No. 23-7416

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Christopher J. Pratt — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Second Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Christopher J. Pratt 24829052
(Your Name)

FCI Loretto PO Box 1000
(Address)

Cresson PA 16630
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED TO THE COURT

1) Did the Second Court of Appeals err when they failed to apply their own standards under United States v. Raymonda, 780 F.3d 105 (2nd Cir. 2015), when dismissing Mr. Pratt's argument of staleness?

2) Relying on the sufficiency of a single, undocumented, second-hand conclusory statement of "the appearance of child pornography" for the determination of probable cause poses a question of exceptional importance before the Court, needing Court guidance to resolve this conflict between the Circuit Courts.

3) Did the lower courts so abandon their duty to "conscientiously review" when dismissing Fourth Amendment violations, and Court rulings such as United States v. Leon under the banners of "Novelty" and "Good Faith", that Supreme Court intervention is necessary?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States of America vs. Christopher J. Pratt
Case 1:18-cr-00348-MAD U.S. District Court for the
Northern District of New York Judgment entered May 17 2019

United States of America vs. Christopher J. Pratt
Case 22-1637-cr U.S. Court of Appeals for the Second Circuit
Judgment entered Oct. 2 2023

Cases Cited

Case 1:18-CR-00348-MAD Document 41 - Public Defender Motion to Dismiss

Case 1:18-CR-00348-MAD Document 53 - Decision and Order

Case 22-1637 Document 17 - Appeal to Second Circuit

Case 22-1637 - Second District Summary Order

United States v. Raymonda, 780 F.3d 105 (2nd Cir. 2015)

United States v. Coon, No. 10-CR-110A, 2011 U.S. Dist. Lexis 51968 (W.D.N.Y. 2011)

United States v. Weber, 923 F.2d 1338 (9th Cir. 1991)

United States v. Coreas, 419 F.3d 151 (2nd Cir. 2005)

United States v. Ulbricht, 853 F.3d 71 (2nd Cir. 2017)

United States v. Leon, 468 U.S. 897 (1984)

United States v. Brunette, 256 F.3d 14 (1st Cir. 2001)

United States v. Rivera, 546 F.3d 245 (2nd Cir. 2008)

Kingsley Books v. Brown, 354 U.S. 436 (1957)

Marcus v. Property Search Warrant, 367 U.S. 717 (1961)

Lo-Ji Sales Inc. v. New York, 442 U.S. 99 (1979)

Illinois v. Gates, 462 U.S. 213 (1983)

New York v. P.J. Video, 475 U.S. 869 (1986)

United Stat;es v. Jasorka, 153 F.3d 58 (2nd Cir. 1998)

United States v. Groezinger, 625 F.Sup.2d 145 (2nd Cir. 2008)

United States v. Falso, 544 F.3d 110 (2nd Cir. 2008)

United States v. Genin, 524 Fed.App'x 738 (2nd Cir. 2013)

United States v. Whitley, 249 F.3d 620 (7th Cir. 2001)

United States v. Wilson, 212 F.3d 787

United States v. Perez, 247 F.Supp.2d 459 (2nd Cir. 2003)

Franks v. Deleware, 438 U.S. at 155 (1978)

United States v. Vigeant, 176 F.3d 571 (1st Cir. 1999)

United States v. Collins

United States v. Underwood, 725 F.3d 1076 (9th Cir. 2013)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 2 2023.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Jurisdictional Statement Pursuant to Rule 28(a)(4)
As submitted to Second Circuit Court of Appeals

This appeal is from a judgment of the United States District Court, Northern District of New York, (D'Agostino, J.), entered July 26, 2022, convicting Christopher J. Pratt, upon his plea of guilty, of distributing child pornography, 18 U.S.C. §§2252A(a)(2)(A) and 2252A(b)(1), receiving child pornography in interstate and foreign commerce, 18 U.S.C. §2252A(a)(2)(A) and (b)(1), and possessing child pornography material that had been transported in interstate or foreign commerce, 18 U.S.C. §2252A(a)(5)(B). Pratt was sentenced on each count to concurrent prison terms of 148 months to be followed by 15 years of supervised release, and restitution in the amount of $18,000. (A-218)

The plea agreement included a condtition, pursuant to Fed. R. Crim. P. 11(a)(2), reserving Pratt's right to appeal the court's adverse determination of his pre-trial motion to suppress evidence and statements on the ground that his Fourth Amendment rights had been violated. (A-142) Jurisdiction in this Court is pursuant to 28 U.S.C. §1291. Jurisdiction in the District Court was pursuant to 18 U.S.C. §3231.

Constitutional and Statutory Provisions Involved

Fourth Amendment: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."

As is discussed in my argument in detail, this Warrant was deficient for a probable cause in three areas at least: staleness, total reliance on a wholly conclusory statments and violation of the four pillars of Leon.

Fifth and Fourteenth Amendments: abuse of discretion and due process. The affiant had no first-hand knowledge of any offending behavior. No written statement from the agent who supposedly had first-hand knowledge was appended. The issuing judge asked for no verbal report. An evidentiary (Franks) hearing should have been allowed. I believe this is also a violation of the Fourth. The warrant was based on a supposed report that was unsupported by any form of affirmation.

CONCISE STATEMENT OF THE CASE

The questions Mr. Pratt asks the Court to consider are all directly related to the clear insufficiency of the search warrant affidavit, and the court's reliance on it in determining a basis for probable cause.

On July 5, 2017, a search warrant was executed on Mr. Pratt's home in Albany, New York. He was arrested that same day on charges of receipt and possession of child pornography. He then spent more than five years awaiting trial.

The search warrant affidavit was submitted and authorized on July 1, 2017. The affiant was Investigator Kowalski, of the Joint Federal Task Force in Albany, New York. In her eight-month investigation of the case she obtained no first-hand evidence of any wrongdoing of Mr. Pratt.

The case was initiated when (apparently) Investigator Vidnansky of the neighboring city of Saratoga sent information to Kowalski's office of the possibility of Mr. Pratt downloading offending material on November 2, 2016. The affidavit contained no written report or statement from Vidnansky, nor did he accompany Kowalski when the affidavit was submitted, nor did the issuing judge request any verbal report from him. "The appearance [of downloading] child pornography" one time on November 2, 2016 was the only "evidence" directly linked to Mr. Pratt. No file names, pictures, or descriptions were appended.

On March 1, 2019, Mr. Pratt's initial Public Defender, Mr. Austin, submitted motion to suppress the search warrant based on the insufficiency of the affidavit, staleness, and other reasons, and he also submitted a motion to suppress statements to police based on Miranda violations. An evidentiary hearing was not allowed.

May 16, 2019, the District Court denied the motions.

March 13, 2020, Mr. Sacco became Mr. Pratt's court-appointed attorney.

On March 8, 2021, Mr. Pratt, made aware of a coming trial date by a third party, submitted a letter to the trial judge stating he wished to go to trial, but all phone calls and letters to Mr. Sacco the previous year had gone unanswered.

A representation hearing was set for March 24, 2021. On March 23, 2021 Mr. Pratt received a letter from the trial judge stating the representation hearing was cancelled, and Mr. Sacco would remain Mr. Pratt's lawyer.

About August 1, 2021, Mr. Pratt first met Mr. Sacco. Mr. Sacco told Mr. Pratt that the firm trial date was set for August 18, 2021, that he (Mr. Sacco) would not assist in preparing for trial, but would handle the appeal. Given the situation, and that he must rely on Mr. Sacco as his only help on appeal, Mr. Pratt felt compelled to agree to plead guilty to all charges. Prior, Mr. Pratt told both lawyers that he felt he could not plead guilty to intent.

August 18, 2021, Mr. Pratt pled guilty, believing he retained the right to appeal both motions.

In January 2022, Mr. Pratt's damaged house was sold for enough to hire Mr. Iseman and Mr. Willstatter to manage his appeal, which he did immediately.

October 3, 2023, after hearing oral arguments, the Second Circuit denied the appeal to suppress the search warrant. Motion of Miranda violations was not heard.

Mr. Pratt is also currently preparing to submit a §2255, ineffective counsel, for denial of fair and speedy trial, not preserving right to appeal both motions and other related matters.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT

The issues presented to the Court all resolve around the search warrant affidavit, the magistrate's "rubber stamping" of it; and in particular the District and Appeals courts casual disregard of established legal rulings concerning what constituted a reasonable basis for the issuance of a search warrant.

The United States Supreme Court has long held questions arising from unreasonable affidavits and warrants to be an important Federal question:

> "The Court has clearly stated and consistently stressed that reviewing courts must continue to conscientously review the sufficiency of affidavits on which warrants are issued."

If the Court can agree to review this case, I believe the Court likely will conclude that they have never reviewed an affidavit more lacking in sufficiency, and the District and Appeals courts have abused and misused the terms "good faith" and "novelty" as an exchange for performing a conscientious review of the many problems, deficiencies of the warrand affidavit, and of the judge's performance in granting it. As Mr. Austin (Mr. Pratt's original Public Defender) states in conclusion of the original motion, (Doc. 41-2, pg. 21):

> "Good faith cannot save this case. If it does, it would send a resounding message to law enforcement that there is no limit to the deficiency of factual showings that ultimately will be upheld."

Public confidence and trust in Law Enforcement and the Judicial System is sadly lacking these days. Personally I consider myself to be pro "law and order". I also am well aware that anything considered a sexual offense in the Federal System carries great prejudice. But how can society continue to function well when/if the "system" is not held to its own standards? When there is no lower limit to what reviewing courts hold "a reasonably well-trained officer" to?

In accordance with Rule 10, there are three sections dealing separately with reasons for the allowance of the writ::

Section One: Staleness and United States v. Raymonda

Section One deals directly with the reviewing courts stark contradiction and conflict with established Second Circuit precedence: United States v. Raymonda, 708 F.3d 105 (2015). The Appeals Court states there is no reason to make a decision as Raymonda was "novel" despite the affidavit itself making it clear the Joint Task Force was well aware of the main issue of Raymonda (whether the affiant could show evidence that a one time user was a "collector"). This Second Circuit Court of Appeals ruling was of course distributed immediately after. "Novelty" can not be held as an excuse to so entirely conflict with established, previous, Second Circuit rulings.

Section Two: Conclusory Statements and "Divided" Circuits

"A United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court."

The search warrant affidavit relies entirely on one vaguely worded conclusory statement that comes second-handed to the affiant, who has no first-hand knowledge of any wrong-doing - "files that 'had the appearance of child pornography'". No verbal or written statement of Investigator Vidnansky was appended to the affidvait, Investigator Kowalski provides no evidence of her own, and relief solely on the vague initiating report of Vidnansky.

In the District Court's review of the case, the judge states as her reasoning to allow this as sufficient due to "good faith" that while "[t]he First, Third, and Ninth Circuits have all held that the label 'child pornography', without more, is insufficient to establish probable cause," (Doc. 53, Pg. 10)."that approach is not universally endorsed" (Doc. 53, pg. 11). The entire sufficiency of the affidavit relies on this one undocumented conclusory statement. And a "divided court" is the justification for the District Court to rule "good faith"; and the Appeals Court declines to review.

In Section Two this question is explored; is there ample evidence of Supreme Court rulings that a "conclusory statement" alone is never sufficient? Are the Circuit Courts truly divided on this issue? Was the District Court justified to avoid ruling based on "good faith" doctrines?

I personally have not found a single case where such a vague second-hand conclusory statement was sufficient; as well as Court rulings that simply an "appearance" is never sufficient.

Section Three: Affidavit Sufficiency; United States v. Leon

> "A United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

United States v. Leon, 468 U.S. 897 is a landmark, often cited, seminal case, where a foundation was set for four tenents where "good-faith" can not rescue a wrongful determination of probable cause for a search warrant. If the Court can consent to review the affidavit in this case, I believe it will be evident that all four tenents have been clearly violated; that the District Court carefully avoided addressing the many issues raised; and instead issued a blanket "good faith" pardon to the very things that Leon states cannot be excused by declaring "good faith"; and that the Second Cricuit abandoned a conscientious review, simply stating "we rely on the District Court's reliance on 'good faith'".

1) An affidavit that even by Second Circuit rulings is reckless and misleading.

2) A rubber stamping judge that did not ask any of the pertinent questions to the affiant.

3) The most "bare-bones" affidavit the Court will review.

4) The judge's claim that a well-trained Joint Task Force Officer cannot be expected to know basic legal rulings in their area of speciality.

Issue I) Staleness

I request the Supreme Court to consider the three following questions regarding the prior courts' decisions on Mr. Pratt's argument of staleness based on the Second Court's own 2015 decision on staleness in United States v. Raymonda, 780 F.3d 105.

1) Did the District Court (Albany, NY) err when they fully accept the prosecution's argument that Mr. Pratt was a "collector" of child pornography despite prosecution and law enforcement presenting no evidence to support such a claim?

2) Did the Court of Appeals abandon their duty to conscientiously review when they avoided making a finding on this point?

3) Did the Court of Appeals err when they failed to apply their own standards under Raymonda (2015) but instead dismissing Mr. Pratt's argument of staleness, claiming "the novelty of the issue" a full two years later, thus giving law enforcement and prosecution a "free pass"?

1) Was the District Court in error when they dismissed Mr. Pratt's staleness argument under Raymonda, in effect just "rubber-stamping" prosecutions "collector" argument rather than conducting a conscientious, independent review of the facts?

A) Does Raymonda apply in Mr. Pratt's case as regards to staleness?

The Raymonda decision provides a perfect fit for Mr. Pratt's case:

> "To establish probable cause in this case [Raymonda], where the agents applied for a warrant on the basis of nine-month-old evidence, it is not enough to show that the suspect had at some point accessed thumbnails of child pornography. It was necessary to show that he accessed them in circumstances sufficiently deliberate or willful to suggest that he was an intentional "collector" of child pornography, likely to hoard those images - or acquire new ones - long after any automatic traces of that initial incident had cleared. No such propensity-raising circumstances are present in this case."

In Pratt's case, the agent, Investigator Kowalski, applied for the

warrant on the basis of eight-month-old evidence. She herself neither viewed nor obtained any new supporting evidence. Like Raymonda, the only "evidence" was Kowalski's second-hand paraphrase of Investigator Vidnansky's one time event...of "an appearance of child poronography" [quoting Kowalski, not Vidnansky]. As mentioned, we are given no statement or affidavit from Vidnansky, no neceesary details - never the less - per Raymonda, a one time, not repeated event. There is no supporting evidence of a pattern; no e-mails, no memberships in questionable web sites, no evidence from a "pen register trap" [I am not sure that that is], etc. Only a second-hand paraphrase of a vague comment of Investigator Vidnansky of a one-time 2 Nov. 2016 incident.

Mr. Pratt's case is a perfect fit. Raymonda v. United States, 780 F.3d 105 should apply!

B) Did the Prosecution offer any "reasonable" evidence as to Mr. Pratt being a collector?

It is the Prosecution's burden here to show evidence of a "sufficiently complicated series of steps to suggest being a collector " (Raymonda, 2015 2nd cir.). In United States v. Underwood, 725 F.3d 1076 (9th Cir. 2013) the affiant tried to ascribe to the defendant as being in the category of a "drug dealer." Here, law enforcement and prosecution seek to categorize Pratt as being a collector. The Underwood court ruled: "Expert opinion may also be considered in the totality of the circumstances analysis for probable cause. As we held in United States v. Weber, however, 'if the government presents export opinion about the behavior of a particular class of persons, for the opinion to have any relevance, the affidavit must lay a foundation which shows that the person subject to the search is a member of the class." 923 F.2d 1338, 1345 (9th Cir. 1990).

United States v. Coreas, 419 F.3d 151, 156 (2nd Cir. 2005) is on point

here as well:

> "Crucially, however, the value of that inference in any given case depends on the preliminary finding that the suspect is a person 'interested in' images of child pornography. The 'alleged proclivities' of collectors of child pornography, that is, are only relevant if there is probable cause to believe that [a given defendant] is such a collector." Id.

Prosecution's sole support for their assertion that Mr. Pratt was a collector was that the peer-to-peer files were downloaded into a "shared folder", and this was their only evidence for the "series of complicated steps", Raymonda. This point was fully and ably argued in both the original motion and the appeal by Pratt's lawyers. "This Court has recognized that Bit Torrent has both legitimate and illicit purposes." United States v. Ulbricht, 853 F.3d 71, 117 (2nd Cir. 2017)...[many additional cases cited]. Accordingly, a person's use of Bit Torrent, which by definition includes the creation of a shared folder, is no indication he is a collector of child pornography." Case 22-1637, Doc. 17, p. 30-31.

The "shared folder" is a default setting of the platform's algorhythm, requiring no additional steps.

> "Such programs are used for many things apparently at least including gaming, movies, and music." Case 1:18-CR-00348-MAD, Doc. 52, pg. 4 (original motion)..."There is not one single fact suggesting that the person who downloaded the files would have known their content when they were obtained, or that they were the product of the computer users search for child pornography, or if they were obtained from a site exclusively devoted to child pornography.

not a quote

> Given that the files, the shared folder, and the Torrent program were likely deleted and no further attempts were made, one might argue it was like a one time mistake. Regardless, it is not the defendant's burden, but the Prosecution's burden to establish a pattern, to establish 'circumstances sufficiently deliberate series of steps to suggest being a collector."

not a quote

But the District Court simply "rubber-stamped" the Prosecution attempt at an argument; copying and pasting Prosecution's "he access once, so he is a collector" in contradiction to the Second Circuit's ruling in Raymonda. I ask the Supreme Court to rule in this matter. The District Court's ruling

clearly contradicts the spirit and letter of United States v. Raymonda.

Of special note: The District Court never claimed "novelty" as an excuse for a "good faith" exclusion. At this point, Raymonda has been a major circuit ruling for two years.

2) Did the Court of Appeals conscientiously review the above issue? Or did they meander about to avoid making a finding of fact?

Part of the Court of Appeals "review" I will bring up in "Issue Three". For the staleness argument decision I would like to direct the Court's attention to page 7, Cas 22-1637, Doc. 76-1. I will copy in full on the next page. The Second Circuit acknowledges the many deficiencies of the government argument. I would certainly argue, and ask this Court: First, when the Appeal Court states "Accordingly it would have been better practice for the government to provide greater detail to establish probable cause that child pornography remained on Pratt's devices at the time the warrant was sought."

Greater detail? What detail was offered at all? Again, the Prosecution argument, that the District Court "rubber-stamped" was that because Pratt used the one-time, he is a collector - in contradiction to Raymonda. What details were offered? The Appeal Court states: "In particular...omitted details that might more clearly have demonstrated probable cause to think that Pratt was a 'collector' of child pornography, including a description of the steps...."

I find the "more clearly have demonstrated" phrase very confusing. Where did law enforcement give any such details to portray Pratt as a collector? Where was there any description of steps? Law enforcement had eight months to find such details, and failed. Or they felt they had no need to based on their court of jurisdiction.

In these months I have viewed many cases similar. When a "review" court

using phrases like, "it would have been better if (Gov't did X, Y, Z)" or "officers should do X, Y, Z", it is a lead up to the review court abandoning its duty at conscientious review, refusing to make a finding, making no clarifying decision; so in the future they can still say "good faith", in that "because we made no decision, we cannot hold officers or government do doing what we have just said is 'better practice' because we never officially made a ruling."

And thus is the case here. The Second Circuit's final word, even after mostly acknowledging the total deficiency of the government's arguments is: (Line 17) "Given the novelty of the issue, however..." My paraphrase "to keep from being accountable for making any finding, or clarifying any issue, to preserve the right for government to not do as they should, to not be held accountable to 'better practices', we will declare 'novelty'" (even though neither the prosecution nor the District Court made any such argument.

The Appeal Court states, "because we refuse to determine if there was probable cause we will support the searching officers' good faith because the issuing judge determined there was probable cause."

The Appeal Court abandoned its Court-appointed duty of conscientious review in not making a determination if Mr. Pratt indeed should be considered a "collector" under Raymonda.

3) Did the Court of Appeals err when they refused to rule on Mr. Pratt's Staleness issue, citing the "novelty of the issue"?

The Raymonda ruling was a full two years before this search warrant, a fully established precedent. On page 8, Case 22-1637, Doc. 76-1, the appeal court "We have explained that 'where a relevant legal deficiency was not previously established in precedent, [an] agent's failure to recognize that deficiency cannot vitiate good faith'." Raymonda, 780 F.3d at 199. But now

the precedent has been clearly established in the Second Circuit. How many years must have gone by for a precedent to not become binding? Investigators Kowalski and Vidnansky special concentration of law enforcement is exactly on this area of crime. Case 1:18-CR-00348-MAD, Doc. 5-1, pg. 4. Investigator Kowalski cites her extensive training as a Task Force Officer with the FBI, that she had done numerous such investigations. Vidnansky likewise is called highly trained by the Prosecutor.

This exact issue of staleness had prviously been addressed in the Second Circuit's jurisdiction. United States v. Coon, No. 10-CR-110A, 2011 U.S. Dist. Lexis 51968 (W.D.N.Y. 2011) ruled on the identical staleness issue.

> "In this case however, was no evidence suggesting that this defendant collected or hoarded child pornography. He did not subscribe to any illicit internet publications or e-groups. He did not have a prepaid membership. There was no evidence indicating that he had "collected" or downloaded many illicit images. In fact the search warrant application referenced only one known image of child pornography having been downloaded from the defendant's computer on one occassion. Under those circumstances, the evidence was insufficient to infer that this defendant collected or hoarded child pornography."

The affidavit in Mr. Pratt's case likewise had a one-time occurence of a download; not a single image was identified as known child pornography, and no other supporting evidence was offered. The suppression in Coon was over-ruled based on novelty, that it was not reasonable to believe that the Agent knew the affidavit was different. The Agent involved in the Coon Case? Agent Ouzer. Four years later, in Raymonda, it would again be Agent Ouzer receiving the blanket pardon of "good-faith", supposing he could not know that what was ruled deficient four years ago was still considered deficient.

It is simply not credible that in 2017, in Mr. Pratt's case, that the well-trained officers of the Federal Joint Taske Force would not be aware of the impact of these rulings. The Court has spoken on this issue of 'good-faith' in Leon' and other rulings;

> "Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth-Amendment precedent and will conform their conduct to these rules."

As seen in these cases, when courts fail to conscienctiously review, even according to their own District's rulings, then officers will not take care, but will feel they can rely on 'Boiler-Plate' assertions with no, or misleading evidence. The standard of a 'reasonably well-trained officer" disappears.

Conclusion

The Second Circuit Court of Appeals declaration of "novelty" does not fit this case. Giving the blanket pardon of "Good Faith" when any reasonably well-trained Federal Joint Task Officer of the Internet Crimes units would have been well aware of these rulings does an end-run around the Fourth Amendment and Supreme Court Rulings. The District Court never even considered "Novelty". I ask the Court to affirm the defense of "Staleness" as dictated under the Second Circuit's ruling precedent of Raymonda (2015)

Issue II) Divided District Courts?

I ask the Supreme Court to consider making two rulings on the question of Category (v) 18 U.S.C. §2256 "lascivious display...":

1) Can a warrant affidavit whose only evidence is "the appearance of child pornography", or even the conclusory statement "child pornography" constitute sufficient evidence to enable an indepdent judge magistrate to be able to properly make a probable cause determination?

2) Should the Second Circuit's over twenty years of implicit agreement on this issue be considered binding in Mr. Pratt's case and other similar cases?

1) The issue of "Category (v)"

"Sexually explicit conduct" is defined in 18 U.S.C. §2256 as "actual or simulated (i) sexual intercourse...(ii) beastiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area".

In reality, all the first four categories require some amount of descriptive detail. Overwhelming courts have stated "appending said images is the best action", and this is not an onerus requirement. Some courts would rule that simply saying "images of two children having sex" is not sufficient; and as sordid and unfortunate as it might be to state "an image of a 12 y/o performing fellatio on an older teen boy" is to have to say, this also is not an onerus task, and unfortunately, no more than one might read in the newspaper or hear on the evening news. However, when it comes to Category (v) "lascivious exhibition", there has been widespread agreement with United States v. Brunette, 256 F.3d 14, 18 (1st Cir. 2001) that:

> "The identification of images that are lascivious will almost always involve, to some degree, a subjective and conclusory determination on the part of the viewer...precisely why the determination should be made by a judge, not an agent" and that "an 'assertion...absent any descriptive support and without an independent review of the images cannot sustain probable cause."

United States v. Rivera, 546 F.3d 245 (2nd Cir. 2008), "The term 'lascivious' is not self-defining"; and one could add a list of citations many pages long. Being 60 years old myself, I can recall such deliberations concerning then 11-year-old Brooke Shields full nudity display in the movie "Pretty Baby" and the infamous Maplethorpe decision.

In Case 1:18 Document 53, pg. 10, the District Court acknowledges, "The First, Third, and Ninth courts have all held that the label 'child pornography', without more, is insufficient to establish probable cause for a search warrant when the alleged pornography falls into the fifth category of sexually explicit conduct ('lascivious exhibition')"...but Document 53, p.11:

> "Still that approach is not universally endorsed" and "although the question has been raised to the Second Circuit, the Second Circuit has not yet ruled on the issue."

I would argue that despite being faced with the issue for over 20 years, the Second Court has avoided a conscientious review of the issue, and not ruled explicitly. I will argue more in depth on this issue later.

I believe the issue before the Court is very similar to earlier Supreme Court decisions on what is sufficient to give a determination of probable cause in obscenity issues. Mr. Pratt's case is uniquely suited for this purpose in that unlike any other case I have seen in my months of research, there is absolutely no evidence given other than "appearance of child pornography", a second-hand paraphrase; or if one chooses to select the fabricated statement, "child pornography".

2) Recent history of related Supreme Court decisions

The issue of, and necessiry for detailed, descriptive information to be supplied by the affiant in a search warrant affidavit is not a new or fleeting concern. It dates back to the beginnings of our country, to safeguard the citizen's rights against unreasonable search and seizure, dates back to the pre-

Colonial British jurisprudence.

In 1957 the Supreme Court decided the New York case of Kingsley Books v. Brown, 354 U.S. 436 (April 1957), and in 1961 the Court decided the Missouri case Marcus v. Property Search Warrant, 367 U.S. 717. The issue in these cases was the supporting affidavit for search warrants for obscene material. Rightly or wrongly, possession of child pornography was not yet a crime, but the underlaying fundamental principle is the same as it ever was: the responsibility of the affiant to provide sufficient detailed description, very preferably wit the actual offending part appended, so that an independent, conscientious judge could independently make a proper probable cause ruling.

The Court upheld the New York case as both a detailed description was provided and the material deemed obscene was appended, allowing the judge to make an independent determination based on his personal review, and not based on the conclusory assertion of law enforcement or the affiant. The issue have not changed. This is what a reasonably well-trained officer has always known they need to do.

In the Missouri case, the Court ruled elsewise, suppressing the evidence obtained for several reasons, one being that neither a detailed description was provided nor were any materials deemed obscene were attached. (1) "...to issue a warrant to search...on the sworn complaint of a police officer stating [that the material is obscene] without scrutiny by the court of any materials considered by the complaintant to be obscene", "still the warrant issued on the strength of the conclusory assertion of a single officer without any scrutiny of any material considered by the complainant to be obscene. The warrant merely repeated the language of the statute."

The exact same words are found in rulings in courts today when it comes to cases like Mr. Pratt's. Often the complainant, though, is granted the "free path" of "good faith exclusion" as if a 'reasonably well-trained officer' could

not be expected to know what an affidavit should; must contain; as if a 'reasonably well-trained officer' would not know that they must provide more than a conclusory assertion! There is nothing "novel" here.

Like the term "obscene", the term "lascivious" is likewise broad, and hard to define. All the courts seem to concue on this, including the Second Circuit. In Marcus v. Property Search Warrant, Lt. Coughlin did not submit a description of said "obscenities" nor did he append copies of any said material. The Supreme Court did not give a "Good Faith Exception" nor did the Court declare the 1957 Kingsley Books case as too "novel". Lt. Coughlin stated that "of his own knowledge" the materials were obscene. The issue remains the same, the insufficiency of such an affidavit based soley on an officers conclusory assertion.

This continuing issue can again be seen in two later cases from New York. In the oft-cited Lo-Ji Sales Inc. v. New York, 442 U.S. 99, the court ruled the magistrate wholly abandoned his judicial role, and had acted as an agent of law enforcement. Or as Illinois v. Gates puts it, "Did the issuing magistrate wholly abandon his judicial role in the manner condemned in Lo-Ji Sales Inc. v. New York?"

However, in 1986, shortly after the Illinois v. Gates decision, the Court upheld the warrant in New York v. P.J. Video, 475 U.S. 869. Although the magistrate did not personally view the movies in question, "each affidavit describes numerous acts...The films were described in each affidavit in such a fashion as to permit the magistrate to focus searchingly on the issue of obscenity". "A reasonably specific affidavit describing the content 'generally suffices' - to determine obscenity - generally provides an adequate basis for magistrate to determine probable cause".

However Marshall, Brennan, and Stevens dissented, saying the affidavit did not contain sufficient description.

Two principles are seen as a constant here:

1) There must be a detailed description in the affidavit. But what is "reasonably specific" as seen in the dissent, will always be open to a grey area, reasonably and predictably giving way to motions to suppress. (There is no description in Mr. Pratt's case, only the vague, second hand attributed statement "appearance of child pornography".

2) Appending an example or copy of the offending material is always the best policy. What reason is there not do so? Especially today, copying and appending the offending image takes seconds. So on the matter of "lascivious exhibition", many courts, such as the soon to be discussed Second Circuit cases of Groezinger and Genin demand that the offending images must be appended.

3) The Second Circuit's history on this issue

I acknowledge that as a lay person, I'm totally unsure as to the legal footing of my following legal agrument: With the Second Circuit implicitly recognizing that probable cause for especially the Category (v) "lascivious exhibition" can not be based merely on a conclusory assertion of the officer, but must have the images appended, or at the very least, specific detailed description sufficient for the magistrate to make an independent determination; the twenty years of such impliciti recognition should bind the court to this standard, or at the very least, make such a finding in a case like Mr. Pratt's that contains no evidence other than the semi-conclusory, semi-vague statement "the appearance of child pornography".

In United States v. Jasorka, 153 F.3d 58 (2nd Cir. 1998), the Eastern District of New York Court (E.D.N.Y.) stated, "The district court issuing a warrant on violation of lascivious exhibition must be made in the same manner as required in assessing whether material is obscene." Even here the government realized that a detailed description must be given, and images

supplied for the judge to review. These are not new expectations on law enforcement. The judge acknowledged he did not review the images:

> "Chief Judge Sifton that the photographs were not exhibited to the magistrate judge, and that she as not given a sufficiently detailed description of them to permit a finding that they involved "lascivious" conduct. He concluded that the magistrate judge therefore lakced sufficient basis to conclude that the intercepted materials violated §2252. The district court further found that the warrant was so lacking of indicia of probable cause that the customs officers could not have reasonably relied on good faith on the issuance of the warrant to justify the search under Leon."

The Second Circuit reversed the suppression. They offered no criticism of the Chief Judge's interpretation of the situation, but ruled "Good Faith" based on this decision being novel. It is interesting to not the E.D.N.Y. Chief Judge did not consider the ruling to be "novel" enough to claim "Good Faith" as he expected that a reasonably well-trained officer would know that, regardless of the charge, conclusory assertions are not sufficient, as ruled consistently by the Supreme Court. As previously noted, this problem of relying on conclusory assertions to find a determination of probable cause were the subject of many motions in all the courts.

In United States v. Riveria, 546 F.3d at 250, the Second Circuit explained that the "term lascivious" is not self-defining and thus..." (2008). Then in 2009, the Southern Distict of New York court (S.D.N.Y.) in United States v. Groezinger, 625 F.Supp.2d 145 stated very clearly:

> "As a consequence of the interpretive ambiguity inherent in the term 'lasciviousness', in the probably cause context, a magistrate may not issue a search warrant based solely on a law enforcement officers conclusion."
>
> "The law enforcement officer is required either to append the lascivious material or to provide a description that is sufficiently detailed for a magistrate to reach an independent legal conclusion that the material is indeed lascivious. The probable cause determination is a nondelegable judicial duty."

The Second Circuit offcer no dissent on this conclusion and cites Groezinger in future decisions. However, once again, "Good Faith" was pronounced, as the decision was considered "novel", and a reasonably well-trained officer

who specialized in such cases would somehow not be aware of these basic requirements of non-conclusory statements without specific detail in search warrants, or that appending the offending material would be a reasonable expectation.

The Second Circuit, in United States v. Falso, 544 F.3d 110 (2nd Cir. 2008) states clearly (quoting Case 1:18 Document 41-2 1813) "A search warrant applicant's statement about what 'appeared' to have happened falls shows of establishing probable cause." To refresh, the sole second-hand paraphrased comment of Inspector Vidnansky was "appeared to be child pornography".

As a final case, in United States v. Genin, 524 Fed.App'x 738 (2nd Cir. 2013) the somewhat similar motion to suppress was denied, and upheld. In upholding the suppression, the Second Circuit cites Groezinger. The warrant affidavit's [af Genin] specific description of these e-amils, and its characterization of approximately 150 videos obtained by the FBI distinguishes this case from the cases Genin cites. In those cases, the warrant of affidavits contained only a perfunctory that the materials at issue contained "child pornography". United States v. Groezinger, 625 F.Supp.2d 145 (S.D.N.Y. 2009).

In Falso, the court wrote,

> "Requiring the government to gather evidence particularized to the target of the before the search warrant application is made will simply focus law enforcement on those who can be reasonably be suspected of possessing child pornography. If this proves to be a hinderance, it is one the Fourth Amendment requires."

Looking at the totality of what the Second Circuit has said in this and other simiarl cases, the reviewing courts (District Court and Court of Appeals) should have required the government to gather evidence before the warrant application; to not accept the unsworn paraphrased words of Investigator Vidnansky, "appearance of"; and eve if one accepted the fabricated, non-attributed conclusory statement "said files consisted of child pornography", the Second

Circuit's implicit if not explicit standards do not accept this as sufficient to probable cause.

So I ask this Court to consider if (1) my argument on this matter is correct, and that the Second Circuit's implicit and explicit findings should be binding in Mr. Pratt's case, or (2) that Pratt's case, utterly devoid of any evidence other than the possible phrase of another investigator's "appearance of child pornography", without any sworn affidavit; demands a ruling of probable cause sufficiency of the one conclusory statement, and that such a ruling should not be avoided under "Good Faith" or "novelty" given the long list of previous cases in the Second Circuit.

