No. _____

In the Supreme Court of the United States

HANFORD CHIU, PETITIONER
v.
UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a faulty search warrant that was executed without probable cause and without a good faith exception violates Fourth Amendment protections.

Whether denying a defendant's ability to present exculpatory evidence at trial violates the Federal Rules of Evidence and due process concerns of fundamental fairness.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Other Authority

Statutes

Rules and Guidelines

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PETITION FOR A WRIT OF CERTIORARI

Petitioner herein respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the First Circuit entered judgment in this case. The opinion (*infra*, 2a) has not been reported.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on June 2, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rules 13.1 and 13.3 and 28 U.S.C. § 2101(c), this petition is timely filed if deposited in the United States mail, with first-class postage prepaid, on or before August 31, 2022.

STATEMENT OF THE CASE

A magistrate in the U.S. District Court for the District of Massachusetts erroneously approved a search warrant for Petitioner's home computer, issuing the warrant according to a federal agent's opinion that it contained images that qualified as child pornography, instead of the magistrate reviewing an image or considering the description of an image the agent expected to find. The trial court then erroneously suppressed as inadmissible hearsay written text messages confirming that another individual with a history of consuming child pornography had full remote access to Petitioner's home computer.

Petitioner was convicted by a jury and the First Circuit Court of Appeals affirmed the conviction and the underlying search which began the case. This petition seeks relief because the First Circuit decision conflicts with decisions of this Court, the Fourth Amendment to the U.S. Constitution, and the Federal Rules of Evidence.

DISCUSSION

On August 21, 2018, Homeland Security Investigations ("HSI") agents arrested Warren Anderson, a middle school teacher in Massachusetts, after executing a warrant to search Anderson's home and vehicle for evidence of child pornography. Anderson had distributed pornographic images of children on Kik, a mobile messaging app. Those photos were detected by an automated system at Kik and the company alerted law enforcement.

With Anderson's permission, agents conducted an on-site forensic examination of his computer, finding files they determined contained child pornography. Anderson told the agent who supervised the search that he "was interested in underage pornography," and identified Petitioner as a friend who shared that interest. Anderson and Petitioner had known each other for several years, but Anderson claimed he and Petitioner had only been viewing child pornography together regularly for the previous six months, either at Anderson's family residence or Petitioner's apartment. Anderson claimed Petitioner's child pornography collection was several times larger than his, and that Petitioner had introduced Anderson to the internet browser Tor, which allowed anonymous viewing and downloading of pornographic material. Anderson did not mention that Petitioner had provided him password-access to his computer, giving Anderson the ability to access Petitioner's computer remotely and download files to it without Petitioner's knowledge.

The HSI supervising agent subsequently applied for a search warrant for Petitioner. For probable cause, the agent repeated much of what Anderson had said, specifically that he and Petitioner viewed child pornography frequently together. Anderson defined child pornography" as "involv[ing] children under 18."

Unlike the affidavit the agent submitted for Anderson's search, which described in detail one of the prohibited images Anderson had transmitted on the Kik platform, the affidavit for Petitioner's search contained only vague descriptions of the images and videos the government expected to find in Petitioner's possession.

Despite lacking the required detail in the application, the magistrate judge issued the warrant to search Petitioner's apartment.

The next morning, August 22, 2018, HSI agents conducted the search in Petitioner's presence, seizing several electronic devices including, *inter alia*, a desktop computer with three removable storage drives, a laptop computer, a tablet computer, and two cell phones. During a forensic preview of the desktop computer and the storage drives, the agents discovered images they described as "depict[ing] prepubescent children engaged in sexual conduct, some with other children and some with adults."

Petitioner was arrested and subsequently indicted on November 15, 2018, with one count of receiving child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and (b)(1), and one count of possessing child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2).

Anderson, who was indicted on identical charges, pleaded guilty on July 23, 2019, and was sentenced on October 16, 2019, to 45 months incarceration. Petitioner maintained his innocence and challenged the search of his apartment and seizure of his electronic devices, filing a motion on June 27, 2019, to suppress the seized evidence. Petitioner argued that the warrant application was unconstitutionally vague in its description of the images and videos the government claimed would be found, and that the seizures of his property were without probable cause or reasonable suspicion, in violation of his Fourth Amendment rights.

The District Court denied the motion to suppress, finding probable cause because Anderson, "an admitted purveyor of child pornography," made the claim that illegal images would be found on Petitioner's computer, and that the supervising HSI agent was experienced in child pornography cases.

Prior to trial, the government disclosed text messages taken from Petitioner's seized cellphone confirming that he had provided Anderson with his computer passwords and occasionally left his computer in Anderson's sole possession, sometimes for repairs that Anderson had the ability to perform and other times so that Anderson could use it to play video games. With the passwords, Anderson had the ability to access the desktop computer and its hard drives at any time through the internet and alter their contents, surreptitiously using the browsers to download images and videos without Petitioner's awareness.

The government moved *in limine* to preclude Petitioner from introducing those texts or any of Anderson's "out of court statements" that indicated Anderson was actually culpable for the evidence on Petitioner's computer. The motion also asked the trial court to deny Petitioner from introducing evidence of Anderson's arrest and conviction, arguing that such information was propensity evidence prohibited by Fed.R.Evid. 404(b). Petitioner argued that Anderson's arrest and conviction were both admissible under the enumerated 404(b) exceptions because those actions showed Anderson "had the motive, knowledge and opportunity to place the charged pornography on the Defendant's desk top computer."

The District Court heard oral argument prior to beginning trial on February 10, 2020. Despite providing the text information in its own discovery, the government complained that Petitioner's filed opposition was the first indication it had that Anderson was often given sole access to Petitioner's desktop computer. The trial court denied the motion in part, allowing Petitioner to introduce evidence of Anderson's arrest for child pornography. As to the text messages, the trial court subsequently allowed them to be introduced for identification purposes, but denied their presentation to the jury absent other circumstances (such as for direct rebuttal).

Anderson was in federal prison by the time the trial began, and the government did not produce him as a trial witness. Petitioner had to establish through cross-examination of the HSI agents who conducted the search that Petitioner and Anderson had exchanged text messages for several years. However, he could not establish through them that Anderson had been given passwords and other log-in information that allowed him to remotely use Petitioner's computer, including his hard drives.

The agents testified that Petitioner's main hard drive contained pornographic images that had been downloaded through use of the Tor browser starting in 2011. Petitioner testified in his own defense and showed that Anderson was actually the original owner of that hard drive in 2011; Petitioner did not acquire the hard drive until two or three years later. That testimony proved that Anderson's claim to the HSI agents that he did not know about the Tor browser before he met Petitioner, a

claim that was repeated in the affidavit submitted to the magistrate judge to acquire Petitioner's search warrant, was patently false.

Over the government's objections Petitioner testified that he had shared his passwords with Anderson, and that Anderson could access Petitioner's computers remotely without his knowledge. However, he was unable to corroborate his testimony with Anderson's text messages or emails.

The jury convicted Petitioner of both charges in the indictment, and the trial court subsequently sentenced him to 110 months.

REASONS FOR GRANTING REVIEW

1. The First Circuit's Ruling Violates the Fourth Amendment's Prohibition Against Unreasonable Search and Seizures, and No Good Faith Exception Applied to Excluding the Seized Evidence.

This Court should grant certiorari because the magistrate's issuance of a faulty search warrant, affirmed by the First Circuit Court of Appeals, subjected Petitioner to an unreasonable search and seizure, and the evidence collected in reliance on that faulty warrant was not obtained in good faith. Under the Constitution, "no Warrants shall issue, but upon probable cause, supported by oath or affirmation." U.S. Const., amend. IV; *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2534 (2019). Further, as noted recently in *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403 (2020): "[T]his Court has longstanding precedent requiring the suppression of all evidence obtained in unconstitutional searches and seizures." (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)).

Absent exigent circumstances, the law places probable cause determinations in the hands of the judiciary, not the police. As this Court has noted, "the detached scrutiny of a neutral magistrate…is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *United States v. Leon*, 468 U.S. 897, 913-14 (1984) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)) (internal quotation marks omitted).

Here, the magistrate did not exercise that judgment, deferring instead to the federal agent's judgment as to what would constitute probable cause to search Petitioner's computers and hard drives. As a consequence, the warrant was issued without probable cause, violating the First Circuit's own guidelines for child pornography cases: The First Circuit determined that appending a warrant application with either the prohibited images themselves or "a sufficiently specific description of the images" is the "best practice" for federal district courts within its jurisdiction. *United States v. Syphers*, 426 F.3d 461, 467 (1st Cir. 2005). Conversely, the "omission of images or a description of them is a serious defect in the warrant application…" *Id.*

As this Court has noted, the Fourth Amendment does not prohibit "the introduction of illegally seized evidence in all proceedings or against all persons." *Leon*, 468 U.S. at 906 (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)). Therefore, the exclusionary rule is to be applied in a judicious manner that supports its deterrent effect, "where its remedial objectives are thought most efficaciously

served." *Id.* at 908 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). *Leon* established that exclusion does not apply if the evidence was obtained in good faith and by an objectively reasonable reliance on what appeared at the time to be a facially valid warrant. *See id.* at 922.

That is not what happened here. The magistrate, in ignoring the basic requirements for this specific kind of warrant application, "wholly abandoned" his judgment in favor of the agent's assertions. *See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). As this Court first noted in *Aguilar v. Texas*, 378 U.S. 108, 111 (1964), a magistrate may "not serve merely as a rubber stamp for the police." Under any judicial examination of the application here and the totality of the circumstances in which it was approved, no good faith exception applied.

First, the procedure of supplying the magistrate with either the images targeted for seizure or their description is well-established, and the First Circuit has stated, "we would, in the future, view quite differently an agent's choice to withhold photos from a judicial officer." *United States v. Brunette*, 256 F.3d 14, 19 (1st Cir. 2001). Without a legally valid description of what the federal agent expected to seize from Petitioner's computer, his affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* (citing *Leon*, 468 U.S. at 923).

Further, the good faith exception is unavailable where a court is "misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth." *Leon*, 468 U.S. at 923

(citing *Franks v. Delaware*, 438 U.S. 154 (1978)). The affiant was an experienced and seasoned special agent who unreasonably failed to recognize – or willfully disregarded – that what Anderson told him during the arrest was patently false. Anderson's child pornography collection on his laptop measured nearly 30 gigabytes, a massive amount for only six months of downloading. Plus, his claim that Petitioner had recently taught him to use the private Tor browser for viewing prohibited internet sites was belied by available evidence that Anderson had been using the browser for years before meeting Petitioner. Those false statements, among others, ended up in the affidavit the agent filed in order to obtain the warrant for Petitioner's computers and hard drives. Under the totality of the circumstances, the resulting search and seizure was constitutionally infirm and unreasonable. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983).

2. The First Circuit's Ruling Contravenes the Federal Rules of Evidence and, Consequently, Violates Due Process Protections.

Under the federal rules, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. As this Court has noted, "Rules 401 and 402 establish the broad principle that relevant evidence — evidence that makes the existence of any fact at issue more or less probable — is admissible unless the Rules provide otherwise." *Huddleston v. United States*, 485 U.S. 681, 687 (1988).

At trial, Petitioner attempted to introduce evidence that Anderson could fully and remotely access Petitioner's computer at any time without his awareness. That fact was not only relevant but crucial to Petitioner's defense, and the evidence establishing that fact was contained primarily in the text messages which were seized from Petitioner's phone, both to and from Anderson. The text messages showed that Petitioner often brought his computer to Anderson's home and left it there, giving Anderson sole possession of the computer for significant periods of time and, also, that Petitioner had given Anderson his passwords and other log-in information. Prior to trial, pursuant to the government's objections, the court excluded these texts and any other written information as inadmissible hearsay. Their subsequent introduction for identification purposes at trial did not cure the prejudicial effect of the court's exclusionary ruling.

When Petitioner testified in his own defense, the text messages should have been admitted and made available to the jury as prior consistent statements. Under Fed.R.Evid. 801(d)(1)(B), a witness's prior statement may be admitted if: "(1) the declarant testifies at trial and is subject to cross-examination; (2) the prior statement is consistent with the declarant's trial testimony; and (3) the prior statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *See also Tome v. United States*, 513 U.S. 150, 156-157 (1995).

The First Circuit cited *Tome* in its opinion, *infra* at App. 17a, for the proposition that all such statements are not admissible merely because the witness's credibility was damaged. *See Tome, supra*, at 157. The First Circuit claimed that the government may have attacked Petitioner's veracity generally but did not level "an express or implied charge," as required by Rule 801, against his "alternate-downloader theory." But in its closing argument the government absolutely asserted to the jury that Petitioner fabricated that claim, directly attacking his defense that Anderson occasionally had sole physical possession of Petitioner's desktop computer, direct remote access to that computer and its hard drives at all times, and had originally owned one of the seized hard drives for years before Petitioner acquired it. The text messages were not only relevant but exculpatory, as they contained information which supported Petitioner's proffered defense and rebutted the government's direct and express charges of fabrication. It was error for the trial court to deny Petitioner's attempt to provide the jury access to those texts during trial and at deliberation.

As this Court has noted many times, the right to a fair trial before an impartial jury is a fundamental aspect of due process. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Due process, then, is violated when circumstances occur that corrupt the fairness of a criminal trial. "The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (internal citations omitted). The trial court's denial of

Petitioner's effort to present a complete defense to the serious charges against him not only offended the federal evidentiary rules but also due process, as it was so unfair it violated "fundamental conceptions of justice." *Dowling v. United States*, 493 U.S. 342, 352 (1990); *United States v. Lovasco*, 431 U.S. 783, 790 (1977). The First Circuit's affirmation compounded that fundamental unfairness and must be reversed.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Paul J. Garrity

PAUL J. GARRITY,
Counsel of Record

AUGUST 26, 2022

United States Court of Appeals
For the First Circuit

No. 21-1120

UNITED STATES,

Appellee,

v.

HANFORD CHIU, a/k/a Hanford Y. Chiu,

Defendant, Appellant.

MANDATE

Entered: June 24, 2022

In accordance with the judgment of June 2, 2022, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this Court.

By the Court:

Maria R. Hamilton, Clerk

cc:
Hanford Chiu
Karen Lisa Eisenstadt
Paul J. Garrity
James D. Herbert
Donald Campbell Lockhart
Anne Paruti
Robert Edward Richardson

United States Court of Appeals
For the First Circuit

No. 21-1120

UNITED STATES,

Appellee,

v.

HANFORD CHIU,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Denise J. Casper, U.S. District Judge]

Before

Lynch, Selya, and Kayatta
Circuit Judges.

Paul J. Garrity for appellant.
Karen L. Eisenstadt, Assistant United States Attorney, with whom Rachel S. Rollins, United States Attorney, was on brief, for appellee.

June 2, 2022

KAYATTA, **Circuit Judge**. Hanford Chiu appeals from his jury convictions for receipt and possession of child pornography. He challenges both the denial of his pre-trial motion to suppress evidence obtained pursuant to an allegedly defective search warrant and the district court's ruling that barred certain text message evidence from Chiu's trial. Upon review, we find that the warrant affidavit provided an adequate basis to support probable cause and that the district court did not abuse its discretion in excluding the text messages as inadmissible hearsay. We therefore affirm Chiu's convictions. Our reasoning follows.

I.

The investigation culminating with Chiu's arrest began with the search and arrest of another man, Warren Anderson. Anderson came to the attention of law enforcement by way of the messaging app Kik, which identified and reported suspected child pornography sent from an IP address that law enforcement tracked to Anderson. Special Agent (SA) Joseph Iannaccone of the Department of Homeland Security (DHS) applied for a search warrant with an affidavit ("the First Affidavit") that included a description of the image transmitted from Kik. When law enforcement approached Anderson to execute the search warrant on August 21, 2018, he provided them with extensive information about his interest in underage pornography, which included "depictions of boys as young as eight years old."

During his initial interviews on August 21, Anderson informed law enforcement that he had met an individual online named Hanford Chiu, who shared his interest in child pornography. The following day, SA Iannaccone, relying primarily on details from Anderson's initial interviews, prepared and filed a second search warrant affidavit ("the Second Affidavit") in support of a request for a warrant to search Chiu's residence, specifically the bedroom he used within a multifamily house.

According to the Second Affidavit, beginning around February of 2018, Anderson and Chiu met weekly at either man's residence to view child pornography. Anderson provided details about the layout of Chiu's residence and Chiu's custom-built PC, which the two used to view child pornography as recently as two days before the interview. Anderson told DHS that Chiu's computer included an extensive collection of downloaded child pornography. When agents asked Anderson to define "child pornography," he "indicated that it would involve children under 18." Anderson discussed a specific website, known to law enforcement to be "dedicated to the exchange of child pornography," which the two accessed via the anonymous internet browser Tor. He noted that Chiu was an attorney -- a fact which law enforcement later verified -- and that Chiu was cautious about his viewing of child pornography, rarely communicating with others on the dark-web sites he visited. Anderson also described some of the videos the

two viewed in their most recent session, "which included depictions of boys as young as 10 years old involved in sexual conduct." Unlike the First Affidavit, however, the Second Affidavit did not discuss any particular piece of contraband that law enforcement had viewed, and SA Iannaccone did not attach any such images.

The magistrate judge authorized the second warrant on August 22, and agents executed the search of Chiu's bedroom the same day. They found in his bedroom a custom-built computer tower with three hard drives, on which agents identified over a thousand images of child pornography in their preliminary on-scene review. Chiu was arrested that day. Later forensic analysis identified the Tor browser installed on multiple drives on Chiu's computer, with bookmarks to known child-pornography sites, as well as over 23,000 downloaded child-pornography files. A grand jury then indicted Chiu on charges of: (I) receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1); and (II) possessing child pornography, in violation of sections 2252A(a)(5)(B) and (b)(2).

Before trial, Chiu moved to suppress the evidence obtained from the search under the theory that the warrant and the supporting Second Affidavit failed to describe sufficiently the basis for probable cause. Specifically, he claimed that the Second Affidavit did not attach any pornographic images to be found and lacked the necessary alternative: descriptions of the illicit

images and videos to be found. The district court denied the motion, and Chiu proceeded to trial.

Chiu's defense at trial was that someone else had downloaded all the contraband to his computer. In support of this theory, he testified without objection that he had provided Anderson -- with whom he had been in a relationship for five years -- with several of his passwords and that he would occasionally bring his computer to Anderson's house for gaming and technical repairs. For further support, Chiu sought to introduce certain text messages between him and Anderson that, according to his counsel, showed that "the computer had crashed, [that] it was brought to Mr. Anderson to be repaired, and that Mr. Anderson requested various e-mail passwords from Mr. Chiu." The district court excluded the messages as hearsay.

Among the evidence in favor of the government, Chiu acknowledged on cross-examination that, on two different occasions within a week of his arrest, someone had accessed child pornography on his computer within minutes of accessing legal work files. Chiu recognized the legal work files and acknowledged having probably been the one to open them, but denied accessing the child pornography -- without providing any explanation for the nearly contemporaneous access.

After two days of trial, the jury convicted Chiu on both counts. The district court sentenced him to 110 months'

imprisonment and five years' supervised release. Chiu timely appealed.

II.

Chiu raises two claims of error in this appeal. First, he contends that the district court erred in denying his motion to suppress because the Second Affidavit failed to attach or sufficiently describe the pornographic images to be found. He then argues that the court erroneously excluded from trial his proposed text-message evidence that purportedly showed that Chiu had shared certain passwords with Anderson and had brought his PC to Anderson's home. We take up these arguments in turn.

A.

"In assessing the district court's denial of [a] motion to suppress, we review the court's legal conclusions de novo while reviewing factual findings for clear error." United States v. Burdulis, 753 F.3d 255, 259 (1st Cir. 2014). The ultimate determination of probable cause is a legal conclusion that we typically review de novo. United States v. O'Neal, 17 F.4th 236, 243 (1st Cir. 2021). With that said, when reviewing affidavits supporting search warrants, "we give significant deference to the magistrate judge's initial evaluation, reversing only if we see no 'substantial basis' for concluding that probable cause existed." United States v. Mendoza-Maisonet, 962 F.3d 1, 16 (1st Cir. 2020) (quoting United States v. Ribeiro, 397 F.3d 43, 48 (1st Cir.

2005)); see also United States v. Cordero-Rosario, 786 F.3d 64, 69 (1st Cir. 2015) (same, in reviewing a child-pornography prosecution). The judicial task in a probable-cause determination "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983); see also United States v. Syphers, 426 F.3d 461, 464 (1st Cir. 2005) (observing, in reviewing a child-pornography prosecution, that "hypertechnical readings" of warrants and affidavits "should be avoided" (quoting United States v. Baldyga, 233 F.3d 674, 683 (1st Cir. 2000)).

We start with the crime for which evidence was sought. The Second Affidavit explained that SA Iannaccone believed he would find in Chiu's bedroom evidence of a violation of 18 U.S.C. § 2252A, which criminalizes the receipt and possession of "child pornography." That term is then defined in section 2256 to include "any visual depiction" "of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8). The statute further defines "sexually explicit conduct" to include: "sexual intercourse," "bestiality," "masturbation," "sadistic or masochistic abuse," and "lascivious exhibition of," inter alia, "genitals." Id. § 2256(2)(A)(i)-(iv).

Chiu's argument against the sufficiency of the affidavit

supporting the warrant to search his bedroom relies on our holding in United States v. Brunette, 256 F.3d 14 (1st Cir. 2001). We held there that an affidavit based on a law enforcement officer's personal review of pornographic images that had been flagged by an internet service provider did not support probable cause where the officer did not attach or describe the images and the affidavit "did not specify with any detail the basis for believing that those images were pornographic." Brunette, 256 F.3d at 15, 17. Instead, the affidavit merely included the officer's assertion that the images depicted a "prepubescent boy lasciviously displaying his genitals," id. at 17, language which tracks nearly verbatim one prong of the statutory definition of "sexually explicit conduct," see 18 U.S.C. § 2256(2)(A)(V). But because the identification of specific images as child pornography will often be, at least in part, a subjective exercise, "the determination should be made by a judge, not an agent." Brunette, 256 F.3d at 18. We thus found error there in "issu[ing] the warrant absent an independent review of the images, or at least some assessment based on a reasonably specific description." Id. at 19. Put another way, Brunette held that "[i]n cases in which the warrant request hinges on a judgment by an officer that particular pictures are pornographic, the officer must convey to the magistrate more than his mere opinion that the images constitute pornography." Burdulis, 753 F.3d at 261.

According to Chiu, the Second Affidavit was likewise insufficient because it did not attach or describe any specific pictures that law enforcement expected to find in Chiu's bedroom -- in contrast to the approach taken with the First Affidavit, which did describe the specific image flagged by Kik. Chiu contends that the Second Affidavit simply substituted an officer's opinion that particular images were pornographic with the same opinion held by another third party: the defendant's criminal associate Anderson. To be sure, the Second Affidavit included numerous indications that Anderson considered the material he viewed with Chiu to be "child pornography." And the most detailed description of the subject matter viewed was Anderson's statement that the two men had recently watched videos "includ[ing] depictions of boys as young as 10 years old involved in sexual conduct." This language does closely resemble some of the language defining "child pornography," which includes "visual depiction[s] . . . of a minor engaging in sexually explicit conduct." See 18 U.S.C. § 2256(8)(B).

But we need not consider whether Anderson's description of the most recently watched videos alone would suffice because the affidavit does not stop there. The totality of the circumstances described by the Second Affidavit included much "more than . . . mere opinion" that particular images were pornographic. Burdulis, 753 F.3d at 261. The affidavit also

detailed Anderson's recounting of his and Chiu's joint activity: that he met Chiu online and later learned they shared an interest in child pornography; that Chiu showed Anderson how to use the dark-web browser Tor to access a specific website known for its use in viewing and downloading child pornography; that Chiu "was very careful about his online activities as they related to child pornography," such that he would only download images posted by others, without communicating with the posters; and that Chiu maintained a personal collection of this downloaded material amounting to some eighty gigabytes stored on the "custom-built desktop computer" in Chiu's bedroom.

In Brunette, we observed that including similar contextual and investigatory details in an affidavit may have put the government on firmer probable-cause footing than the mere anodyne parroting of statutory language. See 256 F.3d at 18–19. We distinguished the skeletal affidavit in Brunette from one in another child-pornography case, in which the Ninth Circuit had upheld a warrant notwithstanding its failure to include or describe any particular images. See United States v. Smith, 795 F.2d 841, 847–48 (9th Cir. 1986). The Smith affidavit, unlike the one in Brunette, "was bolstered by a much stronger investigation prior to applying for the warrant, including interviews with the suspect, some of the victims, and a pediatrician who confirmed that the girls pictured were under eighteen" -- all of which provided "other indicia of probable cause." Brunette, 256 F.3d at 19.

The Second Affidavit is much closer to the one in Smith. It detailed multiple interviews with an associate in the criminal activity and described particulars of how the search target came to acquire, store, and view the contraband -- including Chiu's efforts to evade detection and his history of accessing a website well-known for its use in obtaining child pornography. See also Syphers, 426 F.3d at 466 (recounting the details of a child pornography investigation from an affidavit that "may" have established probable cause, which included interviews with victims and evidence that the defendant had frequented a specialized website for child-pornography enthusiasts).

In sum, the inquiry here trains on whether the affidavit provided the magistrate judge with a "common-sense" basis for finding a fair probability that the target location would contain evidence of the possession of child pornography. In Brunette, we answered "no" because the affidavit, in effect, called for the magistrate judge to defer to the officer's evaluation without any basis for assessing that evaluation. Here, the affidavit provided a bit more detail concerning the images ("depict[ing] boys as young as ten years old involved in sexual conduct"), and the affidavit's chronology of events provided a basis for the magistrate judge to give weight to Anderson's description of what Chiu was doing. We

therefore cannot say that, "given all the circumstances set forth in" the affidavit, it provided "no substantial basis" for probable cause to believe that evidence of child-pornography offenses would be found on Chiu's computer. See Cordero-Rosario, 786 F.3d at 69 (cleaned up). We thus find no error in the district court's denial of Chiu's motion to suppress.

B.

We turn next to Chiu's argument that the district court improperly barred evidence of certain statements, in the form of text messages, from his trial. Before trial, Chiu sought a ruling that text messages exchanged between Chiu and Anderson in 2015 would be admissible. According to Chiu's counsel, the messages showed that Chiu had brought his computer tower to Anderson's house in November of 2015 to be repaired and that Chiu shared various passwords with Anderson. While Chiu contended that he was offering the messages for a non-hearsay purpose -- that is, not for the truth of their content -- the court found that the messages were "being offered for the truth of [the] movement of the computer between the two places," thus rendering the messages hearsay without any apparent exception available. After the defense rested at trial, the court confirmed that counsel had sufficiently preserved the objection to its pretrial ruling.

When a defendant preserves a claim that the district court improperly excluded evidence, we review that claim for abuse

of discretion. United States v. Sabean, 885 F.3d 27, 38–39 (1st Cir. 2018). The government, however, argues for the more stringent plain-error standard because Chiu never argued below the specific theory now raised for overcoming the rule against hearsay, only that the statements were not being offered for their truth. However, we need not wade into that dispute because Chiu's claim fails under even his preferred abuse-of-discretion standard.

On appeal, Chiu argues that the messages ought to have been admitted as prior consistent statements. Under Federal Rule of Evidence 801(d)(1), a witness's prior statement is excluded from the rule against hearsay -- and thus may be admissible -- "when (1) the declarant testifies at trial and is subject to cross examination;(2) the prior statement is consistent with the declarant's trial testimony; and (3) the prior statement is offered 'to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.'" United States v. Jahagirdar, 466 F.3d 149, 155 (1st Cir. 2006) (emphasis omitted) (quoting Fed. R. Evid. 801(d)(1)(B)).[1]

Here, Chiu was the declarant of the statements he sought to introduce, and he did testify at trial, thus satisfying the

[1] Chiu does not make any argument that the text messages ought to have been admissible under the most recent addition to Rule 801(d), for prior consistent statements that are used "to rehabilitate the declarant's credibility as a witness when attacked on another ground," Fed. R. Evid. 801(d)(1)(B)(ii), so we need not discuss that alternative basis.

first prong of our inquiry.[2] On the "consistency" prong, Chiu argues that the text messages are consistent with his testimony that he gave Anderson some passwords and occasionally brought his computer to Anderson for gaming or repairs. The government contests only the degree of consistency, but not that general premise.

