

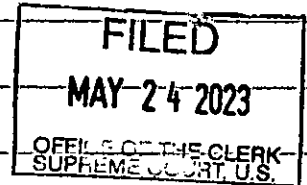
No.

23-5010

ORIGINAL

IN THE  
Supreme Court of the United States

Donald Lee Linville, Petitioner



v.

State of Arizona, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI (Corrected)

PETITIONER in PRO SE:

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## Questions Presented For Review

1. Was Petitioner's Motion to Suppress Appropriately Denied, Violating Petitioner's Fourth Amendment Right to Unreasonable Search and Seizure, and Contrary to Voluminous Federal Precedential History?
2. Should the Trial Court have Granted the Defendant's Rule 20 Motion on Counts 6, 7, and 8, Since Those Drugs Were Found on Unallocated Space on the Defendant's Computer, Following Federal Precedential Law?
3. Should the Petitioner's Rule 20 Motion have been Granted Due to Petitioner Not Knowingly Receiving Child Pornography, Following Federal Precedential History?
4. Was Counsel Ineffective for Failing to Challenge the Constitutionality of the November 6<sup>th</sup>, 2012 Search Warrant? (Lack of Probable Cause due to a Lack of Underlying Crime.)
5. Was Counsel Ineffective for Failing to Argue There was No Nexus Between What Was Found on the Video Camera at B.T.'s Apartment and what Was Sought After At Petitioner's Apartment?

## Relevant Prior Proceedings

1. Petition for Review, Decided February 28, 2023  
Arizona Supreme Court  
STATE V. LINVILLE, No. CR-22-0206-PR

2. Petition for Review, Decided 7-19-2022  
Arizona Court of Appeals  
STATE V. LINVILLE, No. 1 CA-CR 21-0551 PRPC

3. Petition for Post-Conviction Relief, Decided 11/08/2021  
Superior Court of Arizona, Maricopa County  
STATE V. LINVILLE, No. CR2013-110421-001 DT

4. Petition for Review, Decided December 13, 2018  
Arizona Supreme Court  
STATE V. Linville, No. CR-18-0433-PR

5. Appeal From the Superior Court in Maricopa County, Decided 7-24-18  
Arizona Court of Appeals, Division One  
State v. Linville, No. 1 CA-CR 17-0429

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Entered in this Case to Date (Relevant)

1. Memorandum Decision Affirming Convictions

AZ. Court of Appeals, Division One, No. 1 CA-CR 21-0551 PRPC  
(Appendix, # B) (Review Requested)

2. Memorandum Decision Affirming Convictions

AZ. Court of Appeals, Division One, No. 1 CA-CR 17-0429  
(Appendix, # E) (Review Requested)

3. Order; Petition for Review = Denied

AZ. Supreme Court, No. CR-22-0206-PR  
(Appendix, # A)

4. Order; Petition for Review = Denied

AZ. Supreme Court, No. CR-18-0433-PR  
(Appendix, # D)

Note: All opinions are unofficial/unpublished.



## Statement of Jurisdiction

Petitioner Linville, proceeding pro se, requests the U.S. Supreme Court to review the following judgments or orders:

1. Memorandum Decision, Affirming Convictions  
Dated July 19, 2022 (Appendix, # 2);  
And/or
2. Memorandum Decision, Affirming Convictions  
Dated July 24, 2018 (Appendix, # 5)

This is a Habeas Corpus action under 28 USC § 2254 by a state prisoner. Petitioner Linville is not certain, but believes jurisdiction to be conferred on the U.S. Supreme Court by 28 USC § 1254 (1) and also by Rule 10-11 of the Supreme Court Rules. This action arises out of the State of Arizona, in the Ninth Circuit.

## Notification

Pursuant to Supreme Court Rule 29.4 (b), Linville notifies this Court that 28 USC § 2403 (a) may apply in this case and that he is notified of his responsibility to serve the U.S. Solicitor General as any other party.

## Constitutional Provisions and Statutes.

### 1) US Constitutional Amendment 4

"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."

### 2) U.S. Constitutional Amendment 6

"In all criminal prosecutions, the accused shall enjoy the right... To be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have the assistance of counsel for his defense."

### 3) Arizona Revised Statutes (A.R.S.) Listed Below

a) 13-105; Definitions, (31); "Petty Offense" means an offense for which a sentence of a fine only is authorized by law."

b) 13-105; Definitions, (37); "Property" means anything of value, tangible or intangible."

c) 13-702; First Time Felony offenders; sentencing; definition

d) 13-703; Repetitive Offenders; Sentencing

e) 13-705; Dangerous Crimes Against Children; Sentences; definition [explained in brief, relevant]

f) 13-1424; Voyeurism [relevant parts explained in brief]

g) 13-1507; Burglary in the Second Degree; classification: "A. A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with intent to commit any theft or any felony therein."

h) 13-3019; Surveillant... Recording; "A. It is unlawful for any person to knowingly photograph, videotape, film, digitally record or by any other means secretly view, with or without a device, another person without that person's consent..."

## Constitutional Provisions and Statutes, cont.

i) 13-3551; Definitions; " 'Explosive exhibition' means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer. "

j) 13-3552; Commercial sexual exploitation of a minor; classification [explained in brief]

k) 13-3553; Sexual exploitation of a minor; evidence; classification

"A. A person commits sexual exploitation of a minor by knowingly:

1. Recording, filming, photographing, developing, or duplicating any visual depiction in which a minor is engaged in explosive exhibition or other sexual conduct.
2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in explosive exhibition or other sexual conduct. "

## Statement of the Case

### Pre-Trial: Motion to Suppress; Evidentiary Hearing

On October 24, 2012 Victim 1 (V1) found a video camera on the balcony of her apartment. V1 looked at two video files on the camera, and she had an idea who the camera belonged to after she viewed the two video files. (EHTR pp. 11-12).

The first video V1 viewed was blocked by the wheel of a portable barbecue located on V1's balcony. In the second video, V1 was able to see the clothing of the person who was placing the video camera on the balcony. (EHTR p. 13).

V1 saw a person outside her apartment wearing that exact clothing after she had found the camera and looked at the videos. That person was the Petitioner, Donald Linville. V1 called the Phoenix PD, and gave the video camera to the Phoenix PD officer who responded to her call. Phoenix PD took custody of the video camera on October 24, 2012. (EHTR pp. 14-15). The Phoenix PD officer impounded the video camera on October 24, 2012 (EHTR p. 18). The Petitioner reported the video camera lost or stolen to the Phoenix PD on October 24, 2012. (EHTR p. 19).

On October 31, 2012, V1, with the help of the Phoenix PD, conducted a confrontation call with the Petitioner. During that call, the Petitioner admitted ownership of the camera, and admitted that he placed the camera there. (EHTR p. 19).

The Petitioner's camera had a memory card inside the camera. The Phoenix PD forensically viewed the Petitioner's video camera on November 2, 2012, including the memory card. Based on things seen on the memory card, Phoenix PD obtained a search warrant on November 6, 2012 to search the Petitioner's apartment. No search warrant was ever obtained to view the Petitioner's video camera or the memory card. (EHTR pp. 20-21).

VI explained what she saw on the video camera the day she turned it over to Phoenix PD, but the Phoenix PD did not view the files at that time. VI did give permission to view the two videos she had watched on the Petitioner's video camera, and she indicated the device was not hers. (EHTR p. 22). The Petitioner told Phoenix PD that the video camera belonged to him, that it had been lost or stolen, and had asked the Phoenix PD to return the device to him on October 31, 2012. Even though the Petitioner claimed ownership of the camera, Phoenix PD did not return the camera to him. (EHTR pp. 22-23).

