No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

VAHE SARKISS,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Appointed Under the Criminal Justice Act of 1964

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner Vahe Sarkiss' Fourth Amendment rights were violated because there was no reasonable suspicion of a violation of supervised release to support the search of Sarkiss' property when no witness testified that they believed Sarkiss' thumb drive found in the community laundry room contained child pornography.
2. Whether Petitioner's motion to dismiss the superseding indictment charging a violation of 18 U.S.C. § 2252A(a)(5)(B) should have been granted given that the indictment failed to allege an essential element and the district court failed to instruct the petit jury on that element -- that the defendant knew the interstate nature of the materials or that they were produced with materials affecting interstate commerce.

STATEMENT OF RELATED PROCEEDINGS

The proceedings identified below are directly related to the above-captioned case in this Court.

- *United States v. Vahe Sarkiss*, No. 2:19-cr-00495-DSF-1, U.S. District Court for the Central District of California. Judgment entered November 22, 2021.
- *United States v. Vahe Sarkiss*, No. 21-50266, U.S. Court of Appeals for the Ninth Circuit. Memorandum Opinion entered May 30, 2023. Petition for Rehearing denied on August 2, 2023.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Vahe Sarkiss respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 2, 2023.

OPINIONS BELOW

On May 30, 2023, the Ninth Circuit Court of Appeals issued an unpublished decision affirming petitioner's conviction and sentence for one count of possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) , (b)(2) . Appendix A. On August 2, 2023, the Ninth Circuit Court of Appeals denied petitioner's Petition for Panel Rehearing and Rehearing En Banc. Appendix C.

JURISDICTION

On August 2, 2023, the Court of Appeals entered its decision affirming the conviction and sentence of the petitioner for violation of 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment to the United States Constitution:

> 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.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law . . . .

18 U.S.C. § 2252A(a)(5)(B):

> Any person who –
> knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.

18 U.S.C. § 2252A(b)(2):

> Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

STATEMENT OF THE CASE

Petitioner Sarkiss was convicted of one count of possession of child pornography (18 U.S.C. §§ 2252A(a)(5)(B), (b)(2)), following a jury trial. Clerk's Record ("CR") 84; Excerpts of Record ("ER") 2-ER-331-332.

Before this conviction, Sarkiss had been convicted and on supervised release for the same offense, 18 U.S.C. § 2252A(a)(5). His supervised release subjected him to

searches only based on "reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant." 3-ER-419-420.

While on supervised release, on May 31, 2017, Sarkiss' neighbors found a thumb-drive in the laundry room. The thumb-drive contained some personal and work files that indicated it likely belonged to Sarkiss. The thumb drive also contained seven nude photographs of young adult men in sexual activity.

The neighbor who found the thumb drive did not believe the pictures on the thumb drive depicted minors. *See* 3-ER-428.

Sarkiss' supervised release terms included, in pertinent part:

> 21) The defendant shall submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and his effects to search at any time, with or without a warrant, by any law enforcement or Probation Officer ***with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant,*** and by any Probation Officer in the lawful discharge of the officer's supervision functions.

See 3-ER-419-420 (CR 42 at Ex. A (Judgment in Case No. 09-cr-00640-DSF, Doc. 104, at 2-3)) (emphasis added throughout unless otherwise noted).

Per United States Probation Officer Richard Rosette, "the LASD [Los Angeles Sheriff's Department] reviewed the contents of the flash drive but informed that they would not be pursuing the investigation further as it would be difficult to tie Mr. Sarkiss to the flash drive. In addition, it was unclear to them if the images depicted were that of minors…In our review of the flash drive we also agreed with the investigating officer's assessment that while the naked boys depicted in these images appeared to be young teenagers, we could not say with certainty that the pictures

downloaded were of minors." *See* 3-ER-430-431.

USPO Rosette also testified at Sarkiss' motion to suppress hearing that he could not say that the people depicted in the thumb drive were minors and did not include "minors" in his articulation of purported reasonable suspicion to justify his search of Sarkiss. 3-ER-384.

Despite the thumb drive showing no violations of unlawful conduct or reasonable suspicion of such violations including of minors, on August 2, 2017, USPO Rosette searched Sarkiss' home (trailer), pickup truck and car.

Upon a search of devices seized from that search, USPO Rosette stated he found images that he believed qualified as child pornography.

On June 12, 2020, the grand jury returned a superseding indictment alleging one child pornography image and added the jurisdictional allegation that the image was produced using materials that had been transported in interstate or foreign commerce by any means, including by computer. 2-ER-331-332.

Sarkiss went to trial and raised several defenses. At the end of his trial, the jury returned a guilty verdict. 2-ER-289.

At sentencing, the district court sentenced Sarkiss to 135 months in prison, a lifetime of supervised release and a $100 special assessment. 1-ER-46-52.

On appeal, Sarkiss raised several issues including that (1) there was no reasonable suspicion to support the supervised release search of his property that led to these charges and (2) that his indictment charging 18 U.S.C. § 2252A(a)(5)(B)

should have been dismissed for failure to state this essential element and the failure to instruct the jury that Sarkiss must have known of the interstate nexus.

The Ninth Circuit Court of Appeals affirmed Sarkiss' convictions and sentence.

REASONS FOR GRANTING THE PETITION

I. THE PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE THERE WAS NO REASONABLE SUSPICION OF A VIOLATION OF SUPERVISED RELEASE TO SUPPORT THE SEARCH OF SARKISS' PROPERTY WHEN NO WITNESS TESTIFIED THAT THEY BELIEVED SARKISS' THUMB DRIVE FOUND IN THE LAUNDRY ROOM CONTAINED CHILD PORNOGRAPHY

The Ninth Circuit Court of Appeals affirmed the district court's denial of Sarkiss' motion to suppress the fruits of the supervised release search that violated the Fourth Amendment of the United States Constitution.

