 30 which violated 28 USC §2255 which allows for a Petitioner to list **all claims.** It was not possible for Petitioner to list all claims within the 30-page limit.

On April 15, 2020 Respondent filed a motion for leave to file excess pages.

On April 15, 2020 the Court granted Respondent the motion for leave to file excess pages, yet Petitioner was ordered to file with a 30-page limit.

On September 30, 2020, the lower court entered an order stating the Petitioner could only file 8 claims and not to exceed 20 pages.

On October 23, 2020 having been ordered to reduce the number of pages not to exceed 20 pages, Petitioner filed a second amended motion. The second amended motion to vacate was denied.

On April 16, 2021 Petitioner filed a Certificate of Appealability continuing to cite the multiple constitutional, federal statute and case law violations but his Certificate of Appealability was denied on September 8, 2021.

In the Denial, the lower court made a number of factual errors.

Killen continuously denied posing as Till and after four (4) hours of interrogation and after hearing the FBI state he would not be arrested did he under coerced confession tell the FBI what they wanted to hear. He did not voluntarily confess. (Denial, page 3).

Killen's defense counsel did not provide timely notice as to expert witnesses because Killen's defense counsel neglected, failed and refused to retain expert witnesses. Defense counsel was retained on a reduced fee – pro bono arrangement and **refused** to retain expert witnesses. (Denial, page 3)

The government produced false evidence at trial as proved above as the KIK evidence did not have Killen's name, was manipulated by FBI agent Starman but did include other individuals who did not testify at trial; and, the Gigatribe evidence did not include Killen's name but did include the name of other individuals who did not testify at trial. (Denial, page 3)

The parents of the three (3) alleged victims testified, but the alleged victims did not testify violating Killen's Sixth Amendment (U.S. CONST. VI) right. (Denial – page 4)

The psychological report of Dr. Michael DiTomasso did not state Killen was diagnosed with persistent depressive disorder, adjustment disorder and mixed personality disorder. The statement by the lower court was completely out of context. (Denial, page 5).

What Dr. DiTomasso stated was:

> *SUMMARY AND RECOMMENDATIONS:*
> *Patrick is **not** suffering from major psychotic disease. There is a background of mild but chronic depression in him, as should be expected, there is substantial distress arising from his present situation.*
> *At the psychosexual level, Patrick does **not** meet criteria for a diagnosis of pedophilia. . .* (**Exhibit DD** – Report of Dr. Michael DiTomasso, page 11)

Killen did not have an abusive childhood, he had loving adoptive parents who placed him in private schools, lived in a gated community in a large single-family home, took vacations twice a year and loved him unconditionally. Killen had a very happy childhood and was not abused. (Denial, page 5).

The alleged victims who never testified at trial could have been adults but we will never know as Petitioner was not allowed to confront them violating his Sixth Amendment (U.S. CONST. VI) right. (Denial, page 9).

The statement by the lower court that the email from U.S. Probation Officer that the BOP does not offer sex offender treatment was again taken out of context when AUSA Emery violated a direct court order. (Denial, page 10)

> *"the chief psychologist at FDC advised they are willing to see the defendant. . . while his case is pending."* (**Exhibit W** - Email from Roberto Garcia to LaKeshia Williams dated April 17, 2015)

The Petitioner has made a substantial showing of the denial of his Fourth, Fifth, Sixth and Eighth constitutional rights.

This petition timely follows.

REASONS FOR GRANTING THE PETITION

I. A Mutual Legal Assistance Treaty ("MLAT") is not a search warrant and violates a Defendant's Fourth Amendment and due process constitutional rights

The Fourth Amendment (U.S. CONST. IV) **prohibits** law enforcement from obtaining anything without a search warrant. A Mutual Legal Assistance Treaty ("MLAT") is not a search warrant, violates a Defendant's Fourth Amendment (U.S. CONST. IV) right and violates a Defendant's Fifth Amendment Due Process (U.S. CONST. V) right.

If documents surrounding a U.S. citizen are requested from a foreign entity, the request must include a search warrant as the U.S. Constitution requires it.

Further, in any criminal proceeding, the Defendant must be allowed to examine documents obtained. In the instant case, Petitioner was not allowed to examined the one (1) electronic FOLDER, two (2) WORD Documents, one (1) non-child pornography image of a young boy's face, and one (1) PDF document obtained from the Canadian Constable via MLAT as an MLAT is for law enforcement only.

This type of case using a Mutual Legal Assistance Treaty ("MLAT") request in lieu of a search warrant which is a requirement by the U.S. Constitution is a case the Supreme Court should hear as it is an area of law that is unsettled and a conflict of law as it violates a Defendant's Fourth Amendment (U.S. CONST. IV) and Fifth Amendment Due Process (U.S. CONST. V) rights as due process dictates that each side in a criminal case have the ability and opportunity to access the same information but when using an MLAT only law enforcement can obtain the information.

Additionally, according to Michael Caruso, Florida Public Defender, obtaining information and documents using an MLAT is a violation of a Defendant's due process rights.

Mutual Legal Assistance Treaties (MLATs) are limited to law enforcement officials involved in criminal investigations. Access to evidence though an MLAT is, therefore, restricted to prosecutors, and governmental agencies that investigate criminal conduct. Criminal defense lawyers are constricted to using letters rogatory, a much less effective method, to secure evidence located abroad. ***Due process dictates that each side in a criminal case have the ability and opportunity to access the same information. This is lacking.*** (Page 12, para 1)

II. Historical and recent case law has made it clear that when accessing a person's cell phone records and IP address, law enforcement must first obtain a search warrant

The Fourth Amendment (U.S. CONST. IV) **prohibits** law enforcement from accessing and viewing information without a search warrant.

In the landmark decision of *Katz v. United States*, 389 U. S. 347, 351, (1967) the U.S. Supreme Court redefined what constitutes a "search" or "seizure" with regard to the protections of the Fourth Amendment to the U.S. Constitution.. The decision expanded the Fourth Amendment's protections from the right of search and seizures of an individual's "persons, houses, papers, and effects", as specified in the U.S. Constitution, to include as a constitutionally protected area "what [a person] seeks to preserve as private, even in an area accessible to the public".

In *United States v. Ross*, 456 U.S. 798, 822-23 (1982), they also generally retain a reasonable expectation of privacy in data held within electronic storage devices. "Because individuals generally retain a reasonable expectation of privacy in the contents of closed containers."

In *United States v. Bradley*, 923 F.2d 362, 364 (5th Cir.1991), the government has the burden of proving by a preponderance of the evidence that a consent to search was voluntary. In the instant case the consent to search was not voluntary and, in fact, a request for search warrant was made by Petitioner. See also, *United States v. Yeagin*, 927 F.2d 798, 800 (5th Cir.1991); *United States v. Ponce*, 8 F.3d 989, 997 (5th Cir.1993) (The voluntariness of consent is a question of

fact to be determined from a totality of the circumstances.) *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973).

Accordingly, accessing information stored in a computer ordinarily will implicate the owner's reasonable expectation of privacy in the information. See *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) (finding reasonable expectation of privacy in a personal computer); *United States v. Buckner*, 473 F.3d 551, 554 n.2 (4th Cir. 2007) (same); *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) ("Individuals generally possess a reasonable expectation of privacy in their home computers."); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001); *United States v. Al-Marri*, 230 F. Supp. 2d 535, 541 (S.D.N.Y. 2002) ("Courts have uniformly agreed that computers should be treated as if they were closed containers."); *United States v. Reyes*, 922 F. Supp. 818, 832-33 (S.D.N.Y. 1996) (finding reasonable expectation of privacy in data stored in a pager); *United States v. Lynch*, 908 F. Supp. 284, 287 (D.V.I. 1995) (same); *United States v. Chan*, 830 F. Supp. 531, 535 (N.D. Cal. 1993) (same); see also *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) ("A personal computer is often a repository for private information the computer's owner does not intend to share with others. For most people, their computers are their most private spaces.")"

And again, in the landmark case of *Carpenter vs. United States*, 138 S. Ct. 2206, 201 L. Ed 2d 507 (2018), the Supreme Court held that the government violated the Fourth Amendment (U.S. CONST. IV) of the Constitution by accessing historical records containing the physical locations of cell phones providing a comprehensive catalog of the user's past movements and locations without a search warrant. The Court continued to state that the government "invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements."

As the *Carpenter* court noted, cellular phones connect with nearby cell towers. The phone companies keep track of that information with date-stamped information that spell out when a specific telephone was nearby and connected to a specific cell tower. The *Carpenter* court held that the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive catalog of the user's past movements. Further, the Carpenter court held that only 7 days of content information can be obtained ***with*** a search warrant.

In the instant case, 4 months and 25 days of historical content was obtained ***without*** a search warrant when 54 pages of bind logs were produced via MLAT. Bind logs are a client query that must first be enabled to show what IP addresses were accessed. Similar to cell phone records in *Carpenter,* bind logs recorded the historical catalog of Petitioner's movement for over a four (4) month period.

Further in *Riley*, the Supreme Court declined to extend searches of data on cell phones, and held instead that officers must generally secure a warrant before conducting such a search.

Citing *Katz*, the Supreme Court held that the government's acquisition of Carpenter's cell-site records was a Fourth Amendment search. The Fourth Amendment protects not only property interests but certain expectations of privacy as well. *Katz v. United States*, 389 U. S. 347, 351 (1967). ***Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause.*** *Smith v. Maryland*, 442 U. S. 735, 740 (1979) (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to

protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted."

In *United States vs. Warshak*, 631 F.3d 266 (6th Cir. 2010), the Court held that government agents violated the defendant's Fourth Amendment (U.S. CONST. IV) rights by compelling his Internet Service Provider (ISP) to turn over his emails without first obtaining a Search Warrant based on probable cause.

In the instant case, Petitioner's cell phone IP address had been accessed without a Search Warrant and without probable cause when FBI Charlotte requested the records from KIK Interactive, Inc. via an MLAT request. The MLAT request produced 54 pages of bind logs from multiple locations, some supposedly included the Petitioner's IP address. Only having access to bind logs and IP addresses and not the actual chat messages resulted in FBI Charlotte guessing as to who really did what and said what to whom when they decided to arbitrarily use the three (3) mostly used IP addresses stating they belonged to Petitioner.

Additionally, when using an app, the user generally signs a term of service or agreement that gives the app the right to log the location (IP address) of the user. Typically, a user will (1) only allow access while using the app, (2) always allow, or (3) don't allow. However, when choosing the type of service while using the app, the user does not know that the app continuously registers the user's location regardless of whether the user allowed or didn't allow access.

For example, Windows 10 can:

> ***Access all your files, peripheral devices, apps, programs, and registry:*** *The app has the ability to read or write to all your files (including documents, pictures, and music) and registry settings, which allows the app to make changes to your computer and settings. It can use any peripheral devices that are either attached or part of your device (such as cameras, microphones, or printers) without notifying you.*

> *It also has access to your location, and can use platform features, such as location history, app diagnostics, and more, which are denied to most Store apps. You can't control most of the permissions for this app in Settings > Privacy.* Retrieved from App permissions (microsoft.com)

However, in the instant case the Stored Communications Act 18 USC § 2703(a) – Contents of Wire or Electronic Communications in Electronic Storage was violated as a warrant was never issued.

> *(a) A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less,* ***only pursuant to a warrant issued*** *using the procedures described in the Federal Rules of Criminal Procedure.*

Petitioner was also never given the opportunity to review the 54 pages of bind logs, which were obtained illegally without a warrant, thereby violating the Petitioner's Fourth (U.S. CONST. IV) (search warrant was not obtained), and Fifth (U.S. CONST. V) (due process was not afforded to the Petitioner), Amendments of the Constitution. See also, *Brady vs. Maryland*, 373 U.S. 83 (1963) (the prosecution must turn over all **evidence** that might exonerate the defendant (exculpatory **evidence**) to the defense).

In fact, in August 2019, the Petitioner asked both Trial Counsel and Appellate Counsel for a copy of the 54 pages of bind logs, but neither Trial Counsel nor Appellate Counsel was able to produce the 54 pages of bind logs. It is clear the 54 pages of bind logs were never given to Petitioner, were never Bate Stamped, were never produced as evidence at trial, and Petitioner was never given the opportunity to examine the 54 pages of bind logs clearly violating Defendant's Fifth Amendment (U.S. CONST. V) Constitutional right; *Brady vs. Maryland*, 373 U.S. 83 (1963); and *United States v. Agurs*, 427 U.S. 97 (1976).

In *United States vs. Augenblick*, 393 U.S. 348 (1969), the Court stated, "but, apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes

place only where the barriers and safeguards are so relaxed or forgotten, as in *Moore v. Dempsey, supra,* that the proceeding is more a spectacle (*Rideau v. Louisiana,* 373 U. S. 723, 373 U. S. 726) or trial by ordeal (*Brown v. Mississippi,* 297 U. S. 278, 297 U. S. 285) than a disciplined contest."

This type of case allowing law enforcement to access historical content and location information without a search warrant is a case the Supreme Court should hear as it is an area of law that is unsettled and a conflict of law as it violates a Defendant's Fourth Amendment (U.S. CONST. IV) rights, the Stored Communications Act, *Carpenter, Katz, Warshak, Smith.*

III. A Defendant shall have the right to examine any and all evidence whether incriminated or exonerating

The Fifth Amendment (U.S. CONST. V) **prohibits** law enforcement from destroying evidence prior to a Defendant' examination of it. If Defendant's is unable to examine said evidence against him, this is a violation of due process of law.

In *United States vs Augenblick,* 393 U.S. 348 (1969), tapes were lost and/or destroyed which deprived Augenblick of his constitutional due process rights. In *Augenblick,* the US Supreme Court held that

> *"in a conscientious effort to undo an injustice, elevated to a constitutional level what it deemed to be an infraction of the Jencks Act and made a denial of discovery which "seriously impeded his right to a fair trial" a violation "of the Due Process Clause of the Constitution."*

In the instant case, not only was Petitioner denied access to original evidence via an MLAT from the Canadian Constable, but the original evidence had been destroyed.

According to Bate Stamped evidence, the Canadian Constable sent KIK Interactive chats to FBI Charlotte, but that would have been inherently impossible. KIK Interactive does not store chats. Chats are only stored on the phones of the users.

The KIK Guide for Law Enforcement makes it clear that KIK does not store chats, so it is not clear how Canada had KIK chat logs as they are only stored on the phones of KIK users.

> *"The text of KIK conversations is ONLY stored on the phones of the Kik users involved in the conversation. KIK doesn't see or store chat message text in our systems, and* ***we don't ever have access to this information.*** *"* (KIK's Guide for Law Enforcement, page 5).

Petitioner does not know where the Canadian Constable obtained chat logs that were used against him at trial.

Additionally, the original documents were destroyed and Petitioner was never given access to the original documents.

> *"Also reproduced / Copied on this DVD (item 7) un-encrypted, are entire contents of (remaining contents of orange Lexar USB thumb drive, item #5 above. This exhibit item 7 (DVD) will be sent to USA authorities in lieu of item #5 above, which will be* ***destroyed.*** *"* **(Exhibit B** - PJK 00058).

The additional evidence that was destroyed was the information on the Dell laptop.

On March 6, 2015 the FBI seized a Dell laptop from Petitioner. However, the Dell laptop had been re-imaged by the FBI and all original evidence from the Dell laptop had been destroyed.

Dell Laptop

> *"Q. Now, were you the first examiner to take a look at the Dell?*
> *B. No, I was not.*
> *Q. And were you asked to* ***reimage*** *the Dell laptop?*
> *B. Yes, I was.*
> *Q. Why was that?*
> *A. There was an administrative matter with the previous supervisor, and my supervisor tasked me with doing a reexamination.* *"* **(Exhibit T** - DE:142, page 214, lines 2 – 10).

Killen was not allowed to examine the Dell laptop after it had been reimaged by the FBI violating Killen's due process right as the original data on the Dell laptop had been deleted when the laptop was reimaged by the FBI.

This type of case using evidence at trial that had been destroyed prior to Petitioner being able to examine said evidence is a case the Supreme Court should hear as it is an area of law that is unsettled and a conflict of law as it violates a Defendant's Fifth Amendment Due Process (U.S. CONST. V) rights.

CONCLUSION

For the reasons stated herein, Petitioner prays that the petition for a writ of certiorari be granted.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was mailed via Federal Express to the Clerk of the Court and all parties of record this 27th day of December, 2021.

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Respectfully submitted,

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