The disagreement turns instead on the "fabrication" prong. For this inquiry, we consider the degree of fit between the putative prior consistent statement and the charge of fabrication that it is offered to rebut. See United States v. Wilkerson, 411 F.3d 1, 5 (1st Cir. 2005) ("[P]rior consistent statements must at least have 'some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.'" (quoting United States v. Simonelli, 237 F.3d 19, 27 (1st Cir. 2001))); Simonelli, 237 F.3d at 28 ("There is no rule admitting all prior consistent statements simply to bolster the credibility of a witness who has been impeached by particulars.").

To assess that fit for the statements offered here, we therefore ask: Did the government make an express or implied charge that Chiu recently fabricated the claim that Anderson had

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[2] To be sure, Anderson authored some of the messages in the larger set of text exchanges that Chiu initially sought to introduce. Chiu's argument on appeal, however, focuses on the text messages that he sent to Anderson.

occasionally possessed Chiu's computer and passwords? The record shows that the government certainly challenged Chiu's credibility broadly, as well as his claim that someone else had downloaded the images to his computer without his knowledge. But the government never bothered to contest the predicate yet separate claim that Anderson could occasionally access the computer and passwords.

Chiu contends that the government's challenge to his alternate-downloader theory necessarily implied that Chiu fabricated the specific claim that Anderson had occasional access. But clearly it did not: Chiu could certainly do the downloading himself whether or not Anderson was able to do so. And the government's distinction between these claims makes sense in light of its theory at trial. In proving that Chiu possessed the material, the government did not rely on his exclusive ability to access his computer. Rather, it pointed to evidence that someone had actually accessed the pornographic files nearly contemporaneously with actual access of Chiu's work files.

More expansively, Chiu argues that the government's broader attacks on his credibility "strongly implied" that Chiu fabricated "the entirety of [his] testimony," and thus, Chiu should be able to introduce statements consistent with some portion of his testimony. This argument runs headlong into our precedent requiring some degree of fit between the alleged fabrication and the prior statement, as well as the Supreme Court's admonition

that "[p]rior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited." Tome v. United States, 513 U.S. 150, 157 (1995).

In arguing that a more generalized attack on credibility may open the door to prior consistent statements, Chiu points us to United States v. Washington, 434 F.3d 7 (1st Cir. 2006). There, we found no abuse of discretion in a trial court's admission of a prior consistent statement where the party opposing its admission "had suggested that the entirety of [the declarant-witness's] testimony on direct examination had been false." Id. at 15. However, closer review of Washington reveals that it does not support the broad door-opening theory for which Chiu invokes it.

A critical component of the testimony presented by the witness there concerned the identity of an individual from whom he had purchased drugs. Id. at 14. Cross-examination of the witness indeed levied "a charge of fabrication which went to all of [the witness]'s testimony," painting him as "a habitual liar" with "a motive to lie about anything and everything in order to please the DEA." Id. But that examination also suggested the witness specifically fabricated "his testimony about the name of the drug dealer." Id. at 14 & n.11. The government then introduced the challenged evidence: the declarant's contemporaneous and consistent report to law enforcement naming the person who had

sold him the drugs. Id. Thus, there was no serious question that the witness had in fact been impeached on the specific subject of the rehabilitative, prior consistent statement, even if the cross-examination also levied indiscriminate charges of fabrication. Here, by contrast, the government's broad attacks on Chiu's credibility did not also specifically home in on Chiu's assertions that Anderson could occasionally access his computer.[3]

Accordingly, the district court did not abuse its discretion by excluding Chiu's proposed evidence.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

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[3] Chiu also argues that certain statements made by the government during pre-trial conferences and at sentencing somehow levied the kind of fabrication charge that we could consider for the purposes of Rule 801(d)(1)(B), but a witness plainly cannot be impeached at trial by arguments made outside of that trial.