> 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.

Amendment IV, U.S. Constitution.

The Fourth Amendment explicitly states a preference for government agents to conduct searches pursuant to a search warrant. Therefore, the Supreme Court has held warrantless searches and seizures to be *per se* unreasonable unless they fall within a "few specifically established and well delineated exceptions." *Katz v. United*

States, 389 U.S. 347, 357 (1967). A handful of recognized exceptions to the warrant requirement are "jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958). The government bears the burden to demonstrate that an exception to the warrant requirement applies. *United States v. Huguez-Ibarra*, 954 F. 2d 546, 551 (9th Cir. 1992). If the government cannot show that a particular exception applies, evidence seized because of an illegal warrantless search, and the fruits thereof, must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963).

Probationers do not waive their Fourth Amendment rights by agreeing, as a condition of probation, to "submit [their] person and property to search at any time upon request by a law enforcement officer." *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 261 (9th Cir. 1975) (*en banc*). "[A]ny search made pursuant to the condition included in the terms of probation must necessarily meet the Fourth Amendment's standard of reasonableness." *Consuelo-Gonzalez*, 521 F.2d at 262. *See also United States v. Lofton*, 244 F. App'x. 113, *1 (9th Cir. 2007) (applying the same reasonable suspicion analysis to the search of a supervised releasee's residence).

Here, Sarkiss' supervised release term #21 made clear that the search of Sarkiss and his property were to be "with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant."

Reasonable suspicion that a person is engaged in criminal activity "is formed by specific articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in

criminal activity." *United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002) (internal quotations omitted).

The Ninth Circuit found that the "district court properly found that the combination of the suspected child pornography on the flash drive and Sarkiss's prior conviction for possession of child pornography was sufficient to establish reasonable suspicion." Appendix A at 4.

However, there was no suspected child pornography on the flash drive. No witness said that they believed the images of the young men on the flash drive were minors. Neither the woman that found the flash drive, the Los Angeles Sheriff or the U.S. Probation Office believed that the images were of minors. For the district court and the Ninth Circuit to say that the images were of suspected child pornography was erroneous as that finding ignored the lack of such an opinion from the witnesses who viewed the contents of the flash drive.

Second, Sarkiss' prior child pornography possession conviction had no bearing on whether the laundry room thumb drive images were child pornography or supported a purported violation of his supervised release. Indeed, his prior conviction did not prohibit him from possessing adult pornography.

Nor was there any indicia supporting that the images were child pornography including that the files were not password protected, there were no file names indicative of child pornography, and there was no proof that Sarkiss had visited any suspicious websites. The legal images on the thumb drive could not objectively raise reasonable suspicion that Sarkiss possessed child pornography.

Therefore, there was no objective, reasonable suspicion to believe that Sarkiss had violated any supervised release condition or committed any crime to support a search of Sarkiss' home, pickup truck, car, or the computer found in his pickup truck or hard drive found in his car, without a warrant on August 2, 2017.

The evidence obtained from the August 2, 2017 searches and the fruits of those searches, including Sarkiss' statements in response to questioning, should have been suppressed. The Petition should be granted and the decision of the Court of Appeals for the Ninth Circuit should be reversed.

II. THE INDICTMENT SHOULD HAVE BEEN DISMISSED BECAUSE A PLAIN READING OF TITLE 18 U.S.C. § 2252A(a)(5)(B) REQUIRED THE GOVERNMENT TO ALLEGE AND PROVE THAT SARKISS KNEW HIS CRIME HAD AN INTERSTATE NEXUS

The Ninth Circuit Court of Appeals affirmed the district court's denial of Sarkiss' motion to dismiss the superseding indictment because, in their opinion, 18 U.S.C. § 2252A(a)(5)(B) "does not require the Government to allege or prove that Sarkiss knew his crime had an interstate nexus." Appendix A at 4. However, that finding ignores the plain wording of the statute and statutory construction. The indictment should have been dismissed for failure to state this essential element and the failure to instruct the jury that Sarkiss must have known of the interstate nexus.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law . . . .

Title 18 U.S.C. § 2252A(a)(5)(B) proscribes:

> Any person who –
> knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.

The superseding indictment left out an essential element – that the defendant must have possessed the child pornography ***knowing*** that the visual depictions were either (a) mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, including by computer, or (b) produced using materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer.

This Court has "stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461–62 (2002) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). "[A] literal reading of Congress' words is generally the only proper reading of those words." *United States v. Locke*, 471 U.S. 84, 93 (1985).

"This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress

'must have intended' something broader." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014).

"[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009).

Consistent with *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994), a plain reading of section 2252A(a)(5)(B) makes clear that the character of the material is not simply limited to it containing child pornography but also that the child pornography "has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer." 18 U.S.C. § 2252A(a)(5)(B).

Statutory construction requires that "knowingly" should dictate how the defendant must have "performed the entire action" including that the defendant also knew the visual depictions at issue were either a) mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, including by computer, or (b) produced using materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer. *See Flores-Figueroa*, 556 U.S. at 650 ("As a matter of ordinary English grammar, it seems natural to read the

statute's word 'knowingly' as applying to all the subsequently listed elements of the crime."). Section 2252A(a)(5)(B) should have been read the same way with "knowingly" applying to each element including the interstate nexus.

Therefore, the Ninth Circuit's decision and Sarkiss' conviction should be reversed and his indictment dismissed.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: October 26, 2023

s/ Shaun Khojayan

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