DOCKET NO. _____

In The
Supreme Court of the United States

----- ✦-----

RICHARD DZIONARA-NORSEN,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JILLIAN S. HARRINGTON, ESQ.
Attorney at Law
P.O. Box 6006
Monroe Twp., NJ 08831
(718) 490-3235
Attorney For Petitioner Richard Dzionara-Norsen

QUESTIONS PRESENTED

1. A writ of certiorari is requested to determine whether Petitioner's conviction is supported by sufficient evidence to prove guilt beyond a reasonable doubt?

2. A writ of certiorari is requested to determine whether Petitioner's right to present a defense was violated by the district court's denial of his requests to present expert witnesses regarding his fragile mental health and its effects on his interactions with law enforcement?

3. A writ of certiorari is requested to determine whether the district court erred in denying Petitioner's motion to suppress his statements and the contents of a computer seized by law enforcement agents?

4. A writ of certiorari is requested to determine whether the district court erred in amending Counts Two and Three of the indictment in his final charge to the jury?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption. The Petitioner is Richard Dzionara-Norsen. The Respondent is the United States of America.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES: ***PAGE***

TABLE OF CITED AUTHORITIES

STATUTES:

TABLE OF APPENDICES

PAGE

SUPREME COURT
OF THE UNITED STATES

RICHARD DZIONARA-NORSEN,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

Petitioner, Richard Dzionara-Norsen, respectfully prays that a Writ of Certiorari issue to review the Summary Order of the United States Court of Appeals for the Second Circuit dated January 18, 2024 affirming a judgment of conviction entered in the United States District Court for the Western District of New York (Geraci, J.).

CITATION TO THE OPINION BELOW

The Order of the Second Circuit Court of Appeals is an unpublished Summary Order, 21-454-cr (2d Cir. January 18, 2024), but appears in the Appendix annexed hereto [A1-A11].

STATEMENT OF JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was entered in this case on January 18, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in the issues raised herein include, *inter alia*, the Fifth, Sixth and Fourteenth Amendments to the Constitution.

STATEMENT OF THE CASE

I. THE TRIAL

A. *The Government's Case*

FBI Child Exploitation Task Force member, Investigator Carlton Turner, testified that on March 13, 2018, he used the eMule peer-to-peer network to download directly from a router located at Petitioner's mother's home, a file entitled "2009 Gracel series" containing a 2-second video clip depicting a female masturbating on a bed. Turner explained that, because eMule does not have a centralized server, there is no government regulation of what is transferred and, because he was using a law enforcement account, he was only able to download a short clip. Turner admitted that he had no information regarding the female depicted in the video including her age, location or when it was filmed. (T.60, 71-72, 75-76, 80, 83-86, 149-56)[1]

On June 13, 2018, Inv. Turner and SPECIAL AGENT BARRY COUCH went to Petitioner's apartment. He answered the door and agreed to speak with them. That interrogation, which did not include Miranda, was recorded by Couch using a concealed audio recorder. During the interrogation, SA Couch showed Petitioner a screenshot of the 2-second video clip downloaded by Turner and asked if he remembered it. Petitioner responded "Mmhmm." Couch then asked if he was involved in child pornography at 926 Highland Avenue (Petitioner's mother's home), the location from which the download had originated, and he said "Yea." He then asked Petitioner if he is aware that child pornography is illegal and he again responded "Yea." (T.86-89, 97, 108, 183, 202-05)

At the end of the conversation, took his laptop which Petitioner consented to allow them to

[1] Numbers preceded by"T" refer to the pages of the trial transcript; "TT" refer to the pages of other court proceedings with dates noted; "S" refer to the pages of the sentencing transcript.

search. They brought the computer to the FBI office and opened it using the password given to them by Petitioner. They then viewed the browser history, recently opened files and programs, user account information, and peer-to-peer applications. Turner admitted that no files containing child pornography were found, but claimed that the titles of recently opened files were associated with child pornography. They also found Ccleaner, described by Turner as an "anti-forensic" program used to erase content. Turner was forced to admit that, because there were no files recovered, he had no way of knowing what search terms had been used to find the files and that users can download multiple files at once and may not know their contents until they are opened, making it possible for a user to search for music or adult pornography and unintentionally download files containing child pornography. (T.99-103, 117-23, 128-29, 136-37, 158-60, 165-71, 214-23, 226-30, 235-37, 261)

Later that day, SA Couch called Petitioner again and asked him to come to the FBI office for a second interview. He agreed and arrived alone the next morning and was interviewed by SA Markovich. (T.239-41, 265)

Also that same day, a search warrant was executed at the home of Petitioner's mother during which digital devices, none of which contained child pornography, were seized. (T.241, 244)

On June 14, 2018, FBI SPECIAL AGENT JAMES MARKOVICH met with Petitioner. After providing his Miranda warnings, SA Markovich asked him questions about his background and the software, websites and mobile apps he used (eMule, 4Chan, OkCupid, Tinder, Bumble). Markovich claimed that, when asked about child pornography, Petitioner said he was "sexually interested" in pornography depicting minor females, and had downloaded approximately 200 videos/images. When asked where the pornography was located on his computer, Petitioner explained that he kept it in the download folder and deleted the files after viewing them, unless he really liked it, in which case he

would keep it a few days before deleting and then empty the trash file. He further stated that he had recently he used eMule to obtain pornographic videos and that the last time was in March 2018 while at his mother's home. SA Markovich asked Petitioner what search terms he used to locate pornography and he responded: "HMM" and "Graciel" because they would take him to videos that depict adult males having sex with minor females, and girls engaging in sexual foreplay. Petitioner also acknowledged that he understood how peer-to-peer websites work, that they are used to share videos and photographs, and that if a file is in a user's download folder, others can download it. (T.341-45, 352-64, 368, 374)

On cross-examination, SA Markovich admitted that he knew Petitioner was taking prescribed medications for depression and anxiety and was being treated by a therapist, but claimed he did not know about the recent mental health arrest. He also acknowledged that Petitioner told him that he had slept two hours the night before which Markovich acknowledged can affect a person's ability to focus. (T.370-73, 380-82)

Pediatrician ELIZABETH MURRAY, D.O., testified that she reviewed the video clip (and still photograph) downloaded by Inv. Turner and provided her opinion that based on her observations of the body shape and breast development, the female was in the pre-puberty stage of sexual development, less than 12 years old. (T.287-88, 304-06, 315)

ROBERT PRICE, a digital forensic analyst at the Monroe County Crime Lab, testified that he viewed the still photograph from the short video clip downloaded by Turner depicting a child masturbating on a bed and determined it was consistent with the "Gracel series." He explained that even when a program like Ccleaner is used, residual data, including file titles, peer-to-peer activity logs, and metadata indicating when a file was accessed remains in the form of "lnk" files, shortcuts

created by Windows when a file is opened, and jump lists and file paths (the specific hard drive location of a file) which tell you which application was used to open a file. According to Price, if an lnk file is present, that indicates that the file was opened and accessed. (T.393-94, 402, 406-09, 455)

On June 13, 2018, Price examined a computer in connection with this investigation. After imaging the hard drive, he analyzed it and determined that the computer was registered to "Richard." Price discovered Ares and uTorrent, peer-to-peer applications, on the computer which he explained have legitimate uses. He also found Ccleaner, a maintenance software application used by billions of people to remove programs and viruses. Price further explained that he did not recover any child pornography, but claimed there was evidence that it had been used to access this material based on the titles of the lnk and jump list files, including 21 file titles that he believed contained child pornography based solely on the file titles. (T.428-32, 439-44, 452-60, 465-91, 498-99, 510-15)

Finally, Price testified that, to a reasonable degree of scientific certainty, he believed the files for which there were lnk files had been received and viewed on the computer. However, he was forced to admit that, despite searches using the FBI's database, no images/videos involving children were found. He further admitted that it is impossible to say what the original files contained and whether they worked because they were not on the computer when examined. All he could say for certain after examining the computer's jump list, was that he believed files with titles associated with child pornography had been opened, causing lnk files to be created. (T.493, 500, 516, 519-20, 523)

B. *The Defense Case*

The defense did not present any witnesses at trial.

C. *The Verdict and Sentencing*

The jury convicted Petitioner of Count One – Distribution of Child Pornography; Count

Two– Receipt or Attempted Receipt of Child Pornography; and Count Three– Possession or Attempted Possession of Child Pornography. As a result, on February 18, 2021, Petitioner was sentenced to 72 months' imprisonment on each count, to be served concurrently, and to be followed by 10 years of post-release supervision (S.52).

II. THE DIRECT APPEAL TO THE SECOND CIRCUIT COURT OF APPEALS

On direct appeal, Petitioner presented 5 issues for review: (1) whether the Government failed to prove his guilt beyond a reasonable doubt; (2) whether the district court abused his discretion in denying defense requests to present experts regarding Petitioner's mental health diagnoses and their effects on his interactions with law enforcement; (3) whether Petitioner was denied his constitutional right to the effective assistance of counsel; (4) whether the district court erred in denying a motion to suppress Petitioner's statements and computer contents; and (5) whether the district court erred in amending the indictment.

In addition, Petitioner submitted a *pro se* supplemental brief in which he presented 24 issues for review, many of which overlapped with those raised by counsel. All of those issues are incorporated here by reference.

While affirming Petitioner's conviction, the Second Circuit held that: (1) the district court did not err in denying a motion to suppress Petitioner's statements to law enforcement; (2) the district court did not err in refusing to suppress the contents of a laptop computer; (3) the district court did not abuse his discretion in denying the defense requests to present expert witnesses; (4) the evidence was sufficient to prove guilt beyond a reasonable doubt; (5) the district court's final instructions did not constructively amend the indictment; and (6) Petitioner was not denied his constitutional right to effective assistance of trial counsel [A1-A11].