Issue III) The Sufficiency of the affidavit, and of the Courts' review of it.

1) Did the affidavit and search warrant meet the four criteria of United States v. Leon, 468 U.S. 897?

2) Were the Courts' reviews conscientious, thorough, relying on "Good Faith", "novelty" to avoid careful review, or did they err in their conclusions?

3) Did the Court's reviews have error of facts?

The United States Supreme Court has consistently stressed that reviewing courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

The Supreme Court has identified four circumstances in which an officer's reliance on a search warrant would be objectively unreasonable: (1) when the affidavit or testimony in support of the warrant included a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge; (2) when the judge "wholly abandoned his judicial role" in issuing the warrant; (3) when the affidavit in support of the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entierly unreasonable"; (4) when the warrant is "so facially deficient" that the executing officer coul dnot reasonabley presume the warrant to be valid.

It is certain that in today's environment that any mention or review of a "sexual offense" charge will inflame passion and rhetoric, especially in an election cycle; whether it is a one-time mistaken download with the images deleted and never viewed again, or it is the most vilest offender's relentless pursuit of the most sordid and objectionable of offenses. This was readily seen in the Senate confirmation hearings of the most recent nominee to the Supreme Court.

The Second Circuit wrote in United States v. Falso, 544 F.3d 110,

> "Just as there is no higher standard of probable cause when First Amendment values are implicated, however there is no lower standard when the crimes are repugnant and the suspects frustratingly difficult to detect."

I strongly believe that if the Court consents to review Mr. Pratt's case, they will find both - error in fact and error in conclusion on the part of the reviewing courts; that a blanket declaration of "Good Faith" and "novelty" rather than an independent conscientious review of set standard prevailed.

The affidavit and the determination of probable cause fails to meet the four criteria of Leon on many points. This was ably argued in both the original motion to suppress and the recent appeal. Proclamaions of "Good Faith" or "novelty" cannot pre-empt this.

1) "When the affidavit or testimony in support of the warrant included a false statement made knowinly and intentionally or with reckless disregard for its truth, thus misleading the judge."

"The United States Supreme Court has consistently stressed that reviewing courts must continue to conscientiously review the sufficiency of affidavits on which search warrants are issued." United States v. Whitley, 249 F.3d 620, "Because states of minds must be proved circumstantially, a fact finder may infer reckless disregard from circumstances evincing reason to doubt the veracity of the allegations."

i) Evidence of "Judge-Shopping"?

Albany, New York is the capital of New York, about 100,00 residents. The town of Colonie is a small town 10 minutes to the north. Saratoga Springs, where Investigator Vidnansky is located, is 30 minutes further to the north. Mr. Pratt's residence (where he has owned a house for 25 years) is in the city of Albany. There is a District Court in Albany. Investigator Kowalsky is a Deputy Marshall for the FBI. As Mr. Pratt's attorney mentions in the appeal Case 22-1637, Document 17, pg. 3, and page 11 of the reply, Investigator Kowalski's warrant was for the Town of Colonie. Admittedly very circumstantial, and I have no way to know more. Certainly certain officers would prefer certain judges, but I believe it is worth noting that Investigator Kowalski chose not to go to a Federal Magistrate for a search warrant.

ii) Unsubstantiated "Boiler Plate" assertions

United States v. Wilson 212 F.3d at 787 opines: "Reckless disregard for the truth is exhibited when expressing that which was not appropriate accepted as true." United States v. Perez, 247 F.Supp.2d 459 (2nd Cir. 2003):

"I conclude that the agents acted recklessly also because there was absolutely no support for their assertion...Here, for example either had or could have had before they requested the warrant [various steps to lay a foundation for the assertion] or asked other FBI experts, the Cyber Division, for example, could have helped."

Must of this has already been discussed when dealing with the staleness issue. Both the original motion to suppress and the appeal ask the same question throughout: where is the evidence? An affidavit with no evidence backing an assertion; the magistrate judge called to issue a warrant should reject the assertion, and call on the affiant to come back with such evidence. The reviewing courts should not turn a blind eye. But here we are only dealing with the affiant. As will be discussed in the section dealing with the status of "collector". Kowalski has state her training, and is obviously well aware of the ramifications of Raymonda; and indded teh whole staleness issue comes down to this in the District Court! But just as the affiant is well aware of the ramifications, it is not conceivable that a reasonably well-trained officer would not know the ramifications of such cases as the Second Circuit case of United States v. Correas, 419 F.3d 151, quoted in Raymonda: "The alleged 'proclivites' of collectors of child pornography 'are only relevant if there is probable cause to believe that [a given defendant] is such a collector'". Or, as quoted in Section II, "requiring the government to gather evidence particularized to the target before the warrant application is made."

And the above is indeed the standard. Every case I have examined, such as the previously mentioned Genin, evidence is given on the search warrant to support arretions, or the warrant is suppressed. How much evidence must be given, what constitutes "sufficient detail" will always have shades of grey. But in Mr. Pratt's case, there is absolutely no evidence to lay a foundation for an assertion of "collector". The only evidence is a one-time occurrance in the space of eight months, which Raymonda clearly dismissed as insufficient.

If I might try to make an analogy: it would be like Nielson TV ratings noting that on one occassion I had the TV turned to a particular TV series, that series was never viewed again in eight months, yet someone arguing that the one-time use made me an avid fan. It would seem the opposite, if I never turned the TV to that series again, I obviously made the choice I did not want to view it.

In my argument i have tried to focus on Second Circuit rulings. I have already cited United States v. Underwood, quoting United States v. Weber:

> "If the government presents expert opinoin about the behavior of a particular class of persons, for the opinion to have any relevance, the affidavit must lay a foundation which shows that the person subject to the search is a member of the class."

Nevertheless, the Second Circuit, all circuits, and just common sense calls on the affiant to provide some basis for their assertion, and to make such an assertion without any evidence is "reckless".

iii) False, fabricated statement

> "The test for whether an affidavit contains recklessly misleading or false statements is an objective one. We ask whether a false or misleading statement" was included by the affiant in the warrant, "not whether the issuing magistrate was mislead by it." Franks v. Deleware, 438 U.S. at 155.

One of the key statements in the affidavit, a conclusory statement, is clearly fabricated, false. "Said files consisted of child pornography". This statement is not attributed to Inspector Vidnansky, the only person with any direct, first-hand knowledge. He is not quoted as saying "an appearance of child pornography". This statement is not attributed to Inspector Kowalski, nor attributed to an informant. As discussed next, there is no sworn affidavit of Vidnansky, nor was he asked to speak to the magistrate, though only he had first-hand knowledge, and he was only 30 minutes away.

Despite both motions consistently and forcefully declaring the falseness of this statement, 22-1637 Document 17, pg. 3, this statement, along with the

"collector" issue are clong to by both review courts. Case 1:18 Document 53, pg. 10:

> "Instead, the affidavit conclusively asserts that Investigator Vidnansky 'downloaded files of interest' which 'consisted of child pornography' [which Vidnansky does not say] and upon viewing the files, Investigator Vidnansky 'found that they appeared to depict child pornography'."

This narrative of the District Court makes no logical sense. How could one say the files "consisted of child pornography" before viewing said files, then after seeing said files, change to "appeared" to depict child pornography??? The Appeals Court Case 22-1637 Document 76-1: "But the warrant did advise that another FBI Task Force Officer downladed files that 'consited of child pornography'," which the warrant simply does not say. But the issue here is not were the reviewing courts mislead, but that Investigator fabricated the statement 'said files consisted of child pornography'." It has no basis in fact, contradicting what Vidnansky appears to have said.

iv) Critical information omitted

> "Recklessness may be inferred where information 'clearly critical' to the probable cause determination has been omitted." United States v. Rivera, 928 F.2d at 603.

a) Investigator Vidnansky's sworn statement, police report, direct statements

Vidnansky is the only one with any knowledge pertinent to a judge making a determination of probable cause. Inexplicably, Kowalski does not submit any statement from Vidnansky, sworn or unsworn. Just as inexplicably, the issuing judge does not ask into this problem. The only attribution to Vidnansky is not an actual quote, states "the appearance of child pornography"; which as mentioned, falls short of the Second Court's own established standards, United States v. Falso. The original motion goes into depth of this inexpliable shortcoming Case 1:18 Document 41-2, pg. 13. We have information from Kowalsk, what are files of interest? Did Vidnansky see actual images (if so, why not

appended and described) or did he see file names, or what did he see? The Appeal motion Case 22-1637 Document 17, pg. 15-21 deal with thes many shortcomings, concluding "Unspported conclusions [of an officer] are not entitled to any weight." United States v. Vigeant, 176 F.3d 571 (1st Cir. 1999). Investigator Kowalski's fabricated statement "said files consisted of child pornography", indeed all her statements omitted crucial information that necessitated statements from Investigator Vidnansky.

Ultrapeer

Most likely what ever information that came to Inspector Vidnansky and cauwed him to suggest an "appearance of child pornography" was a type of "ultrapeer". Ultrapeer, if I understand correctly, have a variety of different program type, all with basically the same method, information from other sources, other people or platforms ("informants"). The next page has excerpts from the type of affidavit a reasonably trained officer would perpare. Ultrapeer, here "Peer Spectre" is specifically identified, does not actually provide Special Agent Larsen with file images "likely to contain [child pornography]". "Because file names are not always completely accurate, Agent Larsen compared these files to 'DCI's [Iowa] collection of contraband images' and 'found that three of the files matched'." (Larsen also determined that the IP address used made 13 downloads from 5 Sept. to 8 Sept. 2008) United States v. Collins.

b) Search warrant omits any information about Investigator Vidnansky's sources

In the original motion, this concern is highlighted on Case 1:18 Document 41-2, pages 12-15

Informant information Illinois v. Gates, 462 U.S. 213

Page 15 of the motion states:

"The Second Circuit has held that 'in determining what constitutes probable

cause to support a search warrant when the warrant is based upon information obtained through the use of a confidential informant, courts assess the information examining the totality of the circumstances' bearing upon its reliability." United States v. Smith, 9 F.3d 1007 (2nd Cir. 1993), citing Illinois v. Gates, 462, U.S. 213 (1983). Under the totality of the circmstances test for confidential informant information, the "[illegible] "reliability" or "veracity" and the "basis of knowledge" of the confidential informant is "highly relevant" to a finding of probable cause to support the issuance of a search warrant. Illinois v. Gates, 462 U.S. at 230."

This affidavit is totally void of such information. Yes, it has some "copy and paste" information about torrents and Sha-1 values; but nothing specific to this case. As noted, it says nothing about how Vidnansky collected his information. If we make an unsubstantiated assumption he used some sort of "ultra peer", whcih program is highly relevant. More relevant, critical, is what he had used For instance, Case 22-1637 Document 17, pg. 19-20, it is extremely likely, if the above is the case, that Vidnansky never saw an image, and "files of interest" refers, likely, to file names. Files can be full, partial, or contain zero bits (of information); that is a file can be nothing but a file name with no images attached. Files can have names that do not match the content. For instance, some "files" have extremely long file names, to make more "hits", and can be malicious in intent. A person may decide to take a image of Taylor Swift and attach the most vile words imaginable, or the reverse. All is speculation, as the affiant omits necessary and required information.

Corroboration

As noted above in United States v. Collins, corroboration of anonymous sources is necessary. Agent Larsen did not presume that any "said files" were contraband, but first corroborated each file, and leaving it for a judge to make a presumption. Investigator Vidnansky, whose actually words we are never given, likely was acting correctly when he refused to opine that certain files were child pornography, and refused to make a conclusory statement, but used the word "appearance".

Illinois v. Gates states;

"As to the appropriateness of the search warrant based on a partially corroborated anonymous tip; such said information must be excluded."

The District Court totally ignored all these concerns raised. The court did not conscientiously review the issues, did not hold to established Second Circuit decisions, and made errors of fact, such as accepting the sentence "said files consisted of child pornography" as attributed to Investigator Vidndnaky, when it was not, and the total absence of any sworn testimony or documented reports of Investigator Vidnansky.

The Appeal Court likewise did not address these raised issues, and accepted the fabricated sentence; which was not attributed to anyone nor supported by any facts. Thus that statement should be removed from consideration, and the affidavit read as if it were not there. A conscientious review would hold an affiant to the standards of a reasonabley well-trained officer, That is not the case here.

2) When the judge "wholly abandoned his judicial role" in issuing the warrant

Thankfully I will be short and brief. The District Court decided that the judge fulfilled their judicial role. We have not yet gotten to "was the warrant so lacking in indicia..." If I am so fortunate as to have the Supreme Court review this, I believe the issue speaks for itself; that, to me, is a clear example of rubber stamping.

The warrant issuing judge did not raise many of the Second Circuit standards that have alr3eady been cited; laying a foundation for a "collector" assertion, or assertion ascribing any category to a person; no asking why no particularized information was gathered. The biggest questions I would expcect a judge to ask might be: "Why does one sentence state "consisted of

child pornography! and the other say 'appearance'"? Why, if you know it is child pornography, did you neither append an image, nor stated which of five categories it falls into, nor give any detailed description? I would expect a magistrate to tell the affiant, "many years of rulings say the judge is to issue a determination based on his independent review of the facts, and not based on your conclusory statement." Most especially, I would expect a judge pondering issuing a probable cause determination to ask into why Investigator Kowalski, who has no first-hand knowledge of any of the information, is supplying an affidavit with no sworn statement, police report, or personal accompaniment of Investigator Vivnansky.

As I see, of course, is not necessarily as the Court will see. But I believe the "totality of the circumstances" points quite strongly to a mere rubber stamping. Likewise, the reviewing courts totally ignored these questions, instead saying it all does not matter because of "Good Faith" and "novelty". Indeed, the District Court Case 1:18 Document 53, page 9, cites Groezinger (a 2008 case) as still being too novel to expect law enforcement to act in accordance with, a case that had far more than one conclusory statement made in Mr. Pratt's case. In United States v. Collins, I presented just a portion of what Agent Larsen says the magistrate demands.

In the 7th Circuit, in United States v. Lowe, 516 F.3d 580 (2008), the court states that in lieu of actually appending images, a detailed verbal description can suffice. A conclusory statement of an affidavit, without any description, does not suffice. Investigator Vidnansky was only 30-40 minutes away, and coul dhave been asked to appear to give a detailed verbal description, but was not.

In the 4th Circuit, in a somewhat similar case of United States v. Doyle, 650 F.3d 460, Captain Scott signed a search warrant of which he had no first

hand knowledge, so Lt. Rouse accompanied him to give a summary of his investigation and testify to the facts.

In the 11th Circuit, United States v. Smith, 459 F.3d 1276 (2006), "Thus the issuing judge appropriate relied on (Agent Thomas') description of the images and was not required to review them" and the issue thenis whether those descriptions were sufficient to establish probable cause" in United States v. Wilson, 2013 U.S. Dist. Lexis 6021.

Again, "The 11th Circuit has not addressed the precise issue here of how detailed a description of an image an affidavit in a search warrant need be to establish probable cause. However, the Court finds persuasive the Third Circuit decision in United States v. Beatty, 437 F.App'x (3rd Cir. 2011)."

So the 11th Circuit also states a "conclusory statement" not sufficient. How detailed a description must be will always have some grey area.

In Mr. Pratt's case, they had neither a description nor an images. A similar list of rulings could go on for many pages.

The Appeal Court's answer was (page 4):

> "We need not resolve the probable cause issue because we agree with the District Court that the good faith exception to the exclusionary rule applies even assuming probable cause was lacking."

However the history of all the courts, including the Supreme Court, is a conclusory statement in an affidavit is not sufficient to establish probable cause. This affidavit has no evidence than the one statement only indirectly attributed to Investigator Vidnansky "files that appeared to be child pornography".

4) When the warrant is "so facially deficient" that the executing officer could not reasonably presume the warrant to be valid

I am not sure, but I believe this addresses whether any "reasonably well-trained officer" who has taken care to learn what is required of them under the

Fourth Amendment would know better. I believe that has been answered. There is no rationale that explains Kowalski not knowing the rulings such as Raymonda, Groezinger, and other oft-quoted rulings. It is not plausible that she and her supervisor would not know well the Raymonda decision rendered by the Second Circuit fully two years earlier. In fact, the very style of the affidavit, stressing the "Characteristics of a Collector" show they fully know Raymonda and similar rulings. The insufficienty of conclusory statements had they to know and follow; and likewise Raymonda is not too "novel" to be binding.

Even if one accepted that notion that a 2008 case is too recent, it still does not change that the magistrate did not do due diligence. Page 9 states: "Without a clear legal standard to follow, it is not unreasonable for the signing judge to rely on Investigator Vidnansky's opinion that the files 'appeared to depict child pornography'."

My answer would be:

1) I have just mentioned many clear standards the issuing judge did not hold the affiant to.

2) Standards would be more clear if reviewing courts reviewed, made decisions, rather than just saying "good faith" or "novelty".

3) It is unreasonable to rely on Vidnansky's opinion when nothing is directly attributed to him, when no sworn affidavit or even police report is included, when he was not asked to accompany the affidavit.

4) It is unreasonable to rely on "appeared" as (previously noted) Falso (2nd Cir.) circtly states "appearance of" is not sufficient.

5) As noted in the reply brief before the Court of Appeals, page 5 and 6, in a similar context, the Supreme Court rules in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (200) "that the 'appears to be' definition of child pornography overbroad."

3) When the affidavit in support of the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"

I would challenge any conscientous reviewing court to find a more "bare-bones" affidavit. As stated numerous times, the only "evidence" presented is a one-time in eight-months of investigation use of peer-to-peer, and the "appeared to be child pornography" statement unsupported by any statement from Investigator Vidnansky, whom Investigator Kowalski attributes the statement to.

I would like to add something to the previous discussion of a Supreme Court and Second Circuit courts history of the unacceptability of conclusory statements and the need for detailed description and preferably the appending of the offending material.

The District Court stated regarding a "conclusory statement" being insufficient for a determination of probable cause, that while acknowledging the 1st, 3rd, and 9th courts hold such a statement to be clearly insufficient, "still that approach is not universally endorsed." (Case 1:18 Document 53, pg. 11). I do not believe that statement should wholly be accepted without a closer look. I would say rather, "show me a court that has accepted an affidavit that contained nothing other than 'an appearance of child pornography'." The District Court cites United States v. Smith, 795 F.2d 84 (9th Cir. 1986) - but the court just previously mentioned that the 9th court is one of those who categorically states that a conclusory statement is not sufficient. Is the court now arguing against itself?

The District Court cited United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998). First, this affidavit did not rely on a conclusory statement. Conversations, a chart room titled as "kid sex pics", a conversation to buy a floppy disc, etc. Even with all that, the circuit court said, "We agree with the district court that while minimal, the information presnted the judge was

sufficient." The "minimal" information presented a huge body of cases, including Supreme Court cases. But the reviewing courts here refuse to hold them to any basic standard, essentially saying: as long as the magistrate issued a warrant, the officers shall not be held to any standard, but have the Free Pass of Good Faith.

Additionally, Franks v. Delaware states: "That the arresting officer cannot rely on a warrant obtained by his own misleading conduct."

Conclusion

I am sure my style and form are quite deficient. I also have no idea how many cases to cite, how much to argue, whether to repeat arguments made in the previous motions, etc.

I do know I have not seen another case so lacking in the evidence. I do believe the "totality" of the evidence shows that the affidavit is lacking, that the issuing judge ignored any lacking, that any reasonably well-trained officer would be well aware of the issues.

I hope I also made the point that the reviewing courts did not conscientiously review the matters, gave lip service at best to many deficiencies of the affidavit that the previous motions explained well, and gave ample citation for. Mostly the reviewing courts totally ignored the arguments made, and held onto some very clear mistakes or fabrications. (1) The total lack of evidence towards the "Boiler-Plate" assertions of "collector" and (2) the fabricated, conclusory statement "said files consisted of child pornography" (3) the total absence of any statement from Inspector Vidnansky, the only one that actually had any first-hand knoweldge.

The District Court and Court of Appeals seem to summarily dismiss Fourth Amendment claims under the guise of "Good Faith" and "Novelty" rather than conscientiously reviewing the merits of the arguments, putting the cart before

the horse; "Good Faith" before the Fourth Amendment.

In fact, both courts continually say, "we need not resolve probable cause"; but this affidavit is so deficient, so "Bare-Bones", so misleading, to not resolve this issue is to not conscientiously review.

One Note: I did not include discussion on attenuation under the presumption that it is clear that the government has waived all rights to argue this, and Wong Sun v. United States, 371 U.S. 471 (1963) clearly applies if the Court should so rule in Mr. Pratt's favor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Christopher J Pratt 29 Feb 2024

Resubmitted: 30 April 2024