No. 23-5208

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Jason Boudreau

Petitioner,

v.

United States of America

Respondent

Petition for Writ of Certiorari

To the United States Court of Appeals

For the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court's decision to subject the Petitioner to a lifetime suspicionless search condition that lacks any limitations at all violated Petitioner's Fourth Amendment Rights, and whether the Court's decision was an abuse of process.

2. Whether the District Court's decision to subject the Petitioner to a lifetime ban of using or owning any computer, electronic, or internet device, as well as a lifetime ban on the entire internet, with no scope or limitations whatsoever, was an abuse of process or violated Petitioner's First Amendment rights.

3. Whether the Government's use of Petitioner's prior no lo contendere pleas at the sentencing hearing to prove both guilt and specific factual admissions of alleged underlying conduct and the District Court's reliance on the Government's comments at sentencing to substantially enhance Petitioner's sentence was constitutionally and/ore procedurally sound.

4. Whether the District Court's decision to punish Petitioner more harshly because the District Court believed Petitioner's prior State sentences were too lenient was unconstitutional or an abuse of discretion.

5. Whether a plea agreement can be void for lack of consideration.

6. Whether it is constitutional or improper to charge a defendant with multiple counts of violating 18 USC §2252(a)(4)(B) when the factual allegations involve only a single device.

7. Whether it was unconstitutional for police to withhold from a warrant issuing magistrate that a previous, fruitless search had already been conducted when the probable cause for the warrant was based on facts that pre-dated the previous fruit-less search.

QUESTIONS PRESENTED (Continued)

8. Whether it is unconstitutional or improper for the Petitioner to be subjected to a 100-month sentence enhancement (doubling his guideline range) based solely on uncharged, un-adjudicated, non-law enforcement reports, and whether the District Court erred by relying only on the Government's paraphrasing of those reports which were not presented to the Court.

LIST OF ALL PARTIES

Jason Boudreau is the only party to this petition.

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

Jason Boudreau respectfully petitions the Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit affirming in part and dismissing in part Petitioner's appeal of his conviction and sentence.

OPINIONS BELOW

The First Circuit's January 24, 2023 opinion is set forth in Appendix 1a. The First Circuit's March 17, 2023 opinion on Petitioner's petition for Rehearing is set forth in Appendix 2a.

JURISDICTION

On January 24, 2023, the United States Court of Appeals for the First Circuit filed its opinion affirming in part and dismissing in part Petitioner's appeal of his conviction and sentence. See Appx. A. On March 17, 2023, the First Circuit denied Petitioner's timely petition for Rehearing. See Appx. B. Pursuant to this Court's Rule 13.1, this Petition for Certiorari is timely filed within 90 days of March 17, 2023. Petitioner invokes this Court's jurisdiction under 28 USC §1254(1).

STATEMENT OF THE CASE - FACTUAL

Petitioner was charged with violating 18 USC §2252(a)(4)(B). The only evidence stemmed from a search pursuant to a warrant that was issued after a previous and fruitless and warrantless search a few weeks before. The issuing magistrate was not informed of the previous fruitless and warrantless search. The probable cause was based solely on alleged facts that occurred prior to the fruitless and warrantless search. Petitioner moved to suppress the evidence, arguing that the issuing magistrate was misled. The District Court denied the motion to suppress.

Petitioner was subsequently sentenced to 235 months imprisonment, five (5) months short of the statutory maximum, and received a term of lifetime supervised release with numerous conditions, including a lifetime suspicionless search condition that allows any law enforcement officer to search the Petitioner's person, including his body, property, residence, workplace, and vehicles, for any purpose, at any time, without the need for any suspicion whatsoever. The condition allows limitless searches, including invasive bodily searches.

Petitioner's lifetime supervised release also included a complete ban on the entire internet and a complete ban on owning or using any computer, computer network device, or electronic devices. The ban lacks any scope or limitations and includes bans on ATM machines, electric vehicles, cars with infortainment systems, self-checkout kiosks at retail stores, etc.

At sentencing, the Government breached the plea agreement voluminous times by making repeated factual misrepresentations to the Court that were bellied by the record. The Government used Petitioner's prior no lo contendere pleas to prove that

Petitioner had admitted facts alleged in those underlying no lo contendere convictions. The Goverment argued that Petitioner's prior State sentences were not harsh enough and argued that the federal court must punish Petitioner more harshly because of the alleged leniency of those prior State cases. On the record, the District Court stated that it adopted the Government's arguments fully and completely.

At sentencing, Petitioner was subjected to a five (5) point, 100-month sentence enhance based solely on the Government's paraphrasing of non-adjudicated, uncharged conduct in a non-law enforcement report to prove that the allegations did in fact occur. No Shepard or Taylor documents were used.

Due to the improper multiplicious counts charged in the indictment, the plea agreement itself lacked any consideration. The plea agreement contained an appellate waiver, but the 5-point enhancement and the various lifetime conditions of supervised release were not contemplated by the Pre-sentence report or the plea agreement, and therefore were outside the scope of the appeal waiver. Additionally, the Government's breach of the plea agreement voids the waiver.

REASONS FOR GRANTING THE WRIT

1. THIS CASE REPRESENTS A FUNDAMENTAL QUESTION OF WHETHER IT IS UNCONSTITUTIONAL TO SUBJECT A FEDERAL PROBATIONER ON SUPERVISED RELEASE TO A LIFETIME SUSPICIONLESS SEARCH CONDITION OF THE PETITIONER AND ALL OF HIS PROPERTY, AT ANY TIME, WITH NO LIMITATIONS WHATSOEVER, AND WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING SUCH AN OVERBROAD AND SCOPE-LESS CONDITION OF PROBATION FOR THE LIFE OF THE PETITIONER

The district court's decision directly conflicts with this Court's holding in Samson v. California, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), Riley v. California, 573 U.S. 373, 381, 134 S.Ct. 2473, 189 L.ed.2d 430 (2014), and Carpententer v. United States, 138 S.Ct. 2206, 201 L.Ed.2d 507, 513 (2018). The decision also conflicts with other circuits, such as U.S. v. Bruce, 458 F.3d 1157 (10th Cir. 2006). To date, no court has ever upheld a lifetime suspicionless search condition as broad as the instant case.

Here, the district court sentenced Petitioner to a suspicionless search condition that allows any government agent to search the Petitioner's person, home, car, workplace, computer, electronic devices, or any other property, at any time, day or night, without any suspicion, and for any reason at all. The condition lacks any scope whatsoever.