Petitioner submitted a *pro se* petition requesting rehearing and rehearing *en banc*. That request was denied by the Second Circuit in an order dated April 1, 2024.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER PETITIONER'S CONVICTION IS SUPPORTED BY SUFFICIENT EVIDENCE TO PROVE GUILT BEYOND A REASONABLE DOUBT

The issue presented to this Court – whether Petitioner's conviction is supported by sufficient evidence to prove his guilt beyond a reasonable doubt – is of national significance because criminal defendants are being convicted of crimes related to child pornography with little to no evidence to prove the charges, just conjecture and speculation, which is hardly sufficient to establish guilt beyond a reasonable doubt. Here, Petitioner was convicted of child pornography charges without a single image of child pornography having been discovered on his computer. The absence of this crucial evidence must give this Court pause as it creates a dangerous precedent, allowing citizens to be prosecuted on child pornography charges with insufficient evidence, only speculation, to support the allegations. As such, this case demonstrates the desperate need for guidance from this Court on the threshold of proof required to sustain child pornography convictions.

On direct appeal, Petitioner requested review of the sufficiency of the evidence supporting his conviction arguing that the Government failed to prove his guilt beyond a reasonable doubt because it did not prove that he: (1) knowingly distributed child pornography [Count One]; (2) knowingly received or attempted to receive child pornography [Count Two]; and (3) knowingly possessed and accessed child pornography with intent to view, or attempted to possess and access child pornography with intent to view [Count Three]. Essentially, this conviction was based on file titles without any accompanying images/videos and coerced statements made by a mentally fragile,

vulnerable young man, all of which should have been suppressed. Because the evidence was insufficient to prove guilt beyond a reasonable doubt, Petitioner's conviction on all counts should have been vacated by the Second Circuit, and the indictment dismissed.

A. *Count One – Distribution of Child Pornography Shipped and Transported in Interstate and Foreign Commerce*

Count One charged that Petitioner knowingly distributed child pornography, as defined in 18 U.S.C. §2256(8), that had been shipped and transported in interstate and foreign commerce using a computer [18 U.S.C. §§2252A(2)(a), 2252A(b)(1)].[2]

As outlined in the district court's charge, to convict Petitioner, the Government needed to prove that: (1) on or about March 13, 2018, he knowingly distributed a 2-second video clip containing child pornography; (2) which he knew depicted an actual minor engaged in sexually explicit conduct; and (3) the video was transported using a means of interstate or foreign commerce. Because the government did not meet its burden to "prove[] all the elements of the offense" [United States v. Kain, 589 F.3d 945, 948 (8th Circuit 2009)], this conviction cannot stand.

This charge is based on the Government's claim that on March 13, 2018, Inv. Turner downloaded a 2-second video clip from a peer-to-peer[3] folder on a computer it claimed belonged to Petitioner. The proof on this charge is insufficient for several reasons. First, there is no evidence that Petitioner knowingly placed this video in a shared peer-to-peer file. As the district court explained: "An act is done knowingly when it is done voluntarily and intentionally and not because of accident,

[2] Although Count One of the indictment included the attempt, it was removed before the charges were submitted to the jury.

[3] Peer-to-peer networks allow computer users to share files directly, not through a central server or website. Metro-Goldwyn-Mayer Studios v. Grokster, 545 U.S. 913 (2005).

mistake or some other innocent reason. The purpose of adding the word 'knowingly' is to ensure that no one will be convicted for an act done because of a mistake or accident or other innocent reason" (T.638-39). And, while it is true that the Second Circuit has held that "knowingly placing child pornography files in a shared folder on a peer-to-peer file-sharing network constitutes distribution... even if no one actually obtains an image from the folder" [United States v. Reingold, 731 F.3d 204, 229 (2d Cir. 2013)], the crux of that statement, and the critical piece of evidence missing from the Government's case, is proof that the child pornography was placed in the folder "knowingly." The Government's evidence cannot satisfy that burden because it failed to establish that Petitioner: (1) accessed this particular file which was not on his computer when it was examined; (2) knew it contained sexually explicit material involving an actual child; and (3) knew it was in his shared folder. Absent this evidence, this charge cannot stand.

The Second Circuit held that there was sufficient evidence to support this charge based on the Government's proof "that [Petitioner] used a peer-to-peer software, eMule, to distribute child pornography to others" because:

> ... in March 2018, an agent downloaded a pornographic video clip – which the agent identified as part of the "Gracel" series based on his experience with other investigations – from an IP address tracked to Petitioner's mother's residence. In his interviews, Petitioner confirmed that he had used eMule and understood how it worked, lived at his mother's residence in March 2018, used the term "Gracel" to search for child pornography, and knew others could download child pornography through peer-to-peer software from his computer.

United States v. Dzionara-Norsen, 21-454-cr *9. (2d Cir. Jan. 18, 2024). The Second Circuit is wrong. No images of child pornography were found on the laptop and the evidence is insufficient to establish that this image was obtained from that computer on the date specified in the indictment.

Because the Government did not have actual evidence to support these charges (i.e. visual depictions[4] on the computer seized from Petitioner), it focused on statements Petitioner made to the agents on June 13 and 14, 2018. The Second Circuit primarily relied on these statements to affirm the conviction as well. However, as discussed *infra*, the statements allegedly made by Petitioner during the interrogations should not have been admitted and, therefore, should not have been the basis to uphold this conviction. The surreptitiously recorded conversation on Petitioner's doorstep on June 13th was made without Miranda and with a great deal of deception, coercion and implied promises that lulled him into a false sense that the "conversation" would not result in criminal charges. The June 14th interrogation, which was the result of the coercion on June 13th, although allegedly conducted after Miranda, was not recorded [T.344] so SA Markovich's testimony is the only proof of what was said. As the investigators admitted they were aware, Petitioner has serious mental health issues including diagnoses for autism, anxiety and major depressive disorder for which he was taking prescribed medication at the time he made these statements (T.357-60, 370). Thus, any statements allegedly made during those interrogations cannot be relied upon and should not have been the basis to uphold this conviction.

The second issue with the Government's evidence is that it failed to prove that the 2-second video meets the definition of child pornography, defined as any depiction of sexually explicit conduct involving a minor, defined as a person under eighteen. 18 U.S.C. §2256(1), (8). That proof threshold cannot be met because the Government failed to establish the identity of the video's

---

[4] As defined by 28 U.S.C. §2256(5), a visual depiction includes "... data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format."

subject or her age at the time it was created. The only "proof" that the female was a minor was the opinion of Dr. Murray who testified, over defense objection, that after reviewing the material, based on her observations of the body shape and breast development, the female depicted was in the pre-puberty stage of sexual development, less than 12 years old. Murray made this determination without examining the subject, and without any information about her family and medical history, including whether she has underlying conditions that could affect pubertal development. (T.287-88, 304-06, 310-15) This testimony was the only "proof" of the female's age, which is actually just an estimate. Neither the Government nor its witnesses could provide information on the identity of the person depicted, her age when it was created, who created it, where it was created, etc. It was based on that unsupported, speculative testimony that Petitioner was convicted.

Finally, the fact that Petitioner had CCleaner and peer-to-peer file-sharing programs on his computer is not evidence of guilt. As the Government's forensic analyst Robert Price confirmed, there have been approximately 2 billion downloads of CCleaner, a maintenance tool used for legitimate purposes including removing programs that slow down computers (T.495-99, 510). This is especially relevant given that, despite the government's intense forensic examination, no child pornography was found, only jump lists and lnk files (T.523).

B. *Count Two – Knowingly Received or Attempted to Receive Child Pornography Shipped and Transported in Interstate and Foreign Commerce*

Count Two charged that between in or about 2016 and on or about June 13, 2018, Petitioner knowingly received or attempted to receive child pornography shipped and transported in interstate and foreign commerce by any means, including a computer [18 U.S.C. §§2252A(2)(a), (b)(1)].

As outlined in the district court's final instructions, to convict on this charge, the Government

needed to prove that: (1) Petitioner knowingly received a visual depiction that contained child pornography; (2) he knew that it was a depiction of an actual minor; and (3) the depiction was transported using any means of interstate or foreign commerce (T.637). This charge was not proven because the Government failed to meet its burden of establishing all of these elements because absolutely no visual depictions were recovered from the laptop seized from Petitioner. Thus, it cannot be said that he "received" or attempted to receive the illegal material.

This count fails right out of the gate because the Government did not prove that Petitioner "knowingly received or attempted to receive a visual depiction" containing child pornography. What it did prove is that there were file titles in a jump list and lnk files (T.407-08). However, no witness testified that he received any images, knowingly or otherwise, and no witness could testify as to what search was used to locate the files the Government claims contained child pornography. See United States v. Dillingham, 320 F. Supp.3d 809, 822 (E.D. Va. 2018) (District court set aside jury's verdict, holding that evidence was insufficient because there was no "evidence from which to draw the reasonable inference that he knew that child pornography would likely be included in whatever files downloaded"). Indeed, the Government's forensic analyst, who claimed that the presence of lnk files indicates that they were opened [T.407-09], admitted that there is no proof of their contents or their functionality because, despite his efforts using 3 forensic programs and the FBI's database of known child pornography, he recovered no images/videos of child pornography. (T.433, 459-60, 501-04, 516-19, 527-28). Even the Government conceded that the file titles are "...not dispositive of their contents" but, rather "are some evidence of what the files contained." Dkt. #135 at p.10. However, "some evidence" is not proof beyond a reasonable doubt. The file titles alone, regardless of their obscene nature, without an accompanying image/video of child pornography, cannot be

deemed proof beyond a reasonable doubt as it is also possible that they contained material unrelated to child pornography. To convict based on file titles alone requires deep speculation as to what the files "probably" contained which hardly meets the proof beyond a reasonable doubt standard.

Thus, although the Government claims that 21 of the recovered file titles contained language associated with child pornography, because the images themselves were not recovered, it cannot be said that Petitioner "received" images, knew of their sexual nature, or that they depicted minors.

C. *Count Three – Knowingly Possessed and Accessed and Attempted to Possess and Access with Intent to View Images of Child Pornography Shipped and Transported in Interstate and Foreign Commerce*

Count Three charged that Petitioner, between 2016 and June 13, 2018, knowingly possessed and accessed and attempted to possess and access with intent to view, material containing child pornography shipped and transported in interstate and foreign commerce [18 U.S.C. §2252A (a)(5)(B), (b)(2)].

As outlined in the court's charge, to convict Petitioner, the Government needed to prove that: (1) he knowingly possessed or attempted to possess or knowingly accessed with intent to view or attempted to access with intent to view a visual depiction of child pornography; (2) he knew of the sexually explicit nature of the material and that it depicted an actual minor engaged in sexually explicit conduct; and (3) the visual depiction was transported using any means of interstate or foreign commerce. (T.646-47) Once again, these elements were not met by the Government because no visual depictions were recovered from the laptop seized from Petitioner.

All of the reasons cited here in support of Petitioner's claims that the evidence was insufficient to prove Counts One and Two, also apply to Count Three. Specifically, the Government failed to prove that Petitioner knowingly possessed a visual depiction of child pornography because

there were no files containing this material on his computer – only titles of files that may/may not have been opened, and may/may not have contained child pornography. A conviction based on proof that a defendant may/may not have engaged in criminal conduct cannot be said to satisfy the lofty reasonable doubt standard of proof. The Government also failed to prove that Petitioner knew of the sexually explicit nature of the material and knew that the visual depiction was of an actual minor. Without that proof, this charge cannot stand.

In addition, in his *pro se* Supplemental Brief, Petitioner argued that the evidence was insufficient to prove the interstate and foreign commerce nexus element. (*Pro Se* Brief, p. 17 and *Pro Se* Addendum, Pt. 5). In response, the Government argued that this element was proven by Inv. Turner's testimony that eMule operates on the internet, a means or facility of interstate commerce, and that Petitioner's laptop was comprised of material made in China, was sufficient. This claim was not addressed by the Second Circuit (as none of the *pro se* claims was addressed by the Court). However, in United States v. Flyer, 633 F.3d 911, 917-18 (9th Cir. 2011), the Ninth Circuit, *citing* United States v. Wright, 625 F.3d 583 (9th Cir. 2010), held that a defendant's mere connection to the internet is insufficient to "satisfy the jurisdictional requirement where there is undisputed evidence that the files in question never crossed state lines." Thus, this element has not been established.

D. *The Government Failed to Prove That Petitioner Attempted to Commit the Charged Crimes*

For the defendant to be guilty of an attempt crime "...he must have taken a substantial step towards that crime, and must also have had the requisite *mens rea.*" Braxton v. United States, 500 U.S. 344, 349 (1991).

During the charge conference, the district court announced that he eliminated the attempt

language from all charges (T.543). Knowing that its case on the substantive charges was thin and relied on speculation, the Government objected and convinced the court to keep the attempt language for Counts Two and Three. In doing so, the judge amended the counts to say that the Government had to prove the substantive crime "or" the attempt, which was contrary to the indictment which charged the substantive and attempt crimes using "and" (T.556). However, just like the Government's lack of proof on the substantive charges, the evidence of the attempt charges was also insufficient to establish guilt because no files containing child pornography were found on the laptop. Like the substantive crimes, the Government's evidence of the attempted crimes consisted primarily of titles of files it claims included child pornography; a 2-second video clip allegedly downloaded using a peer-to-peer website from a computer used by Petitioner depicting a female whose identity and age are unknown; and, coerced statements from a mentally ill young man. However, what the Government failed to present was any evidence that Petitioner intended to commit the object crimes and engaged in conduct amounting to a substantial step toward its commission, without which attempt charges cannot stand.

E. *Conclusion*

Although it is axiomatic that a conviction may be supported by circumstantial evidence, "there are times that it amounts to only reasonable speculation and not to sufficient evidence." Jackson v. Virginia, 443 U.S. 307, 320 (1979). Here, the evidence was barely even circumstantial and does not come close to the caliber of evidence required to prove guilt beyond a reasonable doubt. This is not a case in which there was proof that the defendant sent emails or instant messages, chatted about or actually shared child pornography. It is also not a case in which there is any actual evidence that such contraband was bought, sold, printed, created, filmed or downloaded by

Petitioner. The computer was searched by FBI experts and not 1 file containing child pornography was found. All that was found was file titles that indicate they may/may not have contained child pornography. At its core, this is a case made "...by piling inference upon inference" which this Court has strongly cautioned against. Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943).

Thus, the failure to present sufficient evidence requires that Petitioner's conviction be vacated with an order to enter a judgment of acquittal.

II. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER PETITIONER'S RIGHT TO PRESENT A DEFENSE WAS VIOLATED BY THE DISTRICT COURT'S DENIAL OF HIS REQUESTS TO PRESENT EXPERT WITNESSES REGARDING HIS FRAGILE MENTAL HEALTH AND ITS EFFECTS ON HIS INTERACTIONS WITH LAW ENFORCEMENT

The issue presented to this Court – whether the district court abused his discretion in denying defense requests to call expert witnesses to testify regarding his mental health diagnoses and their potential effects on his interactions with law enforcement – is of national significance because the treatment by law enforcement of suspects suffering with mental health issues as it relates to their 5th and 6th Amendment rights is a serious issue that needs to be addressed by this Court as these at-risk citizens need to be protected from overzealous law enforcement officers and prosecutors who exploit their vulnerabilities for the ultimate goal of obtaining a conviction.

A. *Factual Background*

By letter dated August 18, 2020, defense counsel David Pilato, Esq., provided notice pursuant to Fed.R.Crim.P. 12.2(b) of his intention to call 2 experts to testify about Petitioner's mental health: (1) R. Douglas Alling would testify "...that he has been treating Petitioner for approximately 10 years, that Petitioner is autistic, and... was prescribed medications that could have bearing on guilt;" and (2) Frank J. Salamone, Psy.D, "would state that he diagnosed Petitioner with Autism Spectrum

Disorder. As a psychologist that has specialized in this disorder for 20 years, who is also an advocate of people with autism, he is particularly versed in when autism, child pornography, and the courts collide." Counsel explained that the notice was late because he was Petitioner's third attorney: "[t]his is a developing, difficult defense" and Petitioner's "mental disease or defect has impacted the attorney-client relationship and our ability to prepare for trial." Dkt. #86.

In response, the Government stated that it would not object on timeliness grounds, but demanded more specific statements describing the experts' proposed testimony pursuant to Fed.R.Crim.P. 16(b)(1)(C); and examination of Petitioner by its own expert. Dkt. #87 at p.1.

During an August 31, 2020 conference, counsel asked the court to order a competency examination because Petitioner's mental health had become an impediment to trial preparation. During that proceeding the prosecutor asked the court to order the defense to provide a summary of his experts' proposed testimony. Both requests were granted. (8/31/20: TT.3-8)

On September 9, 2020, the Government emailed counsel and received this response:

> The witnesses are expected to testify in accordance with what is contained in my pretrial submission:
>
> Dr. Alling is expected to testify to treatment of Defendant for over 10 years, medical and mental health diagnoses, prescribed medications, and that mental health issues, autism, medications, alone or in combination, impacted Defendant's state of mind; Frank J. Salamone, Psy.D... expected to testify that Defendant has Autism Spectrum Disorder.
>
> Defense counsel further stated that "I had hoped to withdraw or elaborate more/sooner but this is where I'm at right now."

Dkt. #102 at p.4. That prompted the Government to file an *in limine* motion asking the court to preclude the proposed experts. Dkt. #102 at p.1.

During a September 28, 2020 conference, the Government argued that the defense's proposed

experts should be excluded because counsel had not provided a summary of their proposed testimony. Counsel's response was that "Dr. Salamone would be prepared to testify that Richard is autistic as I have provided notice to the Government. He's the one that did the evaluation and found that he was somebody who has autism spectrum disorder." He added that "Dr. Alling would be prepared to testify that Richard's health, mental health, autism, medications, or any combination thereof could have impacted his ability to knowingly download child pornography, if he had done so." When asked for what purpose the testimony would be offered, counsel explained that he "would like the jury to understand that this is not just somebody who is charged with child pornography and, for lack of a better way of saying it, looks the part. And I hate to say that, but I am concerned about undue prejudice that my client would suffer." The court precluded the experts. (9/28/20: TT.8-16)

On October 16, 2020, Frank Ciardi, Esq., Petitioner's new counsel, filed a second motion to dismiss wherein he asked for permission to call expert Dennis Debbaudt to testify "in relation to the alleged admissions at issue at the pretrial hearing." Dkt. #133 at p. 12. Two days later, the prosecutor informed the district court that he had spoken with Debbaudt who said he had never testified as an expert, had spoken with Petitioner once, and had not examined his medical records.(11/13/20: TT.4).

In response, defense counsel argued that it is for the court, not the Government, to decide whether a proposed witness has the credentials to be declared an expert, and noted that Debbaudt has "done training for FBI agents, he's written books about autism, he has expertise in autism," and explained that Debbaudt intended to testify about the effects autism may have on law enforcement interactions. (11/13/20: TT.9-10) The court then denied the defense request to call Debbaudt:

> I see no link established here between -- this alleged expert is really questionable whether or not he's an expert at all. It sounds very speculative whatsoever. Clearly there's no link between that and any

> autism defense that could be established here regarding voluntariness of statements or anything else.

(11/13/20: TT.13).

In affirming Petitioner's conviction, the Second Circuit held that

> The district court did not abuse its discretion by precluding this expert testimony. With respect to Dr. Alling, Petitioner failed to comply with the disclosure requirements of Rule 16(b)(1)(C): he submitted Dr. Alling's curriculum vitae and a brief summary of the proposed testimony, but failed to provide a full statement of Dr. Alling's opinions and reasons for them. As for Salamone, his proposed testimony – that "[i]ndividuals with Asperger's syndrome... [are] especially vulnerable to committing this sort of offense," ... is irrelevant because it has no tendency to make the existence of any element of the relevant offenses less likely. Finally, Debbaudt did not appear to be qualified as an expert on autism, having limited educational or practical experience supporting his purported expertise.

United States v. Dzionara-Norsen, 21-454 *8.

B. *Certiorari Should Be Granted to Review this Issue*

The right to call witnesses to present a meaningful defense is a constitutional right guaranteed by both the Compulsory Process Clause of the 6th Amendment and the Due Process Clause of the 14th Amendment. Taylor v. Illinois, 484 U.S. 400, 408-09 (1988); California v. Trombetta, 467 U.S. 479, 486 n. 6 (1984). However, the right to call witnesses has limits. Although the Rules of Evidence provide a liberal standard for admissibility of expert testimony, such testimony "is limited by the requirements of relevancy and by the trial court's traditional discretion to prevent prejudicial or confusing testimony." Agard v. Portuondo, 117 F.3d 696, 704 (2d Cir. 1997).

In United States v. Agurs, 427 U.S. 97, 112 (1976), this Court held that the determination of whether a limitation on the right to present a witness rises to the level of a violation of the right

to present a defense depends upon whether the omitted evidence (evaluated in the context of the entire record) creates a reasonable doubt that did not otherwise exist. That test is easily met here.

1. *The Proposed Expert Testimony Was Relevant*

The proposed expert testimony was clearly relevant to Petitioner's defense. The Second Circuit's decision to affirm and the Government's case were primarily based on Petitioner's involuntary statements and the evidence purportedly obtained from a computer. Counsel made it clear that the crux of the defense was that Petitioner agreed to anything the agents asked because, as counsel argued in summation, he is a "weak, meager, mentally ill" young man fearful of going to jail, where he had recently been for a mental health arrest (T.585-86). However, without the testimony of mental health experts who could explain the diagnoses and their potential effects on his interactions with law enforcement, the defense was left crippled and incomplete.

2. *The Proposed Expert Testimony Was Admissible under Fed.R.Evid.702*

In addition to being relevant, the proposed expert testimony was admissible under Fed. R.Evid. 702 as it would have "...assist[ed] the trier of fact to understand the evidence or to determine a fact in issue." As described *supra*, 2 requests were made by 2 different attorneys. Both were denied due to a lack of information provided by counsel, leaving the defense unable to support its argument which was, as explained by Debbaudt, that:

> Persons with [autism] may have difficulty understanding the nuance of verbal and nonverbal communications and social interaction. They can become perfect targets for victimization such as verbal/physical intimidation and abuse, financial exploitation, sexual abuse and manipulative efforts to engage them in criminal activity…Techniques that utilize trickery and deceit can confuse the concrete and literal thinking person who has [autism] leading them to make misleading statements or false confession. The friendly interrogator can also overly influence them. Isolated and in a never ending search for

> friends, the person can be easily led into saying whatever his new friend wants to hear.

Dkt. #133 at p.12. Debbaudt's detailed outline of his proposed testimony put the Government on notice of exactly what he would say and should have satisfied the defense's burden. It is precisely what the defense claimed from the inception of this case – that Petitioner's statements and consent to search the computer were involuntary because his fragile mental health made him significantly more vulnerable to the agents' manipulative and coercive tactics, and made it more likely that he would provide a false confession. Thus, had the proposed experts been permitted to testify, a reasonable doubt would have been created and the outcome of this case would have been different.

However, instead of giving the defense the opportunity to present this defense at trial, the court precluded Debbaudt's testimony based on the Government's arguments that he had: (1)never before been declared an expert (but had testified in court once before); (2)not reviewed the medical records and police reports; (3)not made plans to travel to New York to testify; and (4)only spoken once with Petitioner. During its argument which convinced the district court to preclude Debbaudt's testimony, the prosecutor, presumably not a medical professional, also noted his belief that Petitioner is not autistic and claimed counsel's request was a ruse to delay trial. (11/30/20 TT.5-7, 12)

The district court's explanation as to why he was precluding the defense's experts makes it clear that he ignored counsel's explanation regarding the proffering of information (11/30/20: TT.8). The court explained he was not convinced that Debbaudt was "an expert" or that there is a "link between that and any autism defense that could be established here regarding voluntariness of statements or anything else" (11/30/20 TT.13). In response, counsel explained that Debbaudt "would place his credentials before this Court" and the court could determine if he's qualified as an expert.

He added that Debbaudt is qualified because "he's done training for FBI agents, he's written books about autism, he has expertise in autism" and, if called to testify, he would explain that

> a person who has autism would basically make voluntary statements in order to appease a law enforcement person; a person with autism would be more truthful than a normal -- at a normal interrogation by someone else. So I guess our testimony specifically would be that it is more likely that Mr. Dzionara-Norsen, upon being confronted with the FBI, having autism would disclose or tell FBI agents what they wanted to hear. That is the basis for ... for the testimony. That is what Mr. Debbaudt has written about, that is what he has presented as a key note speaker at the FBI national institute for classes.

(11/30/20 TT.9-10). That testimony would have gone a long way to creating a reasonable doubt as it would have established Petitioner's claim that his interactions with the agents were greatly influenced by his autism and that anything he said/did should have been deemed involuntary.

C. *Conclusion*

In sum, the testimony of any/all of these experts would have had an immense impact on the jury's verdict because they would have explained why Petitioner was more inclined than the average person to say what he believed the police wanted him to say, especially given their coercive tactics as discussed *infra*. The experts also would have explained the potential impact the prescribed medications Petitioner was taking, under appropriate medical supervision, could have had on those interactions. Thus, any argument that the expert testimony would only have explained why he told "the truth" when interrogated is false. Finally, the Government's claim that "any notion that Petitioner only told law enforcement what they wanted to hear is belied by the computer forensic examination" [Resp. Br. at p. 44] is simply untrue because, it bears repeating, there were no pictures or videos that would fall into the child pornography category found on the laptop. Thus, the district court's erroneous preclusion of the proposed experts was an abuse of discretion that violated

Petitioner's constitutional right to present a defense [U.S. Const. Amend. VI], and irreparably harmed the defense, requiring that this conviction be vacated and a new trial ordered.

III. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS HIS STATEMENTS AND COMPUTER CONTENTS

The third issue upon which Petitioner seeks a writ of certiorari is to evaluate whether the district court erred in denying the defense's motion to suppress his statements and computer contents. This issue is significant and deserving of review because the courts need instruction as to how they should evaluate the voluntariness of statements and consent to search when the defendant is mentally ill. The fact that law enforcement officers took advantage of a mentally vulnerable young man by using coercive, manipulative tactics must be an issue of great public importance.

A. *Certiorari Should Be Granted to Review this Issue*

Custodial statements are only admissible if the Government establishes by a preponderance of the evidence that the defendant knowingly, intelligently, and voluntarily waived his constitutional right against self-incrimination. Colorado v. Connelly, 479 U.S. 157, 168 (1986).

Petitioner allegedly made statements to law enforcement on 2 consecutive days.[5] Since the Government failed to meet its burden to establish that these statements were made and the consent to search the computer was given voluntarily, the statements and contents of the computer should have been suppressed.

1. *The June 13, 2018 Statements*

By motion dated October 14, 2019, the defense requested suppression of statements made

[5] In an affirmation included with a post-hearing submission, Petitioner affirmed: "I deny many of the statements I am alleged to have made." Dkt. #59-2 at p.1 ¶11.

during the June 13th interrogation on the ground that they were obtained without defendant having been advised of his Miranda rights. Dkt. #47.

During a pre-trial evidentiary hearing held by a magistrate, the Government elicited testimony from SA Couch that on June 13th, he and Inv. Turner went to Petitioner's home to interview him about a 2-second video clip Turner had downloaded. Before going, Couch had learned that Petitioner had been subjected to a mental health arrest in February 2018. Couch claimed that he was unable to recall whether he was aware of Petitioner's specific mental health diagnoses, including whether he was autistic and suffered with suicidal ideation, anxiety and depression. (12/18/19: TT.5-6, 37-40, 58) According to Couch, they knocked on the door, Petitioner came out and, with the agents flanked on either side and his back to the closed door, Petitioner was interrogated for 20 minutes. The encounter, recorded with a concealed digital recorder, was replete with lies and coercion designed to lull Petitioner into a false sense of comfort. For instance, Couch told Petitioner that he normally deals with more "important" matters, but wanted to speak with him regarding child pornography to ensure that he was not someone the FBI needed to be "concerned about" or "target" and to make sure that he was receiving counseling. (12/18/19: TT.5-6, 9-13, 35-36, 49-52)

Couch testified that during the interrogation, he showed Petitioner a screenshot of a video clip depicting a female exposing her genitals that he claimed was downloaded from an IP address associated with a router at Petitioner's mother's home (12/18/19: TT.18-19, 31). Petitioner admitted that he used peer-to-peer programs at that time, and that the video associated with the screenshot was the "last time" he downloaded that type of content. Petitioner agreed to show the agents his laptop, retrieved it from his apartment and turned it over to Couch and consented to a search of it. Couch then told him that, because of the child pornography allegations, they needed to take it to "make sure

it's clear," and assured him that if it was clear, they would return it. (12/18/19: TT.20, 52-53)

On cross-examination, Couch admitted that he intentionally "minimize[d]" the seriousness of the encounter and gave Petitioner the false impression that the FBI did not have significant information about him and that he was not the target of their investigation– all lies. He even went so far as to advise Petitioner to speak with his therapist, but warned him not to admit that he downloaded child pornography because the therapist would be required to report it to police. (12/18/19: TT.51-52)

By decision dated April 17, 2020, the court denied suppression, holding that: "Petitioner was not in custody, and thus not entitled to be advised of his Miranda warnings, during the June 13, 2018 interview." She further held that, based on the totality of the circumstances, the statements were voluntary because: (1) the agents approached in plain clothes without displaying weapons; (2) they informed Petitioner they wanted to speak with him about child pornography; (3) he agreed to speak with them; (4) he was not handcuffed, searched, or threatened; (5) the encounter was brief; (6) he was calm and coherent; (7) twice he entered his apartment and voluntarily returned; and (8) he was not arrested after the interrogation. Dkt. #68 at pp.15-16.

There are 2 reasons why Petitioner's June 13th statements should have been suppressed: (1) they were involuntary as the encounter was the equivalent of a custodial interrogation, thus requiring Miranda (2) the totality of the circumstances reveals that the statements were the product of the agents' coercive, deceptive tactics designed to lull a fragile, young, mentality ill man into confessing.

a. The June 13th Statements Were Made During What Amounted to a Custodial Interrogation Requiring Miranda

In accordance with Miranda v. Arizona, 384 U.S. 436, 467 (1966), to protect those not

represented by counsel, a person subjected to custodial interrogation by government agents must receive preliminary warnings regarding their constitutional rights. The Miranda Court defined a "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444. And, this Court has explained that to determine whether a defendant is in custody for Miranda purposes, 2 critical questions must be considered:

> [F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest (internal citations omitted).

Thompson v. Keohane, 516 U.S. 99, 112 (1995) *citing* California v. Beheler, 463 U.S. 1121, 1125 (1983); United States v. Santillan, 902 F.3d 49, 60 (2d Cir. 2018). Considerations relevant to that inquiry may include: "whether the suspect [was] told that he or she is free to leave, the location and atmosphere of the interrogation, the language and tone used by the law enforcement officers, whether the subject [was] searched or frisked, and the length of the interrogation." Id. Petitioner can easily satisfy this test.

If placed in the circumstances in which Petitioner found himself on June 13th, a reasonable person certainly would not have felt free to leave. Id. Armed agents arrived at his door without notice, lured him outside with bogus concern for his well-being and, as they flanked him on either side with his back to the closed door, interrogated him for 20 minutes with the admitted goal of obtaining a confession (12/18/19: TT.34; T.261). And, despite the fact that he was obviously their

target, they deliberately did not Mirandize him and instead, knowing that his mental health was fragile, lulled him into feeling he could speak freely with them.

While it is true that Petitioner was not restrained or told he could not leave, given the above-described circumstances and the fact that he suffers with serious mental disabilities, some of which Couch admitted that he was aware [12/18/19: TT.38-39], it is understandable that he did not know he was free to leave or refuse to speak with the agents. Rather than ensure that he understood what was happening by providing Miranda warnings, the agents preyed upon this fragile, mentally ill young man and used his vulnerabilities to obtain evidence, the importance of which cannot be overstated as it is that evidence (Petitioner's statements and the contents of the computer) that the Second Circuit relied upon to uphold this conviction. Indeed, there is no question that Petitioner believed he was not free to leave because, in an affirmation included with a post-hearing submission, he affirmed that "On June 13, 2018, when speaking to law enforcement, I was not advised of my Constitutional rights and I did not feel as though I was free to leave." Dkt. #59-2 at p.1 ¶3.

The record also reveals that the 2nd prong of this analysis also be met because, in addition to not feeling free to leave, the agent's actions created a scenario akin to that associated with a formal arrest. In making its determination as to whether Miranda was required because this was a custodial interrogation, the court should have considered that during the 20-minute interrogation (despite the agents' assurance that it would last only 5), Petitioner had his back to the closed door with armed agents on either side; and, as discussed in greater detail *infra*, they repeatedly lied and downplayed the seriousness of the situation which, given the limitations caused by his mental health issues, rendered him unable to recognize that he was being interrogated and was saying and doing things that exposed him to serious legal consequences (12/18/19: TT.9-10, 35). Thus, it is clear that this

mentally ill young man would not have felt free to leave.

In sum, a reasonable person in Petitioner's situation would not have understood that he was free to leave and was not required to answer the agents' questions, thus rendering the incident a custodial interrogation. Accordingly, without having been Mirandized, his statements should have been suppressed. See Yarborough v. Alvarado, 541 U.S. 652, 661 (2004).

b. The June 13th Statements Were Coerced

A defendant's statement to police is only voluntary if it is "the product of his free choice." Miranda, 384 U.S. at 458. As instructed by the district court, that free choice is violated and "a statement is not voluntary if it is obtained by means of any other improper conduct or undue pressure which impairs the defendant's physical or mental condition to the extent of undermining his ability to make a choice of whether or not to make a statement" (T.620). As this Court has held, when it comes to police interrogation tactics, "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned" [Miller v. Fenton, 474 U.S. 104, 109 (1985)], and the product of those techniques, involuntary statements to police, must be suppressed because they violate citizens' rights not to be forced to incriminate themselves. U.S. Const. Amend. V.

In determining a statement's voluntariness, a court must consider the totality of the circumstances to determine whether the agents' conduct "was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined – a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth." Rogers v. Richmond, 365 U.S. 534, 544(1961). In making this determination, the court must assess the: (1) characteristics of the accused; (2) interrogation conditions; and (3) conduct of the government agents. Schneckloth v.

Bustamonte, 412 U.S. 218, 226 (1973); Mincey v. Arizona, 437 U.S. 385, 398 (1978).

The voluntariness determination's 1st prong, requiring evaluation of the accused's personal characteristics, must include an assessment of his mental vulnerability. Connelly, 479 U.S. at 164. To ignore those issues would allow government agents to exploit our nation's most vulnerable citizens. Here, the court was presented with statements made by a fragile young man who (1) has been diagnosed with the neuro-developmental disability of autism; (2) suffers with anxiety and depression for which he takes prescribed medications; (3) was under the care of a therapist; (4) had expressed suicidal ideation; and, (5) just a few weeks earlier, had been subjected to a mental hygiene arrest following an incident at his mother's home caused by his mental illness. Dkt. #59-2 at p.1 ¶¶4-7. A summary of the seriousness of his conditions was included in the Pre-Sentence Report ["PSR"] which outlined the findings of the August 2020 competency report ordered by the district court:

> ... diagnostically Dzionara-Norsen presents with symptoms consistent with Major Depressive Disorder, Recurrent, with anxious features. Additionally, Dzionara-Norsen 'presents with probable Autism Spectrum Disorder. Formal testing for this diagnosis was not completed as part of this evaluation; however, he was recently diagnosed with this disorder by Dr. Salamone who reportedly completed psychological testing to confirm the diagnosis. According to Dr. Salamone, Mr. Dzionara-Norsen has a history of Autism spectrum Disorder based on 'lack of social reciprocity, lack of friendships, limited unique interests, and cognitive rigidity.' Mr. Dzionara-Norsen's primary physician, Dr. Alling, has also raised concerns about an Autism Spectrum Disorder diagnosis.'

PSR at §97. All of those factors clearly affected Petitioner's interactions with the agents and the district court should have recognized that and precluded them.

The simple truth is that people with neuro-developmental disabilities such as autism are more vulnerable to police tactics such as coercive and deceptive techniques, and, thus, are particularly

susceptible to making false statements. Com.of Northern Mariana Islands v. Mendiola, 976 F.2d 475, 485 (9th Cir. 1992) ("Consideration of [defendant's] reduced mental capacity is critical because it rendered him more susceptible to subtle forms of coercion"); Smith v. Duckworth, 910 F.2d 1492 (7th Cir. 1990). This is clearly revealed by Petitioner's simplistic responses to the agents' questions. Indeed, Petitioner affirmed that he believed his "mental health issues and medications impacted my ability to make decisions that day, and the following day" and that "I felt I had no choice and, in my opinion, my diminished capacity, because of mental health and medications, added to my inability to make any voluntary decisions." Dkt. #59-2 at p.1 ¶¶7, 14.

The 2nd prong of the evaluation process requires assessment of the interrogation conditions. As discussed *supra*, 2 armed agents arrived unannounced at Petitioner's door, lured him outside with phony concern for his well-being and, and with his back to the door and the agents flanked on either side of him, interrogated him for 20 minutes with the admitted goal of obtaining evidence (T.261). While it is true that he was not restrained, it is easy to understand why anyone, and especially someone with Petitioner's mental health issues, would not feel free to leave.

The final prong of this test – examination of the agents' conduct – also clearly weighed in favor of a finding of coercion. From the outset, the agents lied and made false and implied promises to Petitioner. They lied when they said he was not a target of their investigation. They lied when they said they wanted to "talk to [him] for a few minutes just to make sure [he was] not somebody [they] need to be concerned about" or someone that the FBI needs to "target" (12/18/19: TT.49). They also implicitly promised that he would not be prosecuted. For instance, when Petitioner asked the agents "This doesn't go on my record does it?" SA Couch responded "...uh no as far as anything like a criminal record." Dkt. #47-1 at p. 7. They even stooped to using their knowledge of his mental health

situation, saying that they "...want to make sure you are going to get some counseling on your own for this stuff," but then warned him not to tell his therapist about his alleged child pornography use. These blatant lies were part of the agents' deliberate effort to mislead a suspect into believing they were there because they were concerned about him and hide the fact that their true purpose was to build a criminal case against this mentally ill young man. In reality, they were not there to investigate whether a crime was being committed, but rather to prove that Petitioner was committing the crime. They were simply trying to make their case by lying, tricking and pressuring Petitioner into confessing which drew the magistrate's attention during the suppression hearing:

> MAGISTRATE: ...[T]he statement that you made about using the term 'target' ... what did you mean?
>
> WITNESS: ...[W]e wanted to make sure that he wasn't somebody that we needed to be concerned about or that the FBI would want to target...
>
> MAGISTRATE: Okay. So... is the transcript accurate?
>
> WITNESS: Yes...
>
> MAGISTRATE: Okay. But it does not accurately reflect what you meant by the statement; is that what you're saying?
>
> WITNESS: I believe it does. It says, uh, we just want to make sure, like I said, you're not somebody that we need to be concerned about or as the FBI or target or anything like that.
>
> MAGISTRATE: What does that mean, as the FBI or target or anything like that? You're the FBI, you know if he's a target or not, correct?
>
> WITNESS: Yes.
>
> MAGISTRATE: And you knew when you visited his apartment he was a target?

> WITNESS: Yes.
>
> MAGISTRATE: So what did you mean by you wanted to make sure whether he was a target? You knew the answer to that question. He doesn't know the answer to that question, correct?
>
> WITNESS: Correct.
>
> MAGISTRATE: So what does that statement mean?
>
> WITNESS: ... I'm trying to minimize to Richard the knowledge that the FBI has about him.

(12/18/19: TT.50-52). In her report and recommendation, the magistrate noted that "Unquestionably, Couch attempted to downplay the significance of the interview by, among other things, suggesting that Petitioner was not a target, that the agents' real concern was to ensure that Petitioner receive counseling, and that the matter was not really 'important'" Dkt. #68 at p.17. However, despite her concern, she held that "[T]hose statements, even in combination with his allegations of mental health issues, are not sufficiently coercive as to render Petitioner's subsequent waiver or statements involuntary" and added that her "...finding that Petitioner's will was not overborne by the agents' minimization of the importance of the interview is underscored by the fact that Couch's statements regarding the purpose of the interview were vague and the interview as a whole reasonably suggested the possibility that Petitioner might face criminal liability." Id. at 18. And, although the Second Circuit acknowledged that "Couch made some misleading statements downplaying the significance and purpose of the interview," the court agreed with the magistrate, holding that "we cannot say that the district court erred in concluding that Petitioner's will was not overborne by Couch's misleading statements." United States v. Dzionara-Norsen, 21-454 *4-5.

Although this type of trickery by law enforcement is deplorable, this Court has held that

"examination of the confessant's state of mind can never conclude the due process inquiry" but the defendant's state of mind is "surely relevant to an individual's susceptibility to police coercion" and is a "significant factor in the 'voluntariness' calculus," especially in this environment in which we find that "interrogators have turned to more subtle forms of psychological persuasion." Connelly, 479 U.S. at 164, 167; Hutto v. Ross, 429 U.S. 28, 30 (1970) (Noting that involuntary confession is one "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence"). In other words, a defendant's state of mind, in and of itself, cannot result in a finding of involuntariness but, when a suspect's fragile mental health is exploited by agents to gain his confidence and convince him to speak freely, his mental state must be considered highly relevant to a voluntariness inquiry. Such inquiry here reveals that the agents were aware of Petitioner's mental health which makes him more vulnerable to their coercive tactics and, rather than proceeding cautiously, they used his issues to their advantage and lied to convince him that he was not their target and that they were only there to ensure that he was getting help. That is precisely the type of conduct from which the courts need to protect citizens.

In sum, the district court should have found that Petitioner's diagnoses of autism, anxiety, and major depressive disorder made him more susceptible to the agents' coercive tactics, and found the statements allegedly made by Petitioner on June 13th were involuntary and precluded them.

2. *The Seizure of and Consent to Search the Computer*

The same reasons cited for the suppression of the June 13th statements should also have resulted in the suppression of the contents of the computer seized that same day. Given his serious mental health conditions and the coercion to which he was subjected, Petitioner's decision to turn over a laptop and "consent" to its search cannot be said to have been knowing, voluntary and

intelligent. Schneckloth, 412 U.S. at 229 ("In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents"). The agents deliberately misled Petitioner into believing he was not a target and convinced him they were there to speak with him out of concern for his well-being. They asked to see the computer so they "can feel comfortable that you're staying straight with us," when, in truth, they were gathering evidence. They succeeded in their mission but, under the circumstances, any evidence obtained from the computer should have been suppressed and the failure to do so was an abuse of discretion.

3. *The June 14, 2018 Statements*

SA Couch testified at the pre-trial hearing that, after the interrogation on June 13th, he called Petitioner and asked if he would come to the FBI office the next day to take a polygraph examination (12/18/19: TT.25-26). Petitioner agreed and met SA Markovich who placed him in a windowless interview room which required a key to enter. Markovich claimed that before he administered the polygraph, he informed Petitioner that he was not under arrest, was free to leave, and read his Miranda warnings. Markovich then conducted a pre-test interview, administered the polygraph, and did a post-test interview, which took about 3 hours. Although it took place at the FBI's offices, the encounter was shockingly, according to the agents, not recorded. (12/18/19: TT.27, 66-75, 91)

According to Markovich, during the pre-test interview, Petitioner mentioned that he takes prescription medications for anxiety and depression (the names of which Markovich could not recall) and was receiving treatment for physical ailments related to those conditions. He claimed he could not recall if Petitioner mentioned that he was autistic. Markovich also claimed that Petitioner made statements related to his involvement with child pornography. (12/18/19: TT.79-81, 85-88)

In her report and recommendation, the magistrate recommended denial of Petitioner's motion to suppress the June 14th statements, holding that: "Having concluded that Petitioner's rights were not violated on June 13, 2018, I find that his statements made on June 14, 2018 were not tainted by any of the events of the previous day." Dkt. #68 at p.31.

As explained *supra*, the June 13th statements as well as the evidence found on the computer seized from Petitioner should have been suppressed as they were involuntary because they were the product of a custodial interrogation without Miranda warnings and the result of coercive tactics. Had the magistrate recommended suppression of the June 13th evidence as she should have, she then would have had no choice but to also recommend suppression of the June 14th statements as they were the tainted fruit of the June 13th interrogation. The statements allegedly made by Petitioner on June 14th must be examined through the lens of the coercion to which he was subjected the day before because it is that coercion that convinced him to go without an attorney to the FBI offices the next day for a polygraph examination. Although we cannot know if those coercive tactics were also employed on June 14th because the Government claims there was no recording of the interaction, even if they were not used on June 14th, the June 13th coercion is what convinced Petitioner, an obviously fragile young man, to speak with the agents on June 13th, turn over a laptop without a search warrant, all of which led to him going to the FBI offices first thing the next morning without an attorney, waiving his Miranda rights, and submitting to a polygraph examination. Thus, the events of these dates are inextricably interwoven, making it so that any coercive tactics used on June 13th must be a factor in determining the admissibility of statements allegedly made on June 14th.

Moreover, even if the June 13th statements and evidence discovered on the computer had not been suppressed, the June 14th statements still should have been suppressed as Petitioner's mental

health issues seriously call into question his ability to waive his rights under the conditions to which he was subjected and thus, the voluntariness of his June 14th statements as well. SA Markovich testified at the hearing that Petitioner informed him that he was under a therapist's care and taking medications for depression and anxiety. Although Markovich claimed he could not recall whether he was aware of his autism diagnosis, he did admit that he knew Petitioner was suffering with anxiety and depression severe enough to cause physical ailments. (12/18/19: TT.85-89)

In sum, the district court abused his discretion in denying the defense request to suppress statements made by Petitioner on June 13 and 14, 2018 as well as the contents of the computer. It is difficult to believe that courts would sanction this type of behavior when it comes to encounters with our nation's most vulnerable, mentally ill citizens. It cannot be the case that this Court approves of law enforcement agents using vulnerabilities to exploit mental health issues to achieve their goal of obtaining evidence to be used in criminal prosecutions. Our criminal justice system has strict rules to deter such conduct and the punishment for their violation, suppression of evidence, must be enforced. And, although a defendant's state of mind is not the only factor to be considered in assessing the voluntariness of statements, this Court has recognized that it is a "significant factor in the 'voluntariness' calculus." Connelly, 479 U.S. at 164, 167. As a result, this conviction should be vacated and a new trial ordered without this evidence.

IV. A WRIT OF CERTIORARI IS REQUESTED TO REVIEW THE DISTRICT COURT'S ERROR IN AMENDING COUNTS TWO AND THREE IN HIS CHARGE

Petitioner contends that the district court erred in amending Counts Two and Three of the indictment which altered the proof required to prove these crimes by substituting the word "or" for "and" in his final instructions and on the verdict sheet. This issue is of national significance as the

courts must be reminded that they are required to try defendants on the indictment voted by the grand jury and may not instruct the petit jury in a manner that results in the amendment of that indictment.

A. *Procedural Background*

The indictment stated that Petitioner: "did knowingly distribute, and attempt to distribute, child pornography [Count One]; "did knowingly receive, and attempt to receive, child pornography" [Count Two]; and "did knowingly possess and access with intent to view, and attempt to possess and access with intent to view, material... that contained images of child pornography" [Count Three]. The same language was used when he was arraigned on August 13, 2019 (8/13/19: TT.2-4).

However, at trial, there was a shift from "and" to "or" in Counts Two and Three (no attempt was submitted in Count One), resulting in a shift in the proof the Government needed to convict. In his opening, the prosecutor told the jury to ask itself: "... at any point between 2016 and June 13th, 2018... did he receive or attempt to receive child pornography? ... [A]t any point between 2016 and June 13th, 2018, did he knowingly possess or attempt to possess or even access with intent to view child pornography?" (T.33-34). And, at the outset of the charge conference, the court announced that based on the Government's evidence at trial, he would not charge the attempt versions of the crimes: "I took the attempt out of all the counts... I think it's clear that they're not trying to prove attempt here; you're trying to prove the substantive crimes in each case" (T.543). The Government objected, arguing: "For each charge, Judge, I intentionally and specifically indicted using the language that's contained in the statute which says that a person is guilty of each subdivision if they either complete the conduct or attempt to complete the conduct. So either distribute or attempt to distribute, receive or attempt to receive, or possess or attempt to possess, or access with intent to view or attempt to access with intent to view. The language is right in the statutes..." (T.550). The district court

retreated and agreed to "re-add the attempt charges to Counts 2 and 3" (T.556).

In the judge's final charge, switched back and forth, using both "and" and "or" in outlining the charges. For instance, the court stated that:

> • "Count 2 is receipt and attempted receipt of child pornography... [it] reads: Between in or about 2016 and on or about June 13, 2018... the defendant... did knowingly receive and attempt to receive child pornography... In order to prove the defendant... guilty of receiving child pornography or attempting to receive child pornography the Government must prove each of the following elements..." (T.635-36)
> • "The first element the Government must prove beyond a reasonable doubt is that the defendant... knowingly received or attempted to receive a visual depiction..." (T.638).
> • "...[I]f you find the Government has proven each of the following elements beyond a reasonable doubt... [that] the defendant... knowingly received or attempted to receive a visual depiction..." (T.644).
> • "Count 3 charges possession and attempted possession of child pornography... [It] reads: Between in or about 2016 and on or about June 13th, 2018... the defendant... did knowingly possess and access with intent to view and attempt to possess and access with intent to view... images of child pornography" (T.645).
> • "In order to find the defendant... guilty of possessing child pornography or attempting to possess child pornography, the Government must prove beyond a reasonable doubt the following elements..." (T.646).

The court's verdict sheet used "or" between the substantive and attempt charges for Counts Three and Four. Dkt. #144. And, at sentencing, the court, while outlining the crimes of conviction, reverted back to the indictment language using "and," stating:

> • "Counts 1 and 2, the distribution, attempted distribution of child pornography, and the receipt and attempted receipt of child pornography..." (S.10).
> • "The defendant... was convicted after a jury trial of distribution and attempted distribution of child pornography, receipt and attempted receipt of child pornography, and possession and attempted possession of child pornography" (S.39).
> • "The evidence showed that between 2016 and June of 2018 the

> defendant received and attempted to receive child pornography, knowingly possessed and attempted to possess child pornography, and distributed and attempted to distribute child pornography" (S.41).

On direct appeal, the Second Circuit held that "The district court's instructions on both counts were entirely correct. The indictment here did not allege that Petitioner necessarily committed both the substantive offense and the attempted offense; rather, by using the conjunctive in each count, it merely set forth the alternate means of committing the same crime under the statute. The instruction in the disjunctive did not constructively amend the indictment (internal citations omitted)." United States v. Dzionara-Norsen, 21-454 *10-11.

B. *Certiorari Should Be Granted to Review this Issue*

The Constitution's Grand Jury Clause states: "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless upon a presentment or indictment of a Grand Jury" [U.S. Const. Amend. V], the purpose of which "...is to give the defendant notice of the charge so that he can defend or plead his case adequately." United States v. Neill, 166 F.3d 943, 947 (9th Cir.1999). And,"an indictment may not be amended except by re-submission to the grand jury, unless the change is merely a matter of form." Russell v. United States, 369 U.S. 749, 770 (1962). The amendments at issue herein are not simply "a matter of form."

The Government intentionally chose this indictment's language charging the substantive and attempt crimes using the conjunction "and." Indeed, while convincing the court to keep the attempt charges, the prosecutor explained that he deliberately worded the indictment to mirror the statute's language, explaining that he had: "intentionally and specifically indicted using the language that's contained in the statute which says that a person is guilty of each subdivision if they either complete

the conduct or attempt to complete the conduct."(T.550).[6] However, that language was changed for Counts Two and Three when the court substituted "or" for "and." Although both are coordinating conjunctions, they are not interchangeable. "And" indicates a dependent relationship between the clauses on either side of it. Whereas, "or" indicates an independent relationship or separation of the clauses. Thus, what the district court did was not a correction of a typographical error. It was a material change that resulted in an unconstitutional amendment of the indictment because it changed the threshold of proof needed to convict, a change that can only be made by a grand jury. By switching "and" to "or," the court made it substantially easier for the Government to convict. When the word "and" was used, the Government was required to prove both the substantive and attempt crimes. When "or" was substituted, the Government only had to prove the attempt which requires a significantly lower threshold of proof. And because the verdict sheet was written using "or," we have no way to know the jurors' finding as to whether the substantive or attempt crimes were proven. This was a material amendment which, given the outcome, cannot be deemed harmless.

As a result, this conviction must be vacated and a new trial ordered.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this petition for a Writ of Certiorari be granted.

Respectfully Submitted,

_____
JILLIAN S. HARRINGTON, ESQ.

[6] The Government's argument is incorrect. The word "attempt" does not even appear in 18 U.S.C. §2252A until the statute's sentencing portion: "Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years."

PETITIONER'S APPENDIX

21-454-cr
United States v. Dzionara-Norsen

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of January, two thousand twenty-four.

Present:

AMALYA L. KEARSE,
GERARD E. LYNCH,
WILLIAM J. NARDINI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 21-454-cr

RICHARD DZIONARA-NORSEN,

Defendant-Appellant.

For Appellee: KYLE P. ROSSI (Tiffany H. Lee, *on the brief*), Assistant United States Attorneys, *for* Trini E. Ross, United States Attorney for the Western District of New York, Buffalo, NY

For Defendant-Appellant: JILLIAN S. HARRINGTON, Monroe Township, NJ

Appeal from a judgment of the United States District Court for the Western District of New York (Frank P. Geraci, Jr., *District Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Richard Dzionara-Norsen appeals from a February 23, 2021, judgment of the United States District Court for the Western District of New York (Frank P. Geraci, Jr., *District Judge*), following a jury trial in which he was convicted of (i) distribution of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2252A(b)(1); (ii) receipt and attempted receipt of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2252A(b)(1); and (iii) possession and attempted possession of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2). The district court sentenced Dzionara-Norsen to seventy-two months of imprisonment on each count, to run concurrently, and ten years of supervised release on each count, to run concurrently. Dzionara-Norsen now appeals, raising several challenges to his conviction. We assume the parties' familiarity with the case.

I. Motion to Suppress

Dzionara-Norsen argues that the district court erred by denying his motion to suppress (i) his statements to Federal Bureau of Investigation Special Agent Barry Couch and Task Force Officer Carlton Turner during a June 13, 2018, interview; (ii) the contents of his laptop, which Dzionara-Norsen provided during that interview; and (iii) his statements to Special Agent James Markovich during a June 14, 2018, interview. "On appeal from a district court's ruling on a suppression motion, we review a district court's findings of fact for clear error, and its resolution

of questions of law and mixed questions of law and fact *de novo*." *United States v. Jones*, 43 F.4th 94, 109 (2d Cir. 2022).[1]

A. June 13 Statements

Dzionara-Norsen first argues that his June 13 statements should have been suppressed because he made them during a custodial interview without the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree. To determine "whether a suspect was in custody for the purposes of *Miranda*[,] . . . . [w]e use a two-step, objective test, that asks whether: (1) a reasonable person in the defendant's position would have understood that he or she was free to leave; and (2) there was a restraint of freedom of movement akin to that associated with a formal arrest." *United States v. Santillan*, 902 F.3d 49, 60 (2d Cir. 2018).

The district court found that the June 13 interview, which was recorded, lasted for about eighteen minutes and took place at Dzionara-Norsen's apartment just outside his apartment door; the agents appeared in plain clothes, did not display handcuffs, badges, or weapons, spoke in a conversational tone, and did not make any threats or promises; and Dzionara-Norsen was not physically restrained, at no point asked for an attorney or to stop the interview, and voluntarily returned to resume the interview twice after returning inside to his apartment. Under those circumstances, a reasonable person in Dzionara-Norsen's position would have understood that he was free to leave—indeed, he left the interview to retrieve items from his apartment twice with no repercussions. *See United States v. Familetti*, 878 F.3d 53, 60 (2d Cir. 2017) (concluding that the defendant was not in custody when he was interviewed at his home, was advised that he was not

[1] Unless otherwise indicated, in quoting cases, all internal quotation marks, alteration marks, emphases, footnotes, and citations are omitted.

under arrest and was free to leave, and did not ask or try to leave the interview); *United States v. Faux*, 828 F.3d 130, 135–36 (2d Cir. 2016) ("[C]ourts rarely conclude, absent a formal arrest, that a suspect questioned in her own home is 'in custody.'" (collecting cases)).

Dzionara-Norsen nevertheless argues that because "he suffers [from] serious mental disabilities," "he did not know that he was free to leave or refuse to speak with the agents." Appellant's Br. at 44. We are not persuaded. "[T]he objective circumstances of the interrogation," *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011), demonstrate that a reasonable person in Dzionara-Norsen's situation would have understood (as, indeed, Dzionara-Norsen himself appears to have understood) that he was free to leave the interview at any time. Accordingly, the June 13 interview was noncustodial and therefore *Miranda* warnings were not required.

Dzionara-Norsen also argues that his June 13 statements should be suppressed as involuntary. Again, we disagree. Statements are voluntary when they are "the product of an essentially free and unconstrained choice by their maker" and involuntary if they are "coerced by police activity." *United States v. Haak*, 884 F.3d 400, 409 (2d Cir. 2018). To conclude that a statement was involuntary, courts must determine whether, under the totality of the circumstances, "the defendant's will was overborne by the police conduct" by examining "(1) the characteristics of the accused, (2) the conditions of interrogation, and (3) the conduct of law enforcement officials." *Id.*

During the June 13 interview, Couch made some misleading statements downplaying the significance and purpose of the interview: he said that he was only interviewing Dzionara-Norsen because he "want[ed] to make sure" that Dzionara-Norsen was not someone that the FBI "need[ed] to be concerned about" or "target" and to ensure that he was willing "to get some counseling" for

his child pornography consumption. App'x at 40. Couch admitted during the suppression hearing, however, that Dzionara-Norsen was a potential target at the time of the interview. Moreover, Dzionara-Norsen averred that he suffers from autism, anxiety, and depression and took medications for those issues that affected his ability to make decisions. But, when considering the totality of the circumstances, we cannot say that the district court erred in concluding that Dzionara-Norsen's will was not overborne by Couch's misleading statements. Couch made other statements to Dzionara-Norsen during the interview suggesting that his inquiry into Dzionara-Norsen's child pornography activity could result in criminal prosecution. App'x at 42 (Couch asking Dzionara-Norsen, "I mean you know that [child pornography] is illegal right?"); *id.* at 48 (Couch stating that criminal charges could be brought against Dzionara-Norsen depending on the discretion of prosecutors); *see United States v. Mitchell*, 966 F.2d 92, 100 (2d Cir. 1992) (finding that the defendant's statements were voluntary where the agents "deemphasized, but did not misrepresent, the criminal nature of the inquiry"). Additionally, we discern no clear error in the district court's factual finding that during the interview, Dzionara-Norsen was coherent and appeared to understand the agents' questions and statements. And, as discussed above, the interview was relatively short and noncustodial, the agents used a conversational tone and did not make any threats or promises, and the agents did not display handcuffs, badges, or weapons. *See Haak*, 884 F.3d at 415 (concluding that the defendant's statements were voluntary where he was not in custody, the interview lasted a little over thirty minutes, the officers were dressed in plain clothes and did not display any weapons, he was unrestrained, and the interview was conservational).

B. Contents of Laptop

Dzionara-Norsen further argues that the contents of his laptop should have been suppressed because his consent to search the laptop was involuntary. We are unpersuaded. "It is well settled that one of the specifically established exceptions to the Fourth Amendment requirements that private property not be searched without a search warrant issued upon probable cause is a search that is conducted pursuant to consent." *United States v. O'Brien*, 926 F.3d 57, 75 (2d Cir. 2019). Consent must be given "freely and voluntarily." *Id.* at 76. To determine whether consent is voluntary, courts assess "whether the officer had a reasonable basis for believing that there had been consent to the search," *id.* at 77, under the totality of the circumstances, *United States v. Snype*, 441 F.3d 119, 131 (2d Cir. 2006).

During the interview, Couch asked Dzionara-Norsen if he was willing to show the agents his laptop, to which Dzionara-Norsen responded, "Okay . . ." App'x at 45. Then, when asked if the agents could search the laptop for evidence, Dzionara-Norsen said, "I give you consent," and signed a written form affirming his consent. *Id*. at 46. These circumstances certainly demonstrate voluntary consent. Dzionara-Norsen's argument that his consent was involuntary because of the agents' misleading statements regarding the purpose of the interview and his mental health status fails for the same reasons described above—that is, the ample evidence of voluntariness.

C. June 14 Statements

Finally, Dzionara-Norsen argues that that his June 14 statements should be suppressed because they were tainted by the allegedly coercive police conduct during the June 13 interview. Because we have found that *Miranda* warnings were not required and that his statements and

consent to search his laptop were voluntary during the June 13 interview, the June 14 interview was not tainted.

II. Expert Witnesses

Dzionara-Norsen argues that the district court abused its discretion by denying his requests to present the following expert witnesses: (1) R. Douglas Alling, a medical professional who treated Dzionara-Norsen for ten years, would have testified that Dzionara-Norsen is autistic and took "prescribed medications that could have bearing on guilt," App'x at 116; (2) Frank J. Salamone, Psy. D., would have testified that he diagnosed Dzionara-Norsen with autism and was "particularly versed in when autism, child pornography, and the courts collide," *id.*; and (3) Dennis Debbaudt would have testified that people with autism may be prone "to mak[ing] misleading statements or false confession[s]," *id.* at 155. Dzionara-Norsen contends that the district court should have admitted this expert testimony because it was relevant to his defense that his statements during the interviews were involuntary.

We review the district court's evidentiary rulings, including decisions to preclude expert testimony, for abuse of discretion. *See Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962). "Generally, an expert may be permitted to testify if he is qualified, reliable, and helpful." *United States v. Gatto*, 986 F.3d 104, 117 (2d Cir. 2021) (citing Fed. R. Evid. 702). And, of course, the expert testimony must be relevant to be admissible. *Id.* (citing Fed. R. Evid. 401, 402). A defendant seeking to introduce expert testimony must provide a disclosure for each expert witness, which must contain, in part, "a complete statement of all opinions that the defendant will elicit from the witness in the defendant's case-in-chief" and "the bases and reasons for them." Fed. R. Crim. P. 16(b)(1)(C)(iii). Where a defendant fails to comply with such disclosure requirements, a

court may prohibit the party from introducing the evidence at trial. Fed. R. Crim. P. 16(d)(2)(C). "On appeal, we must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *Gatto*, 986 F.3d at 117.

The district court did not abuse its discretion by precluding this expert testimony. With respect to Dr. Alling, Dzionara-Norsen failed to comply with the disclosure requirements of Rule 16(b)(1)(C): he submitted Dr. Alling's *curriculum vitae* and a brief summary of the proposed testimony, but failed to provide a full statement of Dr. Alling's opinions and reasons for them. As for Salamone, his proposed testimony—that "[i]ndividuals with Asperger's syndrome . . . [are] especially vulnerable to committing this sort of offense," App'x at 128—is irrelevant because it has no tendency to make the existence of any element of the relevant offenses less likely. Finally, Debbaudt did not appear to be qualified as an expert on autism, having limited educational or practical experience supporting his purported expertise.

III. Sufficiency of the Evidence

Dzionara-Norsen argues that the government's evidence was insufficient to support his convictions. We review the sufficiency of the evidence *de novo*, *United States v. Laurent*, 33 F.4th 63, 75 (2d Cir. 2022), and "are required to draw all permissible inferences in favor of the government and resolve all issues of credibility in favor of the jury's verdict," *United States v. Willis*, 14 F.4th 170, 181 (2d Cir. 2021). We must uphold the conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Dzionara-Norsen first contends that the evidence failed to establish that he knowingly permitted others to download child pornography from his computer, as required for the distribution

of child pornography charge. But there was evidence that he used a peer-to-peer software, eMule, to distribute child pornography to others: in March 2018, an agent downloaded a pornographic video clip — which the agent identified as part of the "Gracel" series based on his experience with other investigations—from an IP address tracked to Dzionara-Norsen's mother's residence. In his interviews, Dzionara-Norsen confirmed that he had used eMule and understood how it worked, lived at his mother's residence in March 2018, used the term "Gracel" to search for child pornography, and knew others could download child pornography through peer-to-peer software from his computer. *See United States v. Clarke*, 979 F.3d 82, 91 (2d Cir. 2020) (finding sufficient evidence of knowing distribution based on defendant's admission that "by using the network to download child pornography from the computers of other BitTorrent users, he [knew he] was essentially sharing files of child pornography").

Dzionara-Norsen further argues that the government did not prove the Gracel series video depicted a minor, rather than a developmentally delayed adult. We reject this contention. The government produced an expert witness who testified that the person in the Gracel series was a prepubescent female. Moreover, the jury was given the opportunity to view the video. *United States v. Spoor*, 904 F.3d 141, 152 (2d Cir. 2018) ("Viewing the videos, the jury was entitled to find that the boys [depicted] were approximately nine and ten years old.").

Dzionara-Norsen further argues that the government did not prove that he knowingly received or attempted to receive child pornography and possessed or attempted to possess child pornography because no child pornography files were recovered from his laptop. But there was ample evidence that he had done so. Dzionara-Norsen stated in an interview that he viewed child pornography out of "curiosity," App'x at 42, and that he would "download [child pornography] .

. . and just look at it and delete it," *id.* at 41. He also stated that his laptop did not contain any child pornography because he "might have deleted it." *Id.* at 45. His stated habits were corroborated by the forensic examination of his laptop revealing that he had opened, accessed, and viewed files with names suggesting that the contents thereof were pornographic in nature and involved children. He estimated viewing about 200 videos or images of child pornography in his lifetime.

IV. Amendment of the Indictment

Dzionara-Norsen argues that the district court constructively amended the indictment, in violation of the Fifth Amendment, by instructing the trial jury that it could convict him on Counts Two and Three if he received/possessed *or* attempted to receive/possess child pornography, even though each count was framed in the indictment conjunctively, charging him with receipt/possession *and* attempted receipt/possession. He contends that the use of "or" instead of "and" constituted a constructive amendment of the indictment.

Because Dzionara-Norsen did not object on these grounds before the district court, we review for plain error. *United States v. Calderon*, 944 F.3d 72, 91 (2d Cir. 2019). "A constructive amendment occurs when the charge upon which the defendant is tried differs significantly from the charge upon which the grand jury voted. . . . either where (1) an additional element, sufficient for conviction, is added, or (2) an element essential to the crime charged is altered." *United States v. Dove*, 884 F.3d 138, 146 (2d Cir. 2018).

The district court's instructions on both counts were entirely correct. The indictment here did not allege that Dzionara-Norsen necessarily committed both the substantive offense and the attempted offense; rather, by using the conjunctive in each count, it merely set forth the alternate means of committing the same crime under the statute. *See United States v. McDonough*, 56 F.3d

381, 390 (2d Cir. 1995) ("Where there are several ways to violate a criminal statute, . . . federal pleading requires that an indictment charge in the conjunctive to inform the accused fully of the charges."); *United States v. Mejia*, 545 F.3d 179, 207 (2d Cir. 2008). The instruction in the disjunctive did not constructively amend the indictment.

V. Ineffective Assistance of Counsel

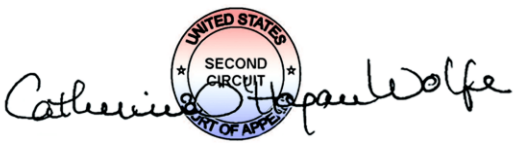
Dzionara-Norsen contends that his trial counsel rendered constitutionally ineffective assistance by failing to introduce expert witnesses on his autism diagnosis at the suppression hearing and trial. But we decline to address this claim because it "cannot be reliably decided on the present record," *United States v. DeLaura*, 858 F.3d 738, 743 (2d Cir. 2017), and, instead, follow our typical practice of leaving such claims to be raised in a motion under 18 U.S.C. § 2255, *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003).

* * *

In addition to the arguments discussed above, which were raised in Dzionara-Norsen's counseled brief, we have also carefully considered all the arguments raised in his supplemental *pro se* brief and find them unpersuasive. For the reasons stated above, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of April, two thousand twenty-four.

United States of America,

Appellee,

v.

Richard Dzionara-Norsen,

Defendant - Appellant.

ORDER

Docket No: 21-454

Appellant, Richard Dzionara-Norsen, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk