ORIGINAL

No. 22-233

SUPREME COURT OF THE UNITED STATES

PAUL CHRETIEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Paul Chretien
Petitioner
39655-068
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Questions Presented

On 5-1-18 and again on 5-4-18, Google observed and reported to NCMEC[1] their observation of the same single image of potential child pornography in their cloud "Google Photos". On 2-5-19, over 9 months later, police applied for and received a search warrant for the premises and electronic records of Petitioner based solely upon the two observations of the same image. While the warrant included the affiant's boilerplate assertion that "pornographers" and those with "collections" of child pornography keep such material indefinitely, there was absolutely zero evidence that Petitioner was such a "pornographer" or "collector" or that he had any "collection" of pornography. Execution of the search warrant resulted in discovery of several additional images of child pornography which resulted in Petitioner's indictment. A motion to suppress was filed alleging that the warrant was stale. This argument was rejected, Petitioner pled to a conditional plea of guilty allowing him to appeal the denial of his motion to suppress. The Court of Appeals affirmed. Petitioner asks this Court:

1.) Whether the Fourth Amendment allows a finding of probable cause for a search warrant for child pornography in a private home based solely, and without more, on evidence in Google Cloud photos of a single isolated image discovered 9 months previously?

2.) Where multiple additional errors affected petitioner's conviction and/or sentence in the courts below, should this Court exercise it's

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[1] National Center for Missing & Exploited Children - www.ncmec.org

supervisory power to vacate his conviction and sentence?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit.

More specifically, the Petitioner Paul Chretien and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Paul Chretien, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on 5-9-22.

OPINIONS BELOW

The 5-9-22 opinion of the Court of Appeals for the Third Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 2022 U.S. App. LEXIS 12502 *; 2022 WL 1451390 and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Western District of Pennsylvania, was entered on 9-16-21, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion, judgment, and finding of facts by the United States District Court for the Western District of Pennsylvania denying Mr. Chretien's motion to suppress, was entered on 12-21-20, is reported at 2020 U.S. Dist. LEXIS 239228 * | 2020 WL 7487997 and is reprinted in the separate Appendix C to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 5-9-22. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> 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. *Id.*

STATEMENT OF THE CASE

On or about 8-27-19 Paul Chretien was charged with violation of 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (distribution of child pornography on or about September 26, 2018) (Count 1); 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (distribution of child pornography on or about September 27, 2018) (Count 2); 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (distribution of child pornography on or about November 19, 2018) (Count 3); 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (receipt of child pornography on or about August 22, 2018) (Count 4); 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (distribution of child pornography on or about November 11, 2018) (Count 5); 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (distribution of child pornography on or about November 12, 2018) (Count 6); 18 U.S.C. § 2252(a)(4)(B) and 18 U.S.C. § 2252(b)(2) (possession of child pornography involving prepubescent minors and minors who have not attained 12 years of age, engaging in sexually explicit conduct on or about February 6, 2019) (Count 7).

These charges arose from execution of a search warrant on his home and computers. The facts supporting the search warrant are as follows: On 5-1-18 and again on 5-4-18, Google observed and reported to NCMEC[1] their observation of the same single image of potential child pornography in their cloud "Google Photos". On 2-5-19, over 9 months later, police applied for and received a search warrant for the premises and electronic records of Petitioner based solely upon the two observations of

[1] National Center for Missing & Exploited Children - www.ncmec.org

the same image. While the warrant included the affiant's boilerplate assertion that "pornographers" and those with "collections" of child pornography keep such material indefinitely, there was absolutely zero evidence that Petitioner was such a "pornographer" or "collector" or that he had any "collection" of pornography. Execution of the search warrant resulted in discovery of several additional images of child pornography which resulted in Petitioner's indictment.

He was arraigned on or about 9-9-19 at which time he pleaded not guilty to the charged violations.

On 12-25-19, counsel filed a motion to suppress. In this motion, counsel argued that the delay of over 9 months from the time that Google reported the image to the date of application for a search warrant rendered the information "stale" which negated probable cause for the search warrant.

On 12-9-20, a hearing was held on the motion to suppress. At the hearing the district court took note of the boilerplate language in the affidavit that "collections" of child pornography are usually kept "for long periods of time" by "child pornographers" and held that, therefore, the 9 months delay was irrelevant.

Importantly, other than the single image that somehow got into Mr. Chretien's Google Photos file, there was no evidence what-so-ever presented that Mr. Chretien was a "collector" of child pornography much less that he was a "child pornographer". (Appendix C)

On 12-21-20, the District Court denied the motion to suppress. *United States v. Chretien,* 2020

U.S. Dist. LEXIS 239228 (WD PA 12-21-20). (Appendix C).

On or about 3-3-21, Mr. Chretien pleaded guilty to violations of 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (distribution of child pornography on or about September 26, 2018) (Count 1); 18 U.S.C. § 2252(a)(4)(B) and 18 U.S.C. § 2252(b)(2) (possession of child pornography involving prepubescent minors and minors who have not attained 12 years of age, engaging in sexually explicit conduct on or about February 6, 2019) (Count 7). The plea was a conditional plea pursuant to Fed.R.Crim.P. 11(a)(2) which allowed him to appeal the denial of his motion to suppress. (Appendix B) (See also plea agreement).

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 34 and a Criminal History of I which resulted in a guideline sentencing range 151-188 months incarceration with a statutory mandatory minimum of 5 years. (USDC Tentative Findings)(Case Number 2:19-cr-00262, Entry 87)

On 9-16-21, Mr. Chretien was sentenced to 72 months incarceration for violations of 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (distribution of child pornography on or about September 26, 2018) (Count 1); 18 U.S.C. § 2252(a)(4)(B) and 18 U.S.C. § 2252(b)(2) (possession of child pornography involving prepubescent minors and minors who have not attained 12 years of age, engaging in sexually explicit conduct on or about February 6, 2019) (Count 7). This sentence represented a downward variance from the guideline sentencing range of 151-188 months. (Appendix B)

The judgment was entered on 9-16-21.

On 9-29-21, a Notice of Appeal was filed. On direct appeal, counsel argued that the motion to suppress should have been granted based on the delay of 9 months from the time the image was discovered until the police applied for a search warrant.

On 5-9-22, the Court of Appeals denied Mr. Chretien's appeal. In denying the appeal, the Court of Appeals held, *inter alia*, that the district court's denial of defendant's motion to suppress evidence was warranted because the affidavit supporting the warrant provided a substantial basis for finding probable cause since the affidavit stated that the image was uploaded from an IP address defendant subscribed to and by a Google account registered using defendant's phone number. *United States v. Chretien*, 2022 U.S. App. LEXIS 12502 * | 2022 WL 1451390 (3rd Cir. 2022).

Mr. Chretien demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. CHRETIEN'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or

> has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States,* 318 U.S. 332 (1943).[2] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

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[2] See also *GACA v. United States,* 411 U.S. 618 (1973); *United States v. Jacobs,* 429 U.S. 909 (1976); *Rea v. United States,* 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens,* 375 U.S. 162 (1963); *Elkins v. United States,* 364 U.S. 206 (1960)..

1A.) The Fourth Amendment Does Not Allow A Finding Of Probable Cause For A Search Warrant For Child Pornography In A Private Home Based Solely, And Without More, On Evidence In Google Cloud Photos Of A Single Isolated Image Discovered 9 Months Previously.

"Staleness" of information supporting a search warrant goes to probable cause. While it's well settled that there is no bright line length of time between police's discovery of facts supporting probable cause and the time of application for a search warrant, it's just as clear that additional facts increase or decrease the importance of the time span involved. *Cf. United States v. Bosyk*, 933 F.3d 319, 322 (4th Cir. 2019) (A valid search warrant may issue only upon allegations of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time).

Child pornography cases present "unique" staleness questions. *United States v. Raymonda*, 780 F.3d 105, 114 (2d Cir. 2015) When assessing claims of staleness in child pornography cases, courts distinguish between categories of suspects. The first category encompasses suspects—often referred to as "collectors"—for whom "circumstances suggest[] [they] had accessed those images willfully and deliberately, actively seeking them out to satisfy a preexisting predilection." *Id.* at 114-5. The second category encompasses those suspects for whom there is an absence of evidence of willful or deliberate interest in child pornography—suspects who may have encountered child pornography in a "purely

negligent or inadvertent" manner. *Id.* at 115. *United States v. Bosyk*, 933 F.3d 319, 364 (4th Cir. 2019) (quoting *Bosyk*, supra).

Federal courts may infer that a suspect is a "collector" of child pornography based on factors such as the following: (1) a suspect's admission of being a pedophile or other evidence that would corroborate this fact; (2) a suspect's extended history of possessing or receiving pornography images; or (3) an allegation that a suspect paid for access to child pornography. Courts have also inferred that a suspect is a collector of child pornography on the basis of a single allegation of possession or receipt where the suspect's access to the pornography images depended on a series of sufficiently complicated steps to suggest his willful intention to view the files, or where the defendant subsequently redistributed the pornographic material to other users. *United States v. Reece*, 2017 U.S. Dist. LEXIS 220176, at *1 (ED VA 2017) (collecting cases).

Until the instant case, no federal court has held that evidence of a single past possession of a single image of child pornography, *without more*, has provided probable cause to issue a search warrant for a private home, much less a single past possession more than 9 months prior to the application for the search warrant.[3]

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[3] *United States v. Bosyk*, 933 F.3d 319, 364 (4th Cir. 2019); *United States v. Raymonda*, 780 F.3d 105, 114 (2d Cir. 2015); *United States v. Doan*, 245 Fed. Appx. 550 * | 2007 U.S. App. LEXIS 18962 ** (7th Cir. 2007); *United States v. Reese*, 2017 U.S. Dist. LEXIS 220176 * | 2017 WL 11373457 (ED VA 2017); *United States v. Guay*, 2001 U.S. Dist. LEXIS 20508 * | 2001 WL 1571460 (D ME 2001); *United States v. Westerlund*, 2009 U.S. Dist. LEXIS 102448, at *11 (WD MI 11-4-09);

In the instant case, as set forth above, on 5-1-18 and again on 5-4-18, Google observed and reported to NCMEC[4] their observation of the same single image of potential child pornography in their cloud "Google Photos". On 2-5-19, over 9 months later, police applied for and received a search warrant for the premises and electronic records of Petitioner based solely upon the two observations of the same image. While the warrant included the affiant's boilerplate assertion that "pornographers" and those with "collections" of child pornography keep such material indefinitely, there was absolutely zero evidence that Petitioner was such a "pornographer" or "collector" or that he had any "collection" of pornography. Execution of the search warrant resulted in discovery of several additional images of child pornography which resulted in Petitioner's indictment. A motion to suppress was filed alleging that the warrant was stale. This argument was rejected, Petitioner pled to a conditional plea of guilty allowing him to appeal the denial of his motion to suppress. The Court of Appeals affirmed.

While the government and the lower courts cited numerous 'facts', NONE of those facts supported any kind of finding that Petitioner was a "collector" of child pornography or that he had a "collection" of child pornography or that he had any other involvement with child pornography than the one, single image that somehow got into his Google Photos file.

Based on the foregoing, this Court should grant Mr. Chretien's petition for writ of certiorari

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[4] National Center for Missing & Exploited Children - www.ncmec.org

because the court of appeals for the third circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. This is because the Fourth Amendment does not allow a finding of probable cause for a search warrant for child pornography in a private home based solely, and without more, on evidence in Google Cloud photos of a single isolated image discovered 9 months previously.

1B.) Multiple Errors In The Courts Below Mandate That Mr. Chretien's Conviction And/Or Sentence Be Vacated.

Mr. Chretien's conviction and sentence are violative of the First, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Mr. Chretien's conviction and sentence are violative of his right to freedom of speech and to petition and his right to be free of unreasonable search and seizure, his right to due process of law, his rights to counsel, to jury trial, to confrontation of witnesses, to present a defense, and to compulsory process, and his right to be free of cruel and unusual punishment under the constitution.

The evidence was insufficient. The government falsified and withheld material evidence. The District Court unlawfully determined Mr. Chretien's sentence.

These claims in Argument 1B are submitted to preserve Mr. Chretien's right to raise them in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach their merits.

Based on all of the foregoing, the decision by the Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States*, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Third Circuit in Mr. Chretien's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Paul Chretien respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[5] to the court of appeals for reconsideration in light of the Fourth Amendment.

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[5] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).