Importantly, the suspicionless search condition is for the rest of the Petitioner's life. "Suspicionless seaches are at the very extreme limits of government power", In Re Sittenfeld, 49 F.4th 1061, n.4 (6th Cir. 2022). For example, in the Sixth Circuit, even probationers and parolees are not subjected to suspicionless searches. See, U.S. v. Sharp, 40 F.4th 749 (6th Cir. 2022).

This Court has allowed suspicionless searches of parolees, not probationers. See, Samson v. U.S., 547 U.S. 843, 850, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006). This is because "an offender on parole is still serving the sentence of imprisonment imposed", U.S. v. Cervantes, 859 F.3d 1175 (9th Cir. 2017). A probationer is not still serving a

a term of imprisonment.

To illustrate the overbreadth and unreasonableness of the suspicionless search condition for life that was imposed, the Petitioner actually has more Fourth Amendment and liberty protections while imprisoned than he will upon release. See, Staples v. U.S., 2018 U.S. Dist. LEXIS 64299 at *6 ("Prisoners have a Fourth Amendment right to be free from unreasonable search and seizure")(citing Foote v. Spiegel, 118 F.3d 1416, 1425 (10th Cir. 1997).

A. Petitioner's Person

While imprisoned, the Petitioner cannot be subjected to body cavity searches, see Hayes v. Marriot, 70 F.3d 1144 (10th Cir. 1995), or warrantless blood tests, see, Henderson v. Belfueil, 354 F.Supp.2d 879 (WD Wis. 2005). This is because courts have held "that a prisoner retains a constitutional right to bodily privacy", Fortner v. Thomas, 983 F.2d 1024, 1026 (11th Cir. 1993).

Here, the district court's suspicionless condition will subject the Petitioner to "intrusion upon [petitioner's] dignitary interests in personal privacy and bodily integrity" by any government agent, at any time, whether reasonable or not, for the rest of his life, Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985).

B. Petitioner's Correspondence

While in prison, the government cannot open and read the Petitioner's mail from his attorneys. See, Bureau of Prisons Program Statement P5265.14 and 28 CFR §540.18, nor can the government listen and record the Petitioner's attorney phone calls.

However, with the imposed suspicionless search condition, once released the government may open, search, and record any and all correspondence that Petitioner sends or receives, regardless of privileges such as attorney-client, physician-patient. All letters, emails, etc. can be thoroughly searched, at any time, for any reason,

for the rest of his life.

C. Telephone and Wiretaps

Again, while in prison, the government cannot record or listen to any phone calls between the Appellant and his attorneys. Upon release, the government can record or search, even contemporaneously, any and all phone calls, video calls, or text messages, at any time, for any reason, without any compliance with the Federal Wiretap Act or any State Wiretap Acts, for the rest of the Petitioner's life.

D. Petitioner's Medical Records

"A prisoner's right to privacy in [his] medical information is not fundamentally inconsistent with incarceration", Doe v. Delie, 257 F.3d 309, 317 (3rd Cir. 2001); Powell v. Shriver, 175 F.3d 107, 112 (2nd Cir. 1999). Courts have held that citizens have a privacy right in their medical records. See, Doe v. Broderick, 225 F.3d 440, 450.

Despite this, upon Petitioner's release, the government can search all of Appellant's medical records, at any time, for any reason, for the rest of his life, completely eliminating any protections of the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"). No medical condition, treatment, or doctor's visit will be exempt from a government search.

E. GPS Tracking of Petitioner

The scope-less suspicionless search condition allows the government to search the Petitioner's historical cell site location data and his live GPS location, at any time, for any reason, for the rest of his life, with complete disregard for the Supreme Court's holding in Carpenter v. U.S., 138 S.Ct. 2206, 201 L.Ed.2d 507 (2017). This includes surreptitious GPS tracking of Petitioner and his vehicle. The government can search, in real time, any location of the Petitioner. No place, whether a doctor's

office or the like, would be private. The Petitioner would have no "expectation of privacy in [his] physical movements" for the rest of his life, Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 2 F.4th 330, 340 (4th Cir. 2021). The condition allows the government to covertly or overtly monitor and catalogue every single movement of Petitioner for the rest of his life, despite this Court's holding in Carpenter.

F. Petitioner's Personal Information

With this condition, the government can conduct warrantless, suspicionless searches of Petitioner's personal information, such as credit reports, tax returns, medical records, phone records, bank records, etc. for the rest of his life. Nothing would be off-limits.

G. Business Records

With this condition, the government can search Petitioner's business records, which would include the personnel files of all employees, business banking information, customer and vendor information, any trade secrets, etc, all at any time, for the rest of Petitioner's life.

H. Petitioner's Computer Files

With this condition, the government can search every single computer file possesed or used by Petitioner, including business records, medical records, financial records, as well as any family medical records, etc that may be located on such a computer or electronic device, despite this Court's holding in Riley v. California, 573 U.S. 373, 393-94, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

These are just some examples. The condition is overbroad because it lacks any scope at all, and is for the rest of the Petitioner's life. A probation condition that provides less privacy and Fourth Amendment protections than a prisoner has is

undisputedly unreasonable and unconstitutional. The Petitioner respectfully requests that this Court hold that such a suspicionless search condition for a probationer is unconstitutinoal.

2. THIS CASE REPRESENTS A FUNDAMENTAL QUESTION OF WHETHER IT IS UNCONSTITUTIONAL TO SUBJECT A FEDERAL PROBATIONER ON SUPERVISED RELEASE TO A LIFETIME BAN OF USING OR OWNING ANY COMPUTER, ELECTRONIC OR INTERNET DEVICES, AS WELL AS A LIFETIME BAN ON THE ENTIRE INTERNET WITH NO SCOPE OR LIMITATIONS WHATSOEVER, AND WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING SUCH AN OVERBROAD CONDITION.

The district court's decision directly conflicts with this Court's holding in Packingham v. North Carolina, 137 S.Ct. 1730, 1739, 198 L.Ed.2d 273 (2017). Further, the decision conflicts with other circuit courts, such as U.S. v. Eaglin, 913 F.3d 88 (2nd Cir. 2019).

The special condition completely bans Petitioner from owning or using a computer or electronic device that is capable of connecting to a computer network or the internet. The standard conditions define "computer" by incorporating the definition from 18 USC §1030(e), which provides a vague and overbroad definition of "computer" that includes non-problematic devices such as calculators, smart appliances, and ATM machines to name a few. See, U.S. v. Peterson, 776 F.App'x 533, 534 (9th Cir. 2016). The definition should not be so expansive so as to include devices that could never be used to view or solicit images. See, U.S. v. Lupola, 806 F.App'x 522, 529 (9th Cir. 2010).

This Court has held that "in assessing the validity of a special condition, we apply 18 USCS §3583(d) and USSG §5D1.3(b), which require that special conditions cause 'no greater deprivation of liberty than is reasonably necessary' to achieve the goals of supervised release", U.S. v. Windle, 35 F.4th 62 (1st Cir. 2022).

A. The Condition is More Restrictive Than Necessary

Section 3583(a) places "real restriction[s] on the district court's freedom to impose conditions of supervised release", U.S. v. Pruden, 398 F.3d 241, 248 (3rd Cir. 2005). Special conditions may not deprive the Petitioner of more liberty "than is reasonably necessary" to deter crime, protect the public, and rehabilitate the defendant. 18 USCS 3583(d)(2), §3553(a). The same is true when district courts alter conditions of supervised release, Id, §3553(e)(2).

"Internet bans are draconian" U.S. v. Holena, 904 F.3d 288, 292 (3rd Cir. 2018). "To gauge whether an internet or computer restriction is more restrictive than necessary, we consider three factors: the restriction's length, its coverage, and the Defendant's underlying conduct", Id at 292. The Court's analysis must be specific, Id. Here, both the length (for life) and coverage of the computer ban and internet ban restrictions are excessive, Holena at 292.

1. Length of the Condition

The Court should be troubled that Petitioner's "restrictions will last as long as he does", U.S. v. Voelker, 489 F.3d 139, 146 (3rd Cir. 2008). This Court has never upheld such a lifetime ban. This Court should have trouble "imagin[ing] how [a defendant] could function in modern society given [a] lifetime ban" on computer and internet use, Id.

2. Scope of the Condition

The bans sweep to broadly. They are the "antithesis of [the] 'narrowly tailored' sanction[s]" courts require, Voelker, 489 F.3d at 145. The restrictions prevent the Petitioner from doing everyday tasks like preparing a resume, completing tax returns, calling or texting a friend for a ride, using any accounting or business software at work, using a credit/debit card at a store, or even using an ATM machine, since an

ATM machine is a computer device that is part of a computer network. None of these activities put the public at risk, yet the Petitioner is banned from doing them for life. The computer device ban is overbroad.

"The internet ban fares little better. It prevents [Petitioner] from accessing anything on the internet - even websites that are unrelated to his crime", Holena at 293. The goal of restricting Petitioner's internet use is to keep him from accessing illegal images. The district court should have tailored its restrictions to that end. Currently, the Petitioner is banned from accessing the IRS website, the Whitehouse website, all congressional websites, all job search websites, all e-commerce websites such as Amazon, all banking websites, all government websites, including this Court's website, all stock, news, and financial websites, etc. Petitioner is banned from owning and running a website for legitimate business purposes. How would accessing any of these websites put the public at risk? This demonstrates the overbreath of the conditions.

"The court may not prevent [petitioner] from doing everyday tasks that have migrated to the internet, like shopping and searching for jobs and housing", Holena, at 294. "The same is true for his use of websites concerning essential information, like news, maps, traffic or weather", Id. Government agencies notify citizens of emergency situations, such as evacuations due to severe weather, etc, however, Petitioner's restrictions would leave him in the dark and left for dead, as he is not allowed to receive such vital, life-saving notices. Does Petitioner's conduct justify his death in such a scenario?

The Petitioner cannot use or own a Smart TV, gaming device, fitness trackers, smart watches, streaming services such as Netflix, or any cell phone applications at all, including government apps. The Petitioner cannot own or use a car

with any infortainment, navigation, GPS, or bluetooth sy tems, which all cars and trucks manufactured after 2015 all have. Petitioner cannot even be a passenger in one of these vehicles. The Petitioner cannot own or drive an electric car. Petitioner cannot use a cell phone or business phone as phones today are all part of a "computer network", therefore Petitioner cannot make any phone calls whatsoever, including phone calls to his probation officer, without violating his special conditions of supervised release.

Petitioner cannot send or receive emails from friends, family, attorneys, or government officials, etc. Petitioner cannot send or receive any text messages since text messages are sent over a "computer network".

The Petitioner cannot make any online bill payments. Petitioner cannot use any social media at all. Petitioner cannot use a calculator, ATM machine, computerized blood-sugar monitors, book any travel, buy stocks, manage retirement accounts, view online obituaries, research law issues, work any job that utilizes his college degree. Petitioner cannot even use a self-checkout register at a store, as that is part of a computer network. The list is endless. This demonstrates how overbroad the condition is.

Further illustrating the need for computers, computer networks, and the internet, the Bureau of Prisons ("BOP") mandates that inmaets must use a computer to send an electronic request for medical or dental care, add or delete phone numbers of family, friends, and attorneys, view their inmate account balances and transactions, manage their pre-release savings, request prison jobs, communicate with prison staff, receive prisoner bulletin board notices, make postal mailing labels, request enrollment in programs, request psychological care, etc. See, BOP Program Statements P4500.12, P5264.08, P5265.14, P5800.16, and P5310.17. The Petitioner must use a computer to access the Lexis Nexis law library in the BOP as

no paper legal materials are avilable. Oddly, all of the above actions are legal while Petitioenr is incarcerated, but illegal upon his release, as Petitioner cannot look for medical care providers online, book appointments online, view his bank transactions online, view his retirement accounts, view government websites or notices online.

B. The Conditions Raise Serious First Amendment Concerns

Section 3583's tailoring requirement reflects constitutional concerns. Conditions of supervised release may not restrict more liberty than reasonably necessary, including constitutional liberty. So, district courts must "consider the First Amendment implications" of their conditions of supervised release, Voelker, 489 F.3d at 150. Conditions that restrict "fundamental rights must be narrowly tailored and...directly related to detering [the defendant] and protecting the public", U.S. v. Loy, 237 F.3d 251, 256 (3rd Cir. 2001). And a condition is "not narrowly tailored if it restricts First Amendment freedom without any resulting benefit to public safety", Id at 266.

Here, Petitioner's lifetime computer and internet bans limit an array of First Amendment activity, and none of that activity is related to his crime. Thus, the severe restrictions on his speech are not making the public safer.

This Court has struck down a North Carolina law banning offenders from using social media websites, Packingham v. North Carolina, 137 S.Ct. at 1738. "Under Packingham, blanket internet restrictions" like the one imposed here, "will rarely be tailored enough to pass constitutional muster", Holena, at 295.

Here, even under Packingham's narrow concurrence, the computer, electronic device and internet ban fails. They suffer from the same "fatal problem" as North Carolina's restrictions on using social media, Packingham, 137 S.Ct. at 1741 (ALito, J. concurring). Their "wide sweep precludes access to a large number of websites that

are most unlikely to facilitate the commission" of a crime, Id.

The Third Circuit has dealt with a similar internet and computer device ban in U.S. v. Miller, 594 F.3d 172 (3rd Cir. 2019). In Miller, the Defendant was sentenced to a lifetime term of supervised release that banned access to the internet. The Third Circuit held the condition was overbroad. The Third Circuit also held that "a complete ban on the use of a computer and internet will rarely be sufficiently tailored to the §3553(a) factors", U.S. v. Albertson, 645 F.3d 191, 197 (3rd Cir. 2010). "In a time where the daily necessities of life and work demand not only internt access but internet fluency, sentencing courts need to select the least restrictive alternative for achieving their sentencing purposes", Id at 200.

The Fifth Circuit, in U.S. v. Duke, 788 F.3d 392 (5th Cir. 2015) addressed whether bans on computers and internet access "imposed for the rest of a defendant's life, are permissible condtions" of supervised release and "conclud[ed] that they are not", Id at 400. The Court further stated that "the ubiquity and importance of the internet to the modern world makes an unconditional ban unreasonable", and than an "absolute computer and internet ban would completely preclude [the defendant] from meaningfully participating in modern society for the rest of his life", Id at 400.

The Third Circuit also noted that "the unconditional, lifetime ban imposed... is so broad and insufficiently tailored as to constitute "plain error", U.S. v. Duke, 788 F.3d at 399 (citing U.S. v. Heckman, 592 F.3d 400, 409 (3rd Cir. 2010).

The Fifth Circuit in U.S. v. Scott, 821 F.3d 562, 571 (5th Cir. 2016) held that it was plain error for a district judge to impose a lifetime computer ban in the context of a possession case, reasoning that, in light of Duke, such conditions "are clearly erroneous".

Courts have not imposed such a broad restriction even after numerous violations of supervised release by defendants. See, U.S. v. Rogers, 988 F.3d 106, 107 (1st Cir.

2021). The First Circuit noted in IMS Health Inc. v. Mills, 616 F.3d 735 (1st Cir. 2010), that the Supreme Court has "recognized that obstructing access to the informational building blocks of speech is every bit as pernicious an abuse of governmental power over the free flow of information and ideas as is restricting the resulting speech itself".

This Court should find that the overbroad, lifetime ban on computers, electronic devices, and internet access is unconstitutional.

3. THIS CASE REPRESENTS A FUNDAMENTAL QUESTION OF WHETHER IT IS UNCONSTITUTIONAL FOR THE GOVERNMENT TO USE A PRIOR NO LO CONTENDERE PLEA TO PROVE GUILT AND / OR FACTUAL ADMISSIONS OF ALLEGED UNDERLYING CONDUCT AT SENTENCING TO FURTHER ENHANCE PETITIONER'S SENTENCE

The First Circuit has held that "a nolo plea differs from a guilty plea only in that it is not an admission of guilt and cannot be used against the pleader in a later proceeding to prove the underlying facts of the crime", Olsen v. Correiro, 189 F.3d 52, 68 (1st Cir. 1999). Here, throughout the Government's sentencing memorandum and sentencing oral argument, the government repeatedly stated that Petitioner admitted to the facts underlying his no lo contendere convictions, which is clearly false.

In the Government's sentencing memorandum refers repeatedly to alleged "admitted" facts of Petitioner's no lo contendere pleas to prove that Petitioner engaged in the alleged conduct underlying Petitioner's no lo contendere pleas. See, Govt. Sentencing Memo at page 1, §1; page 2, §1; page 5, §2; page 6, §2,3, and 4; page 7, ¶2; page 14, ¶1; and page 15, ¶1).

Also, at the sentencing hearing, the government claimed that all of Petitioner's prior conduct was proven by a preponderance of the evidence. See, Sentencing transcript at 15:5-8).

Throughout the sentencing hearing, the government stated that the alleged facts underlying the no lo contendere pleas were true, and that Petitioner had admitted those facts. (See Sent. Tr. 18:5-19; 22:5-10; 22:14-18; 22:20-24; 23:1-8; 23:19-25; 24:14-24; 26:5-13; 32:16-20; 32:21-24). The government also stated that Petitioner's conduct was "proven by conviction" in those no lo contendere cases. (See Sent. Tr. 15:5-8).

However, it is undisputed that "a no lo plea is not an admission of guilt", Smith v. Susquehana Univ., 701 Fed. Appx. 147, 150 (3rd Cir. 2017). Here, the Court stated that it relied on everything that the government said in making its sentencing determination. (See Sent. Tr. 63:11-17; 64:3-9; 65:20-25; 66:1). "The district court erred as a legal matter in relying on the no lo pleas as evidence of commission of a crime", U.S. v. Poellnitz, 372 F.3d 562, 565 (3rd Cir. 2014). Petitioner's no lo contendere pleas were entitled no evidentiary weight at all at sentencing. "A no lo plea reflects a prosecutorial choice to permit a defendant to persist in not admitting the crime for the sake of obtaining the conviction", Sharif v. Picone, 740 F.3d 263, 271 (3rd Cir. 2013). See, Fed. R. Crim. P. 11(e)(6), advisory committee notes, 1974 admendment, ("A plea of nolo contendere, is, for purposes of punishment, the same as a guilty plea...unlike a plea of guilty however, [a nolo plea] cannot be used against a defendant as an admission in a subsequent criminal or civil case").

The government improperly used Petitioner's prior no lo contendere pleas to prove guilt and admission of the underlying facts in those cases, and the district court improperly relied on the government's assertions that the Petitioner admitted the facts in those cases when imposing sentence in the instant federal case. The district court should have followed legal precedent and the Federal Rules.

4. THIS CASE REPRESENTS A FUNDAMENTAL QUESTION OF WHETHER IT IS UNCONSTITUTIONAL FOR THE FEDERAL COURT TO PUNISH A DEFENDANT MORE HARSHLY SPECIFICALLY BECAUSE THE DISTRICT COURT BELIEVED THAT THE PRIOR STATE COURT SENTENCE FOR AN UNRELATED CHARGE WAS TOO LENIENT

At sentencing, the government argued that Petitioner was not punished harshly enough in his prior, unrelated State criminal cases, and argued that Petitioner must be punished for those prior State cases. (See Sent. Tr. 15:5-25; 16:1-14; 16:21-14; 17:12-20; and 25:1-4). The government also erroneously stated that Patitioner's prior State case conduct was much worse and that Petitioner had pled to a lesser charge in those cases, which was false and belied by the State court records. None of Petitioner's State cases were ever pled to a lesser charge.

Worse, at sentencing, the district court stated that Petitioner's State case sentences were not harsh enough and that those sentences were "disheartening". (See Sent. Tr. 14:14-25). The First Circuit held that "if a concern that a State will fail adequately to punish a defendant on an unrelated charge is an impermissible sentencing factor, the sentence must be vacated as a matter of law", U.S. v. Santiago-Rivera, 594 F.3d 82, 84 (1st Cir. 2010). Federal sentencing courts are not the place to re-litigate State court ocnvictions, but that happened here. The district court relied upon an improper factor, i.e, the alleged leniency of the Petitioner's prior state convictions when choosing his federal sentence.

5. THIS CASE REPRESENTS THE FUNDAMENTAL QUESTION OF WHETHER A PLEA AGREEMENT CAN VOID FOR LACK OF CONSIDERATION

The plea agreement in the instant case lacked any consideration whatsoever. A plea agreement "can be challenged for contractual invalidity, including invalidity based on a lack of consideration", U.S. v. Lutchman, 910 F.3d 33, 37 (2nd Cir. 2018).

Here, Petitioner "received no benefit from his plea beyond what he would have

gotten by pleading guilty without an agreement", Id at 37.

First, a three (3) level reduction under U.S.S.G. §3E1.1 was available to the Petitioner even in the absence of an agreement to waive his right to appeal. See, USSG §3E1.1, cmt. 6 ("The government should not withhold [a section 3E1.1(b) motion) based on...whether the defendant agrees to waive his or her right to appeal").

Second, the government's dismissal of several counts did not matter, as those counts would have been grouped into a concurrent sentence even if the government did not dismiss them. Further, as will be argued below, those counts were impermissibly multiplicious.

Petitioner received no benefit from his plea. Courts have refused to enforce appeal waivers because the defendant received very little benefit in exchange for [his] plea of guilty", U.S. v. Goodman, 165 F.3d 169, 174 (2nd Cir. 1999). Petitioner also received no leniency whatsoever for his plea. See, Corbitt v. New Jersey, 439 U.S. 212, 224, n. 14, 58 L.Ed.2d 466, 99 S.Ct. 492 (1978)(discussing leniency usually accorded to defendants who plea guilty as opposed to those who stand trial).

As Petitioner received no benefit from his plea, the appellate waiver in that agreement should not have been enforced.

6. THIS CASE REPRESENTS A FUNDAMENTAL QUESTION OF WHETHER IT IS UNCONSTITUTIONAL OR IMPROPER TO BE CHARGED WITH MULTIPLE COUNTS OF 18 USC §2252(a)(4)(B) WHEN THE CHARGES INVOLVE ONLY ONE DEVICE

The indictment included thirty-three (33) counts of 18 USC §2252(a)(4)(B). However, all of the thumbnail images for those counts were located in a single cache file on a single device. Therefore, Petitioner could only be charged with one count under the statute.

If "the same statutory violation is charged twice, the question is whether the

facts underlying each count were intended by Congress to constitute separate 'units of prosecution'". U.S. v. Polouizzi, 564 F.3d 142, 154 (2d Cir. 2009). The "'unit of prosecution' is the minimum amount of activity a defendant must undertake, what he must do, to commit each new and independent violation of a criminal statute", U.S. v. Rentz, 777 F.3d 1105, 1109 (10th Cir. 2015)(en banc). Determing the unit of prosecution is "a matter of statutory interpretation", Id at 1109, n. 4.

Section 2252(a)(4)(B) makes it a crime for "[a]ny person who either knowingly possesses, or knowingly accesses with the intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matters which contain any visual depiction of child pornography." "The phrase 'one or more' unlike the word 'any' strongly suggests Congress's intent that multiple matters be included in a single unit or prosecution", U.S. v. Chiaradio, 684 F.3d 265, 275 (1st Cir. 2012). "The legislative history contains no indication that Congress intended to permit multiple prosecutions when it used the term 'one or more' in section 2252(a)(4)(B)", Id at 274.

Here, the single cache file on a single device depicted multiple images, yet the government impermissibly charged Petitioner with thirty-three (33) different counts for that single file on a single device.

Those multiplicious counts misled the district court into believing that Petitioner's conduct was more egregious than it was and it affected the consideration in the plea agreement. Courts have held that multiplicity is not harmless error, U.S. v. Chilaca, 909 F.3d 289, 295 (9th Cir. 2008).

The Court should find that the indictment was impermissibly multiplicious and that the plea agreement is void based on that multiplicity. Further, the Court should reverse because the multiple counts misled the district court at sentencing.

7. THIS CASE REPRESENTS A FUNDAMENTAL QUESTION OF WHETHER IT IS UNCONSTITUTIONAL TO WITHHOLD FROM A MAGISTRATE JUDGE THE FACT THAT A PREVIOUS, FRUITLESS SEARCH WAS CONDUCTED WEEKS BEFORE REQUESTING A SEARCH WARRANT IN WHICH THE SUPPORTING AFFIDAVIT RELIED SOLELY ON FACTS THAT OCCURRED PRIOR TO THE FIRST FRUITLESS SEARCH

In April 2015, Lt. Brooks received a tip that illegal activity had occurred at the Petitioner's residence. In July 2015, Lt. Brooks and at least six (6) other officers conducted a multi-hour search of Petitioner's four (4) room apartment. Officers conducted an on-site forensic search of Petitioner's electronic devices and officers seized three (3) hard drives for off-site analysis. The search was for numerous hours and was very thorough. The search turned up nothing illegal at all.

In November 2015, the same Lt. Brooks applied for and received a search warrant for Petitioner's residence based solely on the information from April 2015. Lt. Brooks did not inform the issuing magistrate that a search had been conducted in July 2015 based on that same April 2015 tip. Lt. Brooks omitted this information to mislead the magistrate regarding probable cause for the search.

However, "where an initial fruitless consent search dissipates the probable cause that justified the warrant, new indicia of probable cause must exist to repeat a search of the same premises pursuant to the warrant", U.S. v. Bowling, 900 F.2d 926, 932 (6th Cir. 1990). Here, "the initial complete and thorough search dissipated the probable cause, making the second search unreasonable", U.S. v. Troxel, 564 F.Supp.2d 1235, 1248 (D. Kan. 2008. See also, U.S. v. Keszthelyi, 308 F.3d 557, 571-72 (6th Cir. 2002).

The Troxel court also held that the officer's omission of a previously conducted search was a material omission from the warrant affidavit. The Tenth Circuit held that officers "were not free to ignore facts that dissipated probable cause", Harte v. Bd. of Comm'rs, 864 F.3d 1154, 1185 (10th Cir. 2017).

Therefore, the November 2015 warrant lacked probable cause and was invalid. Nonetheless, the district court held that Petitioner's probation condition allowed

the warrantless search. However, Petitioner's State probation conditions only allowed for a search by his probation officer, or for the purposes of probation, based on "reasonable suspicion". Notably, Petitioner's probation officer was not present for the November 2015 search, and she was unaware that any search would be conducted.

Moreover, there was no "reasonable suspicion" to justify the search. The government nor the officers explained what the "reasonable suspicion" allegedly was.

Without any "reasonable suspicion", the November 2015 search was nothing more than an unreasonable, warrantless search, lacking any suspicion, and that type of search was not within the scope of Petitioner's state probation conditions in effect at the time.

Worse, by denying the motion to suppress, the district court allowed and actually condoned the police to lie to and mislead the issuing warrant magistrate by holding that Lt. Brooks' material omission of the July 2015 search did not mislead that magistrate regarding the dissipation of probable cause. The district court required no accountability from law enforcement.

Allowing police officers to lie to and mislead magistrates in order to obtain a warrant eliminates the role of the "neutral and detached" magistrate, turns the Fourth Amendment into nothing more than a historical relic, and sets a dangerous precedent that neither the public, nor this Honorable Court, should be willing to accept. This Court should find that the district court erred in denying the motion to suppress.

8. THIS CASE REPRESENTS THE FUNDAMENTAL QUESTION OF WHETHER IT IS UNCONSTITUTIONAL TO SUBJECT A DEFENDANT TO A 100-MONTH SENTENCE ENHANCEMENT BASED ON UNCHARGED, UNADJUDICATED, NON-LAW ENFORCEMENT REPORTS, AND WHETHER THE DISTRICT COURT ERRED BY RELYING ON THOSE NON-LAW ENFORCEMENT REPORTS AT SENTENCING TO IMPOSE A FIVE (5) POINT ENHANCEMENT THAT DOUBLED PETITIONER"S GUIDELINE RANGE

With an adjusted offense level of 28, and a criminal history category of IV, the Petitioner's guideline range was 110-137 months. However, at the outset of the sentencing hearing, before any arguments were made, the court determined that the §2G2.2(b)(5) enhancement applied, which nearly doubled Petitioner's Guideline range to 188 to 235 months.

Section 2G2.2(b)(5) of the Guidelines provides for a five (5) point level enhancement if the defendant "engaged in a pattern of activity involving sexual abuse or exploitation of a minor." The commentary to the guideline defines "pattern of activity" as "any combination of two or more separate incidents of the sexual abuse or sexual exploitation of a minor by the defendant", USSG §2G2.2, cmt. 1, U.S. v. Pulman, 735 Fed. Appx. 937, 943-944 (10th Cir. 2018).

However, "sexual abuse or exploitation does not include possession, accessing with intent to view, receipt, or trafficking in any material

relating to the sexual abuse or exploitation of a minor", U.S. v. Lucero, 747 F.3d 1242, 1248 (quoting USSG 2G2.2, cmt. 1).

"Sexual abuse or exploitation has a specific meaning as used in this context; it encompasses only conduct that would constitute an offense under certain enumerated federal statutes", U.S. v. Pulham, 735 Fed. Appx. at 944. "More specifically, sexual abuse or exploitation includes: conduct described in 18 USCS 2241, 2242, 2251(a) - (c), 2251(d)(1)(B), 2251A, 2260(b), 2421, 2422, or 2423; (b) an offense under State law, that would have been an offense under any such section if the offense had occured within the special maritime or territorial jurisdiction of the U.S.", U.S. v. Pulham, 735 Fed. Appx. at 944.

Those statutes primarily criminalize the ues of force or threats to engage in a "sexual act". See, 18 USCS 2241-43 and 2421, 2422, and 2423.

The term "sexual act" is defined in 18 USCS 2246(2) as:

(A) contact between the penis and vulva or the penis and the anus, and for purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with the intent to abuse, humilate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through clothing, of the genetalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person (emphasis added).

"This is a rather narrow definition of sexual abuse or exploitation. Common usage would include much less egregious conduct, and it is apparent that all those participating in Defendant's sentencing were thinking in terms of common usuage", U.S. v. Pulham, 735 Fed. Appx. 937, 957 (10th Cir. 2018).

The PSR does not state or even cite the statutory definition of sexual abuse referenced by that guideline. Neither the parties, nor the court caught that error at sentencing.

To use the language of the third prong or the plain-error review, "there is a reasonable probability that, but the for error [in understanding the definition of sexual abuse or exploitation in the guideline] the result of the proceeding would have been different", U.S. v. Rosales-Miranda, 755 F.3d 1253, 2158 (10th Cir. 2014).

The PSR added the 5-point enhancement based on the government's information in footnote 1 (PSR page 7), and under dockets 61/09-10399, k2/10-0725A, and W11D-CR13-012028-S. (PSR page 10).

Importantly, there was no finding of guilt in the above three (3). caes, since Boudreau pled no lo contender to those cases. At sentencing, the government erronously told the court that Boudreau had pled guilty to those cases. (Sent. Tr. 22:21-24). As stated herein, a no lo plea is not an admission of guilt. Other than merely quoting the police reports in those cases, the government provided no corroborating evidence to prove, by a preponderance of the evidence, that Boudreau was guilty of all of the alleged conduct.

Moreover, none of the alleged conduct in those cases would qualify as a federal offense under 18 USCS 2241, 2242, 2243, 2251(a)-(c), 2251(d)(1)(B), 2251A, 2260(B), 2421, 2422, or 2423. Nor did the government argue such. Therefore, none of those cases would qualify for

the 5-point, 2G2.2(b)(5) enhancement. To be sure, neither the PSR, nor the government, nor the court in imposing sentence identified which of the above specific enumerated statutes applied to Boudreau's alleged conduct.

And, the other alleged conduct provided by the government in footnote 1, page 7 of the PSR, was not reliable and was not proven by a preponderance of the evidence. Other than bare DCYF reports, the government providing no corroborating evidence. (Those DCYF reports were only in the PSR, they were not provided at sentencing). "Corroborating evidence is often key to determining whether a statement is sufficiently reliable", U.S. v. Ruby, 706 F.3d 1221, 1229 (10th Cir. 2013). Here, the government did not provide any testimony or sworn affidavits from the alleged victim in the DCYF report, even though she was over 20 years old at sentencing.

The allegegations were not sufficiently reliable to support the enhancement. Boudreau had consistently denied the allegation, as conceded by the government. (, Sent. Tr. 17:12-20), and the allegation never resulted in any formal prosecution. "The Court cannot impermissibly rest its pattern-of-activity enhancement solely on the PSR's factual findings", U.S. v. Pulham, 735 Fed. Appx. 937, 946 (10th Cir. 2018). See, U.S. v. Ortiz, 993 F.2d 204, 207 (10th Cir. 1993) (holding that unsworn, out-of-court statements "must have 'sufficient corroboration by other means'", to form the basis for an enhancement) (quoting USSG 6A1.3 cmt.)).

Most importantly, that DCYF report lacked probable cause for the police to charge Boudreau with any crime. It is axiomatic that probable cause is a lesser evidentiary standard than the preponderance of the

evidence. Thus, if probable cause did not exist, then the preponderance of the evidence cannot exist.

Further, the court made no specific findings of fact as to any of the government's allegations to support the enhancement, rather, the court merely stated that it was adopting the government's argument in full. (, Sent. Tr. 65:20-25, 66:1). Nor did the court state its reasoning for tacitly concluding that the conduct at issue satisfied the guideline definition of "sexual abuse or exploitation."

The court committed error in finding that Boudreau qualified for the enhancement because the court relied on hearsay-laden allegations that did not evince the requisite indicia of reliability. And, "as it pertains to hearsay information, due process requires that the information used have some minimal indicium of reliability beyond mere allegation", U.S. v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir. 1990).

Boudreau's challenge to the patten of activity enhancement "tests the procedural reasonableness of his sentence, which requires, among other things, a properly calculated guideline range", U.S. v. Cook, 550 F.3d 1292, 1295 (10th Cir. 2005).

The Court Relied On Unreliable Information In The PSR

Defense counsel objected to information and enhancement recommendations in the presentence report (PSR) at sentencing. (Sent. Tr. 38:8-25; 39:1-6; 40:2-8; 47:5-23; 48:17-25).

The government provided probation with police reports and DCYF reports to include in the PSR to "prove" that the underlying conduct of Boudreau's no lo contendere plea convictions and uncharged conduct had actually occured. The PSR then incorporated those reports in the

PSR without any futher investigation. Boudreau requested numerous times for his attorney to dispute the inclusion of those reports.

As stated above, the government cannot use Boudreau's no lo pleas to prove an admission of guilty. Further, the use of the underlying police reports cannot be used to prove guilt either.

A. The Reliability of the Police Reports

A sentencing "court must take pains to base sentencing judgments upon reliable and accurate information", U.S. v. Tavano, 12 F.3d 301, 305 (1st Cir. 1993). Here, the district court impermissibly relied on the PSR's and the government's recitation of police reports to establish facts against Boudreau.

However, not every police report satisfies the reliability floor, See, U.S. v. Ruby, 706 F.3d 1221, 1230 (10th Cir. 2013)(describing potential "concerns" with the police report at issue, including the police officer's accuracy in recording information provided to him); U.S. v. Dougan, 684 F.3d 1030, 1033 n.3 (10th Cir. 2012 ("Not every [police] complain, [i.e. report] has sufficient indicia of reliability for use in sentencing"); U.S. v. Jordan, 742 F.3d 276, 280 (7th Cir. 2014)("Police reports are not presumed to be categorically reliable"); U.S. v. Leekins, 493 F.3d 143, 149 (3rd Cir. 2005)("a mere police report is not inherently reliable"); U.S. v. Gibson, 189 Fed. Appx. 841, 846 (11th Cir. 2006)("The reliability of police reports is far from absolute"); U.S. v. Bell, 785 F.2d 640, 644 (8th Cir. 1986)(police reports "are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true"); U.S. v. Jones, 815 Fed. Appx. 870, 884 (6th Cir. 2020)(Courts "have explicitly discounted the reliability of police reports for sentencing purposes").

More specifically, police reports are not inherently reliable because they "can be adversarial in nature", Jordan, 742 F.3d at 280. Relatedly, police reports "can also be advocacy pieces, written for prosecutors to use in deciding whether or how to charge a suspect", Id. And, typically, police reports "are generated early in an investigation... and [thus] do not account for later events, such as...amendments [] or corrections", Pudencio v. Holder, 669 F.3d 472, 483 (th Cir. 2012).

Indeed, for those very reasons, the Federal Rules of Evidence "[d]espite their liberlity toward public and business records" explicitly omit police reports from the hearsay exception for public records, Olivas-Motta v. Holder, 746 F.3d 907, 918 (9th Cir. 2013); See, Fed. R. Evid. 803 (8)(A)(ii).

"And because police reports - as a category of evidence - are not inherently reliable, it follows that courts cannot resolve disputed sentencing facts simply by assuming that information contained in a police report meets the due-process reliability floor", U.S. v. Padilla, 793 Fed. Appx. 749, 757 (10th Cir. 2019). A sentencing court cannot assume a police report's reliability and instead must make a finding that the specific document at issue contains sufficient indicia of reliability, U.S. v. Jones, 815 Fed. Appx. 870 (6th Cir. 2020). Thus, "because police reports and complaint applications generally are not conclusive records made or used in adjudicating guilt, the Court found that sentencing courts cannot rely on those documents to enhance sentences", U.S. v. Cherry, 194 Fed. Apx. 128, 131 (4th Cir. 2006).

Rather, "the sentencing court must make an independent determination regarding the reliability of all proffered evidence", U.S. v. Colon-Maldanado, 953 F.3d 1, 13 (1st Cir. 2020). That did not happen here. Instead, the district court adopted the PSR, government's memorandum, and government's oral arguement 100% wholesale, without any specific

analysis to the reliability of evidence. See, Sent. Tr. 63:11-17,; 64:3-9; 65:20-25; 66:1-5; 68:12-25).

Notably, especially concerning a no lo contendere plea, a criminal "complaint by itself also lacks sufficient indicia of reliability to support a finding that the Defendant more likely than not committed the charged conduct", U.S. v. Castillo-Torres, 8 F.4th 68 (1st Cir. 2021). And, "a sentencing enhancement cannot stand if its only foundation is the defendant's PSR, at least when the report is not drawn from approved sources", U.S. v. Serrano, 784 F.3d 838, 860 (1st Cir. 2015).

See also, U.S. v. Ferguson, 681 F.3d 826 (6th Cir. 2012), stating that the courts have "cautioned against relying on a PSR's description of factual circumstances underlying a prior conviction in determining a defendant's eligibility for a sentencing enhancement, likening it to a description that one might expect to find in a police report or application for a ciminal complaint".

Here, the district court relied on the underlying police report's of Boudreau's no lo pleas, as the government attempted to prove that Boudreau had admitted to all of that alleged conduct through his no lo pleas, which was impermissible. Importantly, Boudreau did not admit to any facts in those no lo pleas. The Supreme Court has reiterated that a federal sentencing court cannot consider items from the record of a prior conviction that were not conclusively validated in the earlier proceeding, Shepard v. U.S., 544 U.S. 13, 21, 23, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

And, "the heart of the evidentiary restrictions contained in Taylor [v. U.S., 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (199)], and its progeny is that sentencing courts can only consider facts on which the conviction necessarily relied - those that a jury necessarily found or a defendant necessarily admitted - in enhancing a defendant's

sentence", U.S. v. Hennessee, 922 F.3d 437, 447 (6th Cir. 2019).

As argued above, "a nolo plea is not a factual admission that the pleader committed a crime", Olsen v. Correiro, 189 F.3d 52, 59 (1st Cir. 1999).

Curiously, the government failed to present any corroborating evidence for those police reports. This is odd indeed because each of the alleged victims in those police reports were well into their 20's at the time of Boudreau's sentencing. Instead, the government pushed for an additional 5-point enhancement, which added 100-months to Boudreau's guidelines, on mere unsworn, out-of-court statements in police reports. The government also failed to call any of the police officers who authored those reports to testify.

This circuit has held that the court may not credit an out-of-court statement ("hearsay") unless it finds that the statement is reliable and the government's reason(s) for not having the speaker or author testify outweighs the defendant's interest in cross-examining him/her. See, U.S. v. Bueno-Beltran, 857 F.3d 65, 68 (1st Cir. 2017).

Uncharged Conduct in the PSR

The government argued that Boudreau's alleged uncharged conduct from 2005 and 2009 could be used to enhance his sentence under 2G2.2(b)(5). The allegations were contained only in a DCYF report, and those allegations were never charged by law enforcement, meaning that those DCYF reports lacked probable cause for an arrest, and it is undisputed that probable cause is a lesser standard than the preponderance of the evidence, meaning that those reports could not prove, or even establish

probable cause, that Boudreau engaged in any misconduct. Further, at sentencing, the court and the government speculated as to why no police reports were made and why no charges had been filed (, Sent. Tr. 14:14-25; 15:1-25; 16:1-8).

This Court has "express[ed] our distaste for [the] district court's reliance on [the] defendant's record described in the PSR or prior arrests and charges without convictions...(even when the PSR contained detailed facts underlying the individual charges), warning that [a] court imposing incarceration for a later crime cannot simply presume that past charges resolved without conviction...are attributed to flawed or lax prosecutorial or judicial systems rather than the defendant's innocence", U.S. v. Rondon-Garcia, 886 F.3d 14, 25-26 (1st Cir. 2018).

See, U.S. v. Cortes-Medina, 810 F.3d 62, 73 (1st Cir. 2016)(dissent) ("Where the charges...did not bear fruit, they dod not demonstrate culpability", and that "where the evidence of culpability does not meet that level of reliability, the district court erred by factoring unproven charges into the sentence", Id at 10).

Simply put, "a sentencing enhancement based solely on unproven charges...would be improper", U.S. v. Juwa, 508 F.3d 694, 700 (2d Cir. 2007).

See also, U.S. v. Castillo-Torres, 8 F.4th 68, 71-72 (1st Cir. 2021) (listing a string of decisions and "find[ing] it unsurprising that many of our admonitions against the use of unsupported allegations in mere charges contain no hint that they should apply only to some forms of sentence enhancements and not others").

Importantly, "the record reveals nothing about why local authorities did not prosecute him", U.S. v. Torres-Melendez, 2022 U.S. App. LEXIS 7296 at *6 (1st Cir. March 21, 2022).

This Court has made clear that findings based solely on unreliable evidence cannot be established by a preponderance and are therefore clearly erronous, U.S. v. Colon-Maldonado, 953 F.3d 1, 9-10 (1st Cir. 2020), and determinations of reliability are reviewed for abuse of discretion, U.S. v. Luciano, 424 F.3d 174, 180 (1st Cir. 2005).

Again, the government did not present the alleged victim from that DCYF report to testify at sentencing, despite the fact that she was 21-years old at the time of Boudreau's sentencing.

The Alleged Conduct Was Not Proven By a Preponderance of the Evidence

This Court has held that "facts found by a sentencing court must be supported by a preponderance of the evidence", U.S. v. Ortiz-Carrasco, 863 F.3d 1, 3 (1st Cir. 2017. Whether they were so supported is a question this Court reviews for clear error, U.S. v. Luciano, 414 F.3d 174, 180 (1st Cir. 2005).

The preponderance standard is not toothless, and the Court must ensure that the government carries its burden by presenting reliable and specific evidence. See, U.S. v. Martinez, 584 F.3d 1022, 1027 (11th Cir. 2009). See also, U.S. v. Lacouture, 835 F.3d 187, fn. 6 (1st Cir. 2016)("a sentencing enhancement cannot be applied unless the government meets its burden to the predicate facts by a preponderance of the evidence"). Importantly,the 2G2.2(b)(5) enhancement added 100 months to Boudreau's sentence, and nearly doubled his guideline range.

"As a general rule, factual findings underlying a sentencing enhancement need only be found by a preponderance of the evidence",

U.S. v. Parlor, 2 F.4th 807, 816 (9th Cir. 2021). But in some instances, a sentencing enhancement has "an extremely disproportionate impact on the sentence", U.S. v. Valle, 940 F.3d 473, 479 (9th Cir. 2019). "In those circumstances, we have held that due process may require the government to demonstrate facts underlying disputed enhancements by clear and convincing evidence", U.S. v. Lonich, 2020 U.S. App. LEXIS 623 at *64, 23 F.th 881 (9th Cir. 2022).

Here, the government only provided uncorroborated, uncharged alleged conduct that was paraphrased from a non-law enforcement DCYF report and uncorroborated police reports to support the imposition of a five (5) point enhancement that added 100 months to Petitioner's sentence. Importantly, Petitioner did not admit to any of that alleged conduct as part of his no lo contendere pleas in State court.

This Court should find that the government did not support its enhancements by a preponderance of the evidence, and that Petitioner should be re-sentenced without the §2G2.2(b)(5) enhancement. This Court should also note that all of Petitioner's other enhancements imposed at sentencing were based solely on the uncorroborated, alleged PSR facts, and that the government failed to produce any documentary evidence at sentencing to support those other enhancements.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse judgment of the United States Court of Appeals for the First Circuit affirming in part and dismissing in part Petitioner's appeal, or in the alternative, vacating the sentence and/or conviction of the United States District Court for the District of Rhode Island and remand for re-sentencing addressing the issues herein when fashioning a fair sentence.

Respectfully Submitted,

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Dated: 6/1/23