The video camera had been placed on VI's balcony and directed toward the inside of VI's apartment for the purpose of committing the alleged act of voyeurism. (EHTR, p. 25) The video camera was impounded by Phoenix PD on Oct 24, 2012, and remained in the possession of Phoenix PD from that date forward. (EHTR, p. 25) Once the video camera was in the custody of Phoenix PD there was no longer any issue of officer safety. (EHTR p. 25)

The Phoenix PD investigation of the voyeurism indicated that the video camera had been moved or adjusted to change the view, as to avoid the barbecue wheel that had been blocking the view of the camera. (EHTR p. 28) During the movement of the video camera, the person moving or adjusting the video camera inadvertently recorded himself, and allowed VI to see how he was dressed. VI knew the Petitioner from prior contact with him. (EHTR, pp. 28-29)

VI saw the Petitioner return outside her apartment three times while she was speaking to Phoenix PD. In a 25-30 minute time frame, the Petitioner returned to the vicinity of VI's apartment four times to check on the video camera. (EHTR, p. 30).

During the confrontation call on October 31, 2012, the Petitioner claimed ownership of the video camera two or three times. During the confrontation call, the Petitioner requested that the memory card be deleted, and that the video camera be returned to him. (EHTR, p. 33) Detective Albertson of the Phoenix PD is listening to, and directing, the confrontation call. Detective Albertson specifically asks Linville if the Phoenix PD could

search the video camera, and Linville refuses the request (EHTR, p. 33).

After Phoenix PD interviews V1 and V2 (V1's boyfriend living in the apartment with her), and the confrontation call, there is no doubt that the camera belongs to the Petitioner. In addition, the Petitioner had asked the Phoenix PD for the return of the camera. (EHTR p. 34)

Phoenix PD has had possession of the Petitioner's video camera since October 24, 2012, but they never apply for or obtain a search warrant to search the video camera or the memory card inside the video camera. (EHTR, p. 35). The memory card is inside the video camera. The Phoenix PD have to open the video camera in order to retrieve the memory card. (EHTR, p. 36)

On November 2, 2012 Detective Albertson knows the video camera belongs to the Petitioner, and knows the Petitioner has asked for the return of his video camera. (EHTR, p. 37). During an interview of the Petitioner, Detective Albertson asked the Petitioner for permission to search the Petitioner's video camera. The Petitioner refused permission. Detective Albertson has the Petitioner's video camera forensically searched. (EHTR p. 37) A search warrant was not obtained prior to the forensic examination of the video camera and the memory card. (EHTR p. 38) The Phoenix PD's search produced six discs of additional information. (EHTR p. 38). Some of the six discs were illegible or blank, but one or two of the disks had evidence of other crimes possibly committed by the Petitioner. (EHTR, p. 39). The crime of voyeurism was established by looking at the two video files on the Petitioner's video camera. The additional evidence found on the disks took the Phoenix PD's investigation beyond the scope of their investigation for voyeurism. (EHTR, p. 39).

Based on the evidence generated on the disks, Phoenix PD obtained a search warrant on November 6<sup>th</sup> 2012 for the Petitioner's apartment. (EHTR, p. 40) Upon execution of that search warrant, Phoenix PD finds a computer in Petitioner's Apartment. (EHTR, p. 40). Phoenix PD wants to look inside the computers they found in the Petitioner's Apartment.

However, the November 6<sup>th</sup>, 2012 search warrant does not allow Phoenix PD to look inside the computer. (EHTR, p. 41). Phoenix PD knows it cannot look inside the Petitioner's computer without a search warrant giving them permission to do so. Phoenix PD obtains a second search warrant that allows them to search inside the Petitioner's computer. (EHTR, pp. 45-46). The information used to show probable cause for the first search warrant, dated November 6, 2012, came from the warrantless search of the memory card inside of the Petitioner's video camera. (EHTR, p. 60) (The information obtained through the warrantless search is evident in the November 6, 2012 search warrant affidavit, because VI did not provide information and details specific to the file lengths during her interviews with Phoenix PD.)

### Evidence Generated During Trial

1. Lieutenant Albertson begins the investigation, with Detective Elting conducting the forensic analysis of the seized electronics.

Lieutenant Albertson of the Phoenix PD testified that he was, at one point, the case agent on this matter and another unrelated investigation regarding Petitioner. (RT 03/15/17, pp. 54-64). The video camera's memory card was subsequently analyzed although no search warrant was obtained to perform such a search. (ID. at 80) The information discovered during the examination was used as the bases to request a search warrant of Petitioner's home. (ID. at 64-88). On November 6, 2012 Albertson wrote a search warrant for Petitioner's residence. (ID. at 64-65, 77). From that warrant stemmed two investigations: into surreptitious video recording of sexual acts, and the possession of child pornography on computer equipment. When Albertson's warrant was executed, eight items were seized that included a laptop computer and a

desktop computer. (ID. at 64-65, 77, RT 03/28/17, pp. 69-70).

Detective Elting was asked to analyze items seized to look for surreptitious videos. (RT 03/22/17, p. 53). In particular, a ASUS laptop, a HP desktop, a 32 gigabyte Polaroid SDHC memory card, and a cell phone memory card were seized and analyzed. (ID. at 53.) On January 9, 2013, Detective Elting discovered an image depicting, in his opinion, sexual exploitation of a minor in the laptop's recycle bin. (RT 03/22/17, pp. 55-58).

Indicia of ownership was established when Petitioner's school work, financial information, and resumes were located. (ID. at 88-90) and, after an additional search warrant was obtained to broaden the scope of analysis, the search continued. (ID. at 55-58)

2. When questioned, Detective McChes was unable to confirm the images were knowingly received, purchased or downloaded, looked at, or viewed; and Detective Elting was asked specifically about each count involving sexual exploitation of a minor, and he answered that he found no evidence that the Defendant violated that statute.

The following images, for counts 5-14, were taken for review, were discussed during trial, and were published for the jury to view:

Count 8 of the indictment, the first image discovered by Elting, was a 13 minute video. This video was found in the seized laptop computer's recycle bin from user DJ. (RT 03/16/17, pp. 39-40, 51; 03/22/17, p. 72). The image was evaluated with Cindy Nelson. (RT 03/15/17, p. 130). Mrs. Nelson gave the opinion the person in the video was less than twelve years of age. (RT 03/29/17, pp. 25-26). Detective McChes was unable to tell if Petitioner knowingly downloaded the video to his laptop. (RT 03/16/17, p. 51). When questioned, McChes did not know if the video had ever been watched. (ID.)



Count 5 of the indictment was a 21 minute video removed from the seized desktop computer's recovered folders from unallocated space by Elting. (ID. at 123; RT 03/16/17, p. 49; 03/22/17, p. 63), and evaluated by Cindy Nelson. (RT 03/15/17, p. 123). Mrs. Nelson opined the child in the image was less than ten years old. (Based on Sexual Maturity Ratings.) (RT 03/29/17, p. 23). Detective McChesee could not tell the jury the Petitioner knowingly downloaded the image or looked at it or viewed it. (RT 03/16/17, pp. 46-47).

Count 6 of the indictment was nearly a 9 minute video taken from the seized desktop computer's recovered folders from unallocated space by Elting. (RT 03/16/17, pp. 49-50; 03/22/17, p. 69). After evaluation, Mrs. Nelson concluded the child to be less than twelve years old. (RT 03/29/17, p. 124). Again, Detective McChesee could not tell the jury Petitioner knowingly downloaded the image, looked at it or viewed it. (RT 03/16/17, pp. 47-48, 50).

Count 7 of the indictment was a still image from the desktop computer's recovered folder from unallocated space by Elting (RT 03/16/17, p. 50; 03/22/17, p. 70), and was viewed by Cindy Nelson, which she concluded the child in the image was less than 10 years old. (RT 03/29/17, p. 25). Detective McChesee could not say Petitioner knowingly downloaded, looked at, or viewed the image. (RT 03/16/17, p. 50).

Count 9 of the indictment was a 21 minute video removed from the seized laptop computer's recycle bin from user DJ1 by Elting. (RT 03/16/17, p. 52; 03/22/17, p. 75). Mrs. Nelson gave her opinion, after evaluation, that the child in the video was less than twelve years old. (RT 03/22/17, p. 26).

Count 10 of the indictment was an image taken from the seized laptop computer's recycle bin from user DJ1 by Elting. (ID. at 52-53, 03/22/17, p. 56) Mrs. Nelson gave her opinion that the child in the image was less than twelve years old. (RT, 03/29/17, pp. 26-27).

Count 11 of the indictment was an image taken from the seized laptop

computer's recycle bin from user DJI for analysis. (ID. at 19, 53; 03/22/17, p. 77). After completing a sexual maturity rating analysis, Mrs. Nelson formed the opinion that the child in the image was less than twelve years old. (RT 03/29/17, p. 27).

Count 12 of the indictment was a 1 minute video found on the seized laptop computer's recycle bin from user DJI by Elting. (RT 03/16/17, pp. 25; 03/22/17, p. 78). Mrs. Nelson informed the jury that, in her opinion, the child in the image was less than twelve years old. (RT 03/29/17, pp. 27-28).

Count 13 of the indictment was a four and a half minute video from the laptop computer's recycle bin from user DJI by Elting, and was analyzed by Cindy Nelson. (ID. at 26, 55; 03/22/17, p. 79). Mrs. Nelson formed the opinion that the child in the image was less than twelve years old. (RT 03/29/17, p. 28).

Count 14 of the indictment was a still image taken from the seized laptop computer's recycle bin from user DJI by Elting, for analysis by Cindy Nelson. (RT 03/16/17, pp. 27-28, 56; 03/22/17, p. 80). After analysis, Mrs. Nelson concluded the age of the child in the image was less than twelve years old. (RT 03/29/17, pp. 28-29).

As to Counts 9-14, Detective McChes was again unable to confirm images were knowingly received, purchased or downloaded, looked at, or viewed. (03/16/17, pp. 52-56, 64).

Detective Elting was asked specifically about the Petitioner's violation of the Sexual Exploitation of a Minor statute for each count involving sexual exploitation of a minor (5-14), and he answered that he found no evidence that the Petitioner violated that statute in regard to any of those counts. (Day 8 TR, p. 66-74).

3. Detective Elting explains about Bit Torrent, his independent study of how a person can inadvertently download child pornography while searching for adult pornography.

Evidence of Bit Torrent, a software used to search and download multiple "torrents" or files from other users and pieces them together, was found on Petitioner's laptop. (RT 03/21/17, pp. 122-124; 03/28/17, pp. 148-156). Detective Elting, the Phoenix PD expert witness, identified an informal study he performed that indicated that as much as 5%-10% of downloaded adult pornography contains child pornography. (Day 5 TR, p. 127, l. 3) This indicates the likelihood that a person who downloads adult pornography, like the petitioner, will inadvertently download child pornography at the same time. Detective Elting also testified that downloading through the use of Bit Torrent will result in accidental downloading of child pornography. (Day 9 TR, p. 5, l. 13) and, it is possible to accidentally or inadvertently download child pornography while downloading other types of media. (Day 9 TR, p. 8-9).

4. The images found were all deleted, found in unallocated space, or in the recycle bin waiting to automatically go to unallocated space. Petitioner did not, and could not, retrieve files from either unallocated space or the recycle bin.

Detective Elting found all of the child pornography on the Petitioner's computers in either the recycle bin or in unallocated space. (Day 6 TR, p. 68, l. 8) Detective Elting testified that images cannot be directly deleted into unallocated space. (Day 8 TR, p. 102, l. 9-11). Images found in unallocated space had been deleted from the operating system of the computer. (RT 03/27/17, p. 22). To get a file to unallocated space, the file must be deleted, sent to the recycle bin, which can then be "emptied" to move the file to unallocated space, or it can be set to empty automatically. (ID. at 41). The Petitioner's recycle bin was default set to auto-empty. (No action required) (Day 8 TR, p. 45, l. 11-21). And, there is no way to

determine if the Petitioner retrieved anything from the unallocated space on his computer. (Day 8, TR, p. 46, l. 1-4). Also, the Petitioner did not have any programs on his computer that would allow him to access the unallocated space on his computer. (Day 8 TR, p. 52, l. 1-25) In addition, there was no indication that the Petitioner recovered anything from his recycle bin. (Day 8, TR p. 46, l. 15-18) Petitioner's technical/computer knowledge is identified as a 3 or 4 out of 10 by Detective McChes of the Phoenix PD. (Day 4 TR, p. 38, l. 10).

5. Lonnie Dworkin testified the child pornography was not downloaded intentionally, there was no indication Linville sought child pornography, the files went straight from the download site to the recycle bin, were not opened, and not recovered from the recycle bin.

On Day 9 of trial, the defense expert, Lonnie Dworkin, was allowed to testify out of order (i.e. during the pendency of the State's case). He testified that the Petitioner had not knowingly downloaded the child pornography images that are basis of the sexual exploitation charges. (Day 9 TR, p. 199, 7-11). All files on the Petitioner's computer went straight from the download site directly into the recycle bin. (Day 10, TR, p. 113). This means that the Petitioner did not keep any child pornography in his cache files. The internet search terms used by the Petitioner did not indicate that he was ever searching for child pornography (Day 10 TR, pp. 116-117)

The Petitioner's downloads of child pornography were deleted without being opened. (Day 10 TR, p. 128). There was no indication that the Petitioner ever retrieved anything from his recycle bin. (ID. at 130). Petitioner's computer usage showed a pattern of deleting all child pornography files. (ID. at 136-137). All child pornography

downloaded onto the Petitioner's computer had been deleted. (ID. at 143). And, there is no indication that the Petitioner had looked at any of the child pornography. (See, Detective Elting's testimony above.)

Mr. Dworkin agrees with Detective Elting that downloading significant amounts of adult pornography, as the Petitioner did, will increase the odds of downloading child pornography inadvertently. (Day 10 TR, p. 151). On Petitioner's computer, some of the adult pornography was deleted along with all of the child pornography. (ID. at 153)

b. Motion to Acquit, Rule 20, and the State failed to produce any evidence that Linville was ever "sexually stimulated" by the images, and failed to explain the original photographer's intent of the images.

After the State rested its case, the Petitioner made a Motion to Acquit pursuant to Arizona Rules of Criminal Procedure. At that time, the trial court judge had already heard the Petitioner's expert witness testify. The trial court judge referred to the Petitioner's evidence in his ruling on the Defendant's Rule 20 Motion. (Day 10 TR, p. 43)

At no time during the State's case did it produce any evidence/testimony that the Petitioner was ever "sexually stimulated" by child pornography (how could the State assert this when the Petitioner did not view the files), nor did the State discuss or prove the photographer's intent behind the photos or videos published to the jury. (No citations to the record available, as none of this was ever discussed during trial.)

1. Was Petitioner's Motion to Suppress Appropriately Denied, Violating Petitioner's Fourth Amendment Right To Unreasonable Search And Seizure, And Contrary To Voluminous Federal Precedential History?

In its ruling on the Defendant's Motion to Suppress, the trial court made several inaccurate or demonstrably false statements, and both the trial court and Arizona Court of Appeals made rulings that conflict with relevant decisions of various circuit courts and United States Supreme Court. (See Rule 10(b) and (c) of the Rules of the United States Supreme Court.)

Although the Petitioner placed his video camera on B.T.'s balcony, it was for the purpose of committing the alleged crime of voyeurism. Petitioner could not complete that act without returning to retrieve his video camera. And, the Petitioner returned to the vicinity of B.T.'s apartment 3-4 different times as was noted by B.T. and her boyfriend.

As mentioned above, Petitioner filed a Motion to Suppress the warrantless search of his recording device. The Superior Court denied the motion, ruling that Petitioner had abandoned the device when he placed it on the balcony. (See Under Advisement Ruling, 1/23/17, p. 1) This ruling was affirmed by the Arizona Court of Appeals (See Appendix Exhibit #5, 7/24/18 Ruling, p. 4). The Petitioner did not abandon his video camera, nor did the Petitioner relinquish any expectation of privacy by asking B.T. to delete the contents of the memory card. (Noting the courts did not provide any precedent to support their conclusions.)

A. There was no abandonment of the video camera.

To abandon personal property, "one must voluntarily and intentionally give up

a known right." See *Grande v. Jennings*, 229 Ariz. 584, 278 P.3d 1287 (App. 2012). Abandonment involves an intent to abandon, together with an act or omission that carries that intent into effect. See *Mason v. Hasso*, 90 Ariz. 126, 367 P.2d 1 (1961).

Further, the State's abandonment argument is fallacious. First, Petitioner did not abandon his video camera. He intentionally placed it on B.T.'s balcony to record B.T. Second, Petitioner never gave up ownership of the video camera. How could he? He was using the video camera to commit an alleged unlawful act. Third, during and after the time Petitioner's video camera was found by B.T. on the balcony, Petitioner engaged in numerous attempts to retrieve the video camera. In fact, B.T. and her boyfriend both acknowledged to the Phoenix PD patrolman on scene that they each saw Petitioner lurking outside B.T.'s apartment while the patrolman was on scene. (Additionally, Petitioner filed a lost/stolen report for the camera.)

Where there is no verbal denial of an interest in the property, or clear physical relinquishment of the property (such as by throwing the property away, unconditionally giving it to another person, or dropping it and running away from it), a person has not abandoned the property. See *U.S. v. Lopez-Cruz*, 730 F.3d 803 (9<sup>th</sup> cir. 2013), *U.S. v. Most*, 876 F.2d 191 (D.C. cir. 1989).

Leaving the video camera on B.T.'s balcony alone does not constitute abandonment because the objective evidence is that Petitioner intended to come back and retrieve the footage. See *U.S. v. James*, 353 F.3d 606, 615-16 (8<sup>th</sup> cir. 2003). (Adding that a defendant who physically relinquished the discs containing child pornography did so in a way that demonstrates abandonment by asking someone to hold onto the discs and destroy them for him.) Other Federal courts have found in cases like this one, where there was no denial of an interest in the property or clear

Physical relinquishment of it (such as by throwing the property away, unconditionally giving it to another person, or dropping it and running away from it), that a person had not abandoned the property. See E.g.; *United States v. Infante-Puiz*, 13 F.3d 498, 501-02 (1<sup>st</sup> cir. 1994); *United States v. Scrivner*, 680 F.2d 1099, 1100-01 (5<sup>th</sup> cir. 1982); *United States v. Basinski*, 226 F.3d 829, 837-38 (7<sup>th</sup> cir. 2000); *United States v. James*, 353 F.3d 606, 616 (8<sup>th</sup> cir. 2003); *United States v. Lopez-Cruz*, 730 F.3d 803, 808-09 (9<sup>th</sup> cir. 2013); *United States v. Garzon*, 119 F.3d 1146, 1450 (10<sup>th</sup> cir. 1997); *United States v. Most*, 876 F.2d 191, 196-97 (D.C. cir. 1989).

The State's abandonment argument is made moot by the actions of Detective Albertson during his October 31, 2012 interview of Petitioner. As stated above, this act alone establishes Petitioner's ownership of his video camera, and established that Petitioner had a reasonable expectation of privacy in his video camera and its contents (the memory card). The trial court acknowledged Petitioner's ownership of his video camera because of Detective Albertson's interview.

A series of cases from other jurisdictions hold that physically relinquishing an item does not necessarily constitute abandonment. See *United States v. James*, 353 F.3d 606, 615-16 (8<sup>th</sup> cir. 2013) (Finding that an inmate who left computer CD's with a friend for safekeeping, then instructed that the CD's be destroyed, did not abandon his expectation of privacy in the CD's); *United States v. Garzon*, 119 F.3d 1446, 1452 (10<sup>th</sup> cir. 1997) (concluded that the defendant had not abandoned his bags for purposes of a dog sniff). Additionally, the United States Supreme Court has held that attempting to hide property from the police does not constitute abandonment. *Smith v. Ohio*, 494 U.S. 541, 543-44 (1990) ("[A] citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police



officer's inquiry, clearly has not abandoned that property.")

B. Asking another person to have a video deleted/destroyed is not abandonment. There was the issue of Petitioner asking B.T. to destroy the videos. In *United States v. James*, the defendant in that case gave several CD's containing child pornography to a friend for safekeeping with the instruction that the discs be destroyed. 353 F.3d 606, 610 (8<sup>th</sup> cir. 2003). When police picked up the discs at the friend's home and searched them, one of the government's arguments was that the warrantless search was valid because the defendant abandoned the media by asking a friend to destroy them. (ID. at 615-16). The court held that there was no "support for the abandonment theory from [defendant's] instruction to destroy the discs." (ID. at 616). This is because "the destruction order 'did not invite all the world to rummage through the [discs] at will'... but, instead, 'manifested a desire that nobody possess or examine the contents of the [discs].'" ID. citing *United States v. Basinski*, 226 F.3d 829, 838 (7<sup>th</sup> cir. 2000) (holding that instructing a third party to destroy a briefcase containing contraband did not amount to abandonment.)

Although the Arizona Court of Appeals believed that Petitioner's desire to have B.T. delete the footage on the recording device amounted to abandonment, James stands for the opposite. (353 F.3d at 615-16). It is said that "bad cases make bad law." It can equally be said that that badly drafted motions lead to bad law. A well-reasoned principle is that if a person requests that someone delete compromising footage of a person having sex they clearly have not abandoned all interest in the property - they want the evidence destroyed from prying eyes. (See ID.) If leaving bags on a bus even after being asked to remove them for a

dog sniff did not amount to abandonment, clearly there is an exception when an individual attempts to elude the item from capture. See *Carzon*, *supra*. This principle applies to Arizona because the United States Supreme Court recognized that principle in *Smith*. (494 U.S. at 543-44).

C. Petitioner has an expectation of privacy and ownership interest in his video camera.

In addition, the trial court admits that the Petitioner had an expectation of privacy in his video camera and its contents as of October 31, 2012. But, the trial court fails to realize that the operative warrantless search of Petitioner's video camera occurred on November 2, 2012. The trial court incorrectly assumes that the operative search was the viewing of the two videos on the camera that took place prior to October 31, 2012. This is clearly inaccurate. The operative search was of the Petitioner's memory card. It was that search that provided the Phoenix PD with the information that generated facts sufficient to justify the issuance of the search warrant for Petitioner's apartment on November 6, 2012. (For example: B.T. did not provide to the detectives the length of the videos, to the minute and second, that was evident in the November 6, 2012 search warrant affidavit. Only by warrantlessly searching the memory card and getting specific details could the Phoenix PD use it and have it in their application for a search warrant. This clearly proves their warrantless search of the device and the memory card, Phoenix PD's using of that information in the search warrant affidavit, and thus violating Petitioner's Fourth Amendment rights.) The Phoenix PD asked Petitioner for his permission to search his video camera. The Petitioner refused such permission. That act alone indicates the Phoenix PD knew the video camera belonged to the Petitioner, and that he has a reasonable expectation of privacy in the video camera as of that date - October 31, 2012. Also, the trial court admits that the

Petitioner had a reasonable expectation of privacy as of October 31, 2012. As indicated above, the warrantless search of Petitioner's device occurred on Nov 2, 2012.

The burden is on the Petitioner to show that he has a reasonable expectation of privacy. As stated in *Rakas v. Illinois*, 439 U.S. 128 (1978), "a person cannot challenge a search unless he has a legitimate expectation of privacy in the area [item] searched." Also, as stated in *Pawlings v. Kentucky*, 448 U.S. 98 (1980), "ownership of an item is a factor to be considered in determining expectation of privacy."

As indicated above, the Phoenix PD acknowledged Petitioner's ownership of, and reasonable expectation of privacy in, his video camera during their interview of the Petitioner that occurred on Oct. 31, 2012. The trial court even acknowledged that the Petitioner had a reasonable expectation of privacy in the video camera as of Oct. 31, 2012. Therefore, the Phoenix PD's warrantless search of the Petitioner's video camera on Nov. 2, 2012 was unlawful and improper, and cannot stand.

#### D. Legal argument, precedent, prejudice, and relief requested.

A warrantless search is presumably unconstitutional unless a warrant exception applies. See *Grob v. Ramirez*, 540 U.S. 551 (2004), and *Rodriguez v. Arellano*, 194 Ariz. 211, 979 P.2d 539 (Div. I, 1999). In Arizona, warrantless searches are presumably unreasonable. In order to engage in a warrantless search, the police must have consent from the owner, specifically refused herein, or an exception to the warrant rule must apply. Exceptions to the warrant rule include searches incident to stops/detentions, border stops, arrest, vehicle searches, inventory searches, and when exigent circumstances (i.e., danger to the officer or possible degradation to the evidence) exist. None of these exceptions to the warrant rule apply herein. As indicated above,

The Petitioner's video camera had been in the exclusive custody and control of the Phoenix PD as of October 24, 2012. There were no exigent circumstances on Nov. 2, 2012 that justified the Phoenix PD engaging in a warrantless search of the Petitioner's video camera or its contents (i.e. memory card.)

The exclusionary rule arises out of the Fourth Amendment to the U.S. Constitution, and is adopted in Article 2, Section 8 of the Arizona Constitution. The seminal case in regard to the exclusionary rule is *Mapp v. Ohio*, 367 U.S. 643 (1948), wherein it states that "any evidence obtained as a result of such illegal searches and seizures is generally inadmissible at trial pursuant to the exclusionary rule." This adoption of the exclusionary rule has been adopted in Arizona in *State v. Carez*, 202 Ariz. 133, 42 P.3d 564 (2002), among other cases.

In addition, although the trial court did not agree, the Petitioner submits that the case *State v. Huerta*, 223 Ariz. 424, 224 P.3d 240 (Div. 2, 2010) is instructive. In *Huerta*, the Defendant never claimed ownership of a duffle bag in which the police found contraband. Therefore, *Huerta* did not have a reasonable expectation of privacy. In this case the Petitioner claimed ownership of his video camera on several occasions.

Additionally, the Petitioner submits that the search of the contents of the Petitioner's video camera, namely the memory card contained inside the video camera, is controlled by *Riley v. California*, 134 S.Ct 2473 (2014). This case is controlling law in regard to the search of electronic devices that have memory capabilities, such as the Petitioner's video camera and its memory card contained therein. Although the police can search the electronic device's container for things such as fingerprints and DNA, they cannot search the memory card inside the video camera container without first obtaining consent from the owner (Refused by Petitioner), or obtaining a search warrant, not done herein.

The case Riley v. California, 134 S.Ct 2473 (2014) is not just about cell phones, but about the data contained within the cell phone, or any other electronic device. (Like a laptop computer, See U.S. v. Lichtenberger, 786 F.3d 478 (6<sup>th</sup> cir. 2015).) The protection granted by the Supreme Court in Riley, supra is of the data that can be stored in the microprocessor and memory within the cell phone.

The state ignores the fact that Petitioner's video camera also contained a microprocessor (the memory card) that stores vast amounts of information, primarily photos and videos. The same protection granted to the cell phone in Riley, and the laptop computer in Lichtenberger, must be provided to Petitioner herein because of the existence of the stored data on Petitioner's memory card located inside Petitioner's video camera.

As stated in Lichtenberger @488, "the likelihood that an electronic device will contain 1) many kinds of data, 2) in vast amounts, and 3) corresponding to a long swath of time, convinced the Riley Court that officers must obtain a search warrant before searching such a device." And, Petitioner's video camera was not obtained during his arrest. The Phoenix PD had Petitioner's video camera in their possession from October 24, 2012 to November 2, 2012 before they engaged in their non-consensual, warrantless search. There were no exigent factors present at the time of that search to justify it being done without a warrant.

The exclusionary rule clearly applies herein, and the warrantless search of the Petitioner's video camera cannot be allowed to stand. The Petitioner is very clearly prejudiced by this, as this would have not only very clearly altered the outcome of trial, but the actions taken by the Phoenix PD violated the Petitioner's constitutional rights. The fruits of that warrantless search must be suppressed.

It is clear that the warrantless search of the Petitioner's video camera and memory card on November 2, 2012 was unconstitutional and unlawful. And, it is clear that the exclusionary rule applies to all of the evidence that the Phoenix PD found in the Petitioner's memory card as a result of that warrantless search. (Namely, the evidence used to generate the November 6<sup>th</sup>, 2012 search warrant, and subsequently the evidence found in Petitioner's apartment derived from the execution of the November 6<sup>th</sup>, 2012 search warrant, all must be suppressed.)

Therefore, the Petitioner respectfully requests this Court to reverse the trial court's ruling on the Petitioner's Motion to Suppress. And, the Petitioner requests this Court to grant his Motion to Suppress and to exclude/suppress all evidence obtained as a result of the warrantless search of the Petitioner's memory card and the corresponding November 6<sup>th</sup>, 2012 search warrant.

2. Should the Trial Court have Granted the Defendant's Rule 20 Motion on Counts 6, 7, and 8 Since Those Images Were Found on Unallocated Space on the Defendant's Computer, Following Federal Precedential History?

Unallocated space is space on a hard drive that contains deleted data, usually emptied from the operating system's recycle bin folder, that cannot be seen or accessed by the user without the use of forensic software. See *U.S. v. Flyer*, 633 F.3d (9th Cir. 2011). The images that constitute Counts 6, 7, and 8 of the State's Indictment were found on the Petitioner's computer in unallocated space.

In its search of the Petitioner's apartment and his computer found in his apartment, the State did not find forensic software that would allow the Petitioner to access information located on his computer in unallocated space. (See testimony of Detective Elting). When questioned by defense counsel, Detective Elting indicated that, even if retrieved, all that can be known about such a file is that it once existed on the computer's hard drive. But, you cannot determine when a file was created, accessed, or deleted by the user. See *Flyer*, *supra*.

There is considerable federal case law on the subject of "inadvertent downloading" of child pornography, and there is a long line of federal case law holding that "there was insufficient evidence to establish that [a defendant] exercised dominion and control over the images recovered from the unallocated space on the hard drive." See *Flyer*, *supra*. See also, *U.S. v. Kuchinsky*, 469 F.3d 853, 862 (9th Cir. 2006), *U.S. v. Ramm*, 455 F.3d 990, 1001 (9th Cir. 2006), and other cases deciding this same issue. A defendant knowingly possess

Images stored in unallocated space if there is evidence he had accessed websites containing child pornography, and was aware images or videos from those websites would be stored there by the computer's operating system or Internet browser. See, *State v. Jensen*, 217 Ariz. 345, 173 P.3d 1046 (Div. I, 2008).

The State provided no evidence that the Petitioner ever searched for child pornography on his computer, or accessed any child pornography websites. The testimony of Detective Elting indicated that his search of the Petitioner's computer indicated no such searches for child pornography. And, Detective Elting testified that his own independent studies showed him that as much as 5%-10% of adult pornography, when downloaded, can be child pornography inadvertently downloaded at the same time. There was ample evidence that the Petitioner regularly downloaded adult pornography through Internet sites such as Bit Torrent, and others.

Using the reasoning in *Jensen* and the ruling in *Ayer*, it is submitted that the State provided no sufficient evidence that a reasonable person could accept as adequate and sufficient to support a conclusion of guilt beyond a reasonable doubt, see *State v. Tarango*, 182 Ariz. 241, 895 P.2d 1009 (Div. I, 1994), in regard to Counts 6, 7, and 8. See also *U.S. v. Kuchinsky*, 469 F.3d 853, 862 (9th Cir. 2006) (defendant did not knowingly possess images in temporary directory because there was no evidence he was a "sophisticated" computer user, had tried to access images of child pornography, or "even knew of the existence of the cache files."), *U.S. v. Romm*, 455 F.3d 990, 1001 (9th Cir. 2006) (defendant possessed child pornography when he had "ability to control images while they were displayed on his screen" and he knew "images were saved to his disk" by automatic operation of



his computer), *U.S. v. Bass*, 411 F.3d 1198, 1202 (10<sup>th</sup> cir. 2005) (defendant knowingly possessed cached images when he attempted to remove them), and *U.S. v. Tucker*, 305 F.3d 1193, 1204-05 (10<sup>th</sup> cir. 2002) (defendant "knowingly acquired and possessed" child pornography when he deleted images from his browser cache).

The clear reasoning of these cases is that to "knowingly" receive or possess an image of child pornography, a defendant has to first know that the child pornography is actually being downloaded to his computer. Then he has to do something (i.e. open that image onto his screen, move the image to a File/Folder on his computer, etc...) to indicate "dominion and control" over that image. The mere fact of having images of child pornography inadvertently downloaded to a computer, but then immediately deleted without being viewed or doing anything else with that image does not rise to the level of proof of dominion and control such that a reasonable person could accept as adequate and sufficient to support a conclusion of guilt beyond a reasonable doubt. See *Tarango*. Also, the State court's rulings on this argument fall within Rule 10 (b) of the Rules of the Supreme Court of the United States.

For that reason, the trial court's denial of the Defendant's Rule 20 Motion as it pertains to Counts 6, 7, and 8 was error, and should be reversed. All of the other images of child pornography (counts 9-14), were found in the Petitioner's computer recycle bin waiting to automatically move to unallocated space. (Testimony during trial indicated Petitioner did not/could not retrieve files from the recycle bin, lacking ability to do so). The same argument regarding unallocated space can be made in regard to Counts 9-14 found in the recycle bin, due to the same inherent principle. (Lack of knowledge of the files, lack of ability to access/retrieve files in recycle bin, thus having lack of dominion and control once in a place unretrievable by petitioner).

### 3. Should the Petitioner's Rule 20 Motion Have Been Granted Due to Petitioner Not Knowingly Receiving Child Pornography, Following Federal Case Law?

The State's expert witness, Detective Elting, testified that from his experience it is normal for child pornography to be inadvertently and unknowingly downloaded during the downloading of adult pornography. His estimate, from a non-scientific study he had performed, was that as much as 5%-10% of the downloads of adult pornography would be child pornography.

Detective Elting also testified that the Petitioner downloaded large amounts of adult pornography. And, Detective Elting testified that he did not find any evidence of the Petitioner searching for child pornography. The only conclusion Detective Elting could reach was that the child pornography found on Petitioner's computer was inadvertently and unknowingly downloaded during his downloading of adult porn.

In *State v. Jensen*, 217 Ariz. 345, 173 P.3d 1046 (Dir. 1, 2008) the court addressed this issue. In that case the court stated "[W]e recognize that there is a division in authority as whether a defendant knowingly possesses child pornography on a computer when the computer automatically downloads those images without the defendant's knowledge."

For the proposition that a defendant cannot be found to "knowingly" possess child pornography when the record shows no knowledge that the images are on the computer, the court in *Jensen* cites *U.S. v. Kuchinsky*, 469 F.3d 853, 861-63 (9th Cir. 2006). In *Kuchinsky*, the court held that it could not consider images recovered from the cache for purposes of a sentencing calculation when no evidence indicated that the defendant had tried to access cache files or knew of their existence.

The court in *Kuchinsky* reasoned as follows: "Where a defendant lacks

knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images." *Id.* at 863.

Likewise in *U.S. v. Flyer*, 633 F.3d 911 (9th cir. 2011). In a case involving the use of the LimeWire Internet site, where the user had to manually activate LimeWire in order to access child pornography on that site, the Court held as follows: "We conclude that Flyer's conviction must be reversed under the reasoning in ... *Kuchinsky* ... The government concedes that it presented no evidence that Flyer knew of the presence of the files on the unallocated space of his ... computer's hard drive."

Further in *Flyer* the court notes that "[T]he government counters that evidence demonstrating that the files had at some point been deleted, resulting in their placement in unallocated space, is sufficient to establish possession." But the Court counters "[B]ut deletion of an image alone does not support a conviction for knowing possession of child pornography."

In *Jensen*, *supra*, the court concluded that "[T]he view that knowing possession requires an affirmative act on the part of the Defendant to save the image or at least knowing that the computer is saving it seems consistent with the Arizona definition of knowingly possessing an item requiring a voluntary act on the part of the Defendant giving him dominion and control over the item. Arizona Revised Statute 13-105(31) and (37).

The court in *Jensen* concluded that Jensen knowingly possessed child pornography because he **INTENTIONALLY** searched for child pornography. However, the Court also stated "[T]his does not mean, however, that inadvertent

receipt of child pornography violates 18-3553(A)(2)."

Herein, the State presented no evidence that the Petitioner intentionally searched for child pornography. The State evidence was that the Petitioner INADVERTENTLY downloaded child pornography during his voluminous downloads of adult pornography. The Petitioner made this argument during his Rule 20 Motion to the Court. However, the Arizona Courts rejected the Petitioner's argument and use of Jensen, and denied the Petitioner's Rule 20 Motion on that issue.

The Petitioner submits that the trial court and AZ Court of Appeals, erred in their rulings on this issue in the Petitioner's Rule 20 Motion. Additionally, the State courts' rulings conflict with other AZ state and federal case history, thereby falling within the scope of Rule 10 (b) and (c) of the Rules of the Supreme Court of the United States. And, the Petitioner asserts that in his Rule 20 Motion in regard to all of the sexual exploitation of a minor counts (i.e. 5-14) should have been granted thereby dismissing all of the sexual exploitation counts against the Petitioner.

#### 4. Was Counsel Ineffective For Failing to Challenge the Constitutionality of the November 6<sup>th</sup>, 2012 Search Warrant? (Lack of Probable Cause and Lack of Underlying Crime.)

On November 4, 2016, Petitioner's trial counsel, Robert Dossey, filed a motion to suppress the evidence obtained in a warrantless search of the recording device and its memory card. The trial court set an evidentiary hearing. At the hearing, Dossey argued that the warrantless search of Petitioner's recording device violated the Fourth Amendment. During that hearing, Dossey conceded that the evidence on the video camera amounted to voyeurism. (RT, 1/20/17, p. 64) Also, the officer testifying at that hearing stated that the basis for the warrant was, "[i]f [Petitioner] is loading video of voyeurism from one incident, it stands to reason that... this is going to be on his computers, that he's going to be saving it." (RT 1/20/17, p. 40). In closing argument, the state argued that, "[t]he police, in viewing the video with the victim, had the information they needed to know that they had evidence of voyeurism, and that based on the information that they viewed, they had the ability to get a search warrant for anything else in the defendant's home that may contain contraband." ID. at 70. Mr. Dossey did not challenge that assertion. He now believes that was error to do so.

#### A. Trial Counsel was Ineffective Failing to raise this argument.

The Petitioner must prove ineffective assistance of counsel by a preponderance of the evidence. The Sixth Amendment guarantees a defendant "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This guarantee also applies to Arizona's Constitution. *State v. Lee*, 142 Ariz. 210, 214 (Ariz. 1984). *Strickland*

and its progeny provide a two-part test to determine if relief should be granted.

First, Petitioner must show that counsel's performance was deficient, as defined by prevailing norms. And, second, the deficient performance must result in prejudice to the Petitioner. *State v. Nash*, 143 Ariz. 392, 398 (1985). Prejudice is found when the Petitioner shows that but for defense counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *State v. Lee*, 142 Ariz. 210, 214 (1984). "A 'reasonable probability' is less than 'more likely than not' but more than a mere possibility." *Id.*

Lastly, the appropriate remedy for a violation of the Sixth Amendment "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981).

A tactical decision made "after a thorough investigation of law and fact relevant to plausible options are virtually unchallengeable" but "*Strickland* does not support the holding that defense counsel may make no efforts at all in investigating the law and facts relevant to plausible options and then claim the decision was strategic." *Orner v. Farman*, 116 F. App'x 844, 845 (9th Cir. 2004) citing *Strickland*, 466 U.S. at 690-91. Instead, *Strickland* holds that "counsel has a duty to make reasonable investigations or to make a reasonable choice that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91.

Reasonableness is a standard that trial courts are well versed in, and the standard of review is "reasonableness under the prevailing professional norms." *Id.* at 688. And while the Supreme Court did not state that a trial court must adhere strictly to ABA standards, it did recommend them to trial courts as a guide in determining what is reasonable under those prevailing professional norms. *Id.* So, when trial counsel does not meet those standards, it certainly raises red flags and provides

strong, objective, and persuasive authority that Petitioner's attorney did not meet those standards.

Furthermore, Arizona has adopted Strickland's reasoning when it comes to informed decisions. In a case where the verdict hinged on medical expert testimony in a complicated child abuse case, the Court held that "despite its strategic gloss, counsel's decision to not consult with an expert before settling on a defense strategy cannot qualify as a reasoned decision. It therefore fell below prevailing professional norms." *State v. Denz*, 306 P.3d 98, 104 (Ariz. Ct. App. 2013). While there is a presumption that counsel's conduct falls within professional norms, it is rebuttable and can be overcome if Petitioner can show his attorney's decisions "were instead the result of 'inaptitude, inexperience, or lack of preparation.'" *Id.* citing *State v. Goswick*, 142 Ariz. 582, 586 (Ariz. 1984). In other words, an "uninformed strategy" is "no strategy at all." See *Orner, supra*.

Regarding the issue of the search warrant, by the Petitioner's trial counsel's own admission, he felt that he fell below the standard of care for an attorney and made a mistake. (See Petition, 4/17/19, pp. 2-3). The problem is that he did not make an informed decision. But, here, trial counsel made the burden of proof even easier — he admitted that he failed to fully research it. See *Id.* By his own admission, this was not strategic, nor tactical, and trial counsel's actions fell below established prevailing professional norms. Not only was this ineffective, but it clearly prejudiced the Petitioner, as the outcome of the case would have been drastically altered.

### B. Legal Argument

Dossey later filed an ineffective assistance of counsel claim against himself

For failing to challenge the constitutionality of the first search warrant attained in this case. Specifically, Dossey cited *Franks v. Delaware*, 438 U.S. 154, 156 (1978) (holding that when police make false claims or material omissions to attain a warrant, the court must excise those statements to determine whether probable cause exists). (See Petition, 4/17/19). Dossey argued that the officer made a false statement by alleging that petitioner committed voyeurism. He argued, "the Defendant could not have committed the crime of voyeurism because the alleged victim of that crime did not have a reasonable expectation of privacy in her apartment at the time of the alleged incident of voyeurism because her door was open, and her [sic] person and actions were readily viewable by the public at large." (ID. at p. 2)

However, *Franks* does not quite fit because it is up to the Court to decide whether probable cause exists to issue a warrant. The AZ. Supreme Court has held that "[a]n officer has probable cause to conduct a search if a reasonably prudent person, based upon the facts known by the officer, would be justified in concluding that the items sought are connected with the criminal activity and that they would be found at the place to be searched." *State v. Buccini*, 167 Ariz. 550, 556 (Ariz. 1991) citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The issue then is whether there was enough evidence on Petitioner's video camera for probable cause to exist in requesting the first warrant.

To that end, Dossey's argument that he should have filed a motion to challenge the existing probable cause is a valid claim. The relevant parts of the voyeurism statute are:

A. It is unlawful to knowingly invade the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation.

C. For the purposes of this section, a person's privacy is invaded if both of the following apply:

1. The person has a reasonable expectation of that the person will not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.

2. The person is photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or



without a device, either: (a) while the person is in a state of undress or partial dress; (b) while the person is engaged in sexual intercourse or sexual contact; (c) while the person is urinating or defecating; (d) in a manner that directly or indirectly captures or allows the viewing of the person's genitalia, buttock, or female breast, whether clothed or unclothed, that is not otherwise visible to the public.

Arizona Revised Statute (A.R.S.) § 13-1424.

Both at the evidentiary hearing and on appeal, Mr. Dossey left out a critical fact for both courts to decide whether voyeurism ever occurred. Specifically, Dossey failed to point out that the balcony doors were open. (See Police Report, DR Number 2012 01912876, Bates p. 6) As a result, Petitioner did not invade the privacy of B.T. as defined by A.R.S. § 13-1424(c). Voyeurism requires both that B.T. had a reasonable expectation of privacy and that she was in a state of undress, engaged in sexual intercourse, urinating or defecating, or naked in a way that is not otherwise visible to the public. See ID. None of the second factors were present and she did not have the same expectation of privacy with the balcony doors open. While the officer argued there might have been some evidence the video showed more than what could be viewed from the street, Petitioner disputes that. The device was placed in arm's reach from the public area (sidewalk) and the device could only capture footage that could be seen by anyone standing outside (looking over and below the short balcony wall.)

Second, the video evidence obtained from the memory card was not enough to establish probable cause for the commission of any other crime where there would be justification to search for evidence of crimes associated with that particular criminal activity. According to those same reports, officers found a video on the memory card of the recording device of petitioner having consensual sex with a woman. While not a ubiquitous practice, it is not unheard of for couples to record their sexual activity.

Given that Petitioner's camera in the Police Reports could only capture footage available to anyone standing on the street, there was no evidence of surreptitious recording either. (See A.R.S. § 13-3019) Here, recording sex that appears consensual is not evidence of a crime. It was only because police found the memory card in conjunction with filming

a recording device on B.T.'s porch, elevated it to what they believed was criminal activity. (RT 1/20/17, p. 40) But without the underlying felony offense of voyeurism, surreptitious recording falls flat because a reasonably prudent person would not believe that amounts to criminal activity. See *Buccini*, *Supra*.

Moreover, there is no evidence Petitioner committed Burglary either. See A.R.S. §13-1507 (requiring trespass with intent to commit a felony.) The only evidence of a crime was that Petitioner committed trespassing by placing the video camera on the balcony. But evidence of trespass is not sufficient for the police to search his computer. In fact, the officer testified at the evidentiary hearing that the sole basis for obtaining the warrant was the voyeurism charge. (RT 1/20/17, p. 40)

#### D. Instructive Analysis and Application of Similar Cases.

There does not appear to be any case law on point in Arizona whether a crime was committed in the first place when Petitioner placed the camera on the balcony other than trespass, which would not justify searching his home. Aside from the Statutes listed above, there are unpublished instructive cases in Arizona to reach the conclusion about a lack of probable cause.

In *State v. Tiggs*, No. 1 CA-CR 12-0373, p1 (Ariz. Ct. App. Oct 1, 2013), the court held that because the victim had the blinds to her bedroom window partially closed, and the defendant was peeking in late at night into her bedroom, there was sufficient evidence of an expectation of privacy. *ID.* at 6.

In *State v. Reed*, No. 1 CA-CR 16-0269, pp. 5-6 (Ariz. Ct. App. 11, 2017), by using a mirror to look under a closed bathroom door while the person was urinating, the defendant in *Reed* violated that. See *ID.* at 3, 5-6.

Both cases are distinguishable from Petitioner's case. *Reed* involved a closed bathroom door, so there clearly was an expectation of privacy. *ID.* *Tiggs* involved partially closed bedroom windows late at night. No. 1 CA-CR 12-0373, at 1. But, Petitioner's case involved open patio doors that were viewable from the sidewalk, other apartment balconies across the sidewalk, and from the common areas of the apartment complex. As noted in the petition, the facts showed that the footage did not capture anything more than what could have been seen from the sidewalk, other balconies, or common areas. This is a problem for the State because the

expectation of privacy was not the same. Petitioner's behavior was not socially acceptable, but that does not mean it was illegal (other than the trespassing to place the camera there). Anything that would have been in plain view from a public area outside the apartment is not voyeurism or surreptitious recording.

#### E. Prejudice and Relief Requested.

As Dossey concedes, it was ineffective for him to fail to raise this issue. (See Petition, 4/17/19). But Petitioner must also prove prejudice or that there is a reasonable probability that the outcome would have been different if Dossey filed the motion to suppress the issuance of the First search warrant, based on a lack of probable cause. (Distinct from the previously filed motion to suppress based on a warrantless search.) To that end, Petitioner submits that the outcome would be different, and the Petitioner was prejudiced for the reasons mentioned above. If there was no probable cause to issue the First search warrant (Nov. 6, 2012), then all other evidence obtained would have been suppressed by the doctrine of the fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471 (1963). Without any video evidence of the recorded sexual encounters (obtained in the Petitioner's apartment), police would not have interviewed the victims comprising counts 1-4, and would not have found the child pornography (also obtained in the Petitioner's apartment) comprising counts 5-14. Additionally, Petitioner submits that Rule 10(b) and (c) of the Rules of the United States Supreme Court apply here. Therefore, Petitioner submits that he be granted a new hearing to argue his motion to suppress the November 6, 2012 warrant, due to a lack of probable cause and lack of underlying crime.

5. Was Counsel Ineffective for Failing to Argue There Was No Nexus Between What Was Found On The Video Camera at B.T.'s Apartment and What Was Sought After at Petitioner's Apartment.

A. Trial Counsel was ineffective for failing to raise this argument.

To prevent belaboring the Court, Petitioner hereby incorporates the same argument regarding trial counsel's ineffective performance from the previous section, in its entirety, herein.

B. Facts and Legal Argument.

Even if the Court concludes that voyeurism was committed, there was no nexus between the camera footage found on B.T.'s apartment balcony and the police investigation for more evidence of sex crimes at Petitioner's apartment. (Even with Petitioner's conceded trespass violation, it would not justify the search of his apartment for more evidence of voyeurism.) In the January 20, 2017 motion to suppress evidentiary hearing, the officer testified that "if [Donald] is loading video of voyeurism from one incident, it stands to reason that if he's doing this to other people, that this is going to be on his computers, that he is going to be saving it." ID. at 39-40. This is problematic.

The following points should be clear as to what Petitioner is arguing. First, the police had no actual evidence that this was being done to anyone else. Petitioner did not provide further evidence of crimes. During the October 31, 2012 confrontation call, Petitioner stated the incident was a "one time thing." Police re-integrated that admission in the November 6, 2012 search warrant affidavit. Probable cause to suspect more crimes have been committed cannot be based on an "if." Second, there was no evidence that anything was ever transferred or uploaded to another device from that camera. Third, there was no evidence that anything was ever saved on any other device. Finally, nothing in the search warrant affidavit alluded to any inference that any evidence would be found at Petitioner's home.

In addition to the case law already provided in this petition, Petitioner submits that case law from the Ninth Circuit is instructive. A search warrant must not be based on conclusory allegations that

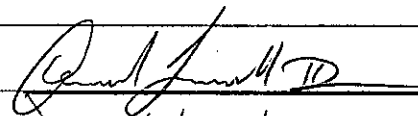
a person who committed one crime must have more evidence at home. *United States v. Underwood*, 725 F.3d 1076, 1079, 1084 (9<sup>th</sup> cir. 2013) (holding that a warrant was invalid where police based a search of Defendant's home on the delivery of one crate of ecstasy pills and the officer's "training and experience" that "traffickers keep their records at their residences" because it required the Court to make too many inferences that evidence would be found at the Defendant's home.) Here, the November 6, 2012 search warrant only included facts and evidence viewed at B.T.'s apartment and nothing about what is or may be found at Petitioner's apartment. See also, *United States v. Artis*, 919 F.3d 1123, 1132 (9<sup>th</sup> cir. 2019) (evidence that the Defendant was a fugitive of justice was not probable cause to search the apartment for evidence of credit card fraud.); *United States v. Griffith*, 867 F.3d 1265, 1271 (D.C. cir. 2017) (evidence of participation in a crime does not justify the search of a home to look for a cell phone.) The search warrant in Petitioner's case did not support probable cause: police would find more evidence of voyeurism in his apartment. There was no articulable facts to support this conclusion other than the officer's mere speculation. See *Underwood*.

Lastly, in *United States v. Needham*, the defendant challenged that there was no probable cause for the issuance of a warrant to search his residence for child porn. 718 F.3d 1190, 1193 (9<sup>th</sup> cir. 2013). There, the defendant was accused of molesting a boy in the mall bathroom. *Id.* at 1191. The police requested a warrant to search the defendant's home for credit card and clothes he was wearing at the mall. *Id.* at 1193. For this, the defendant did not have an objection. See, *Id.* But, in addition, the police requested a warrant to search his computer for child porn because, based on the officer's training and experience, the two crimes are connected. See *Id.* There, the Court held that, "such inference, alone, does not establish probable cause to search a suspected child molester's home for child porn." *Id.* at 1195 (motion to suppress denied on other grounds.). The fact that there was a sex tape that, from evidence known to police at the time, appeared to be consensual, would not have given the officer's probable cause to look for all sexually explicit content that may or may not be on his computer. There was simply no nexus between the footage on the device and facts to justify a search of Petitioner's home. (Also Rule 10 (b) and (c) of the Rules of the U.S. Supreme Court apply here.)

Petitioner respectfully requests this Court to grant his petition for Certiorari for the reasons included herein, and to further clarify the protections in *Riley v. California*, and to further explain probable cause for search warrants - regarding the details included in this petition.

Respectfully Submitted on June 14, 2023.

Linville affirms under penalty of perjury that all information and statements made by him within this document are true and to the best of his information, knowledge and belief.



Donald Linville.

Petitioner in pro se.