NO. ______________

IN THE SUPREME COURT OF THE UNITED STATES

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RAYMOND ALFRED GAGNON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

* * * * *

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

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PETITION FOR WRIT OF CERTIORARI

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Dated: September 12, 2017

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying the Rule 60 Motion after movant made a showing of fraud on the habeas court?
2. Whether broadening the scope of the conviction to include the Chumley disks during the habeas proceedings, in the absence of supporting evidence, and in the absence of any constitutional safeguards such as assistance of counsel and the right to confront the evidence, invalidate the final judgment?
3. Whether the court's participation in the fraud scheme and refusal to permit access to rebuttal evidence, along with the court's numerous erroneous findings which facilitated the perpetration of fraud, invalidates the final judgment?
4. Whether the court's refusal to acknowledge or address any of the due process violations that occurred during the habeas proceedings is reversible error?
5. Whether the court's refusal to resolve certain claims, refusal to acknowledge allegations of the denial of due process, refusal to address any allegations of FBI or Prosecutor Misconduct, refusal to permit claims to be developed, mocking the movant because he was unable to develop his claims since the court denied discovery, and ignoring his allegations of double jeopardy, and refusal to follow applicable procedures in resolving claims, in total indicate that the district court is biased and requires reopening the final judgment?
6. Whether the district court's actions were sufficiently inconsistent with due process of law that the court's accumulated errors warrant reopening the final judgment to correct the errors?
7. Whether the Appellate Court failed to adhere to the review process for issuing a C.O.A. as set forth in Miller-El v. Cockrel by affirming on the grounds of the Court's earlier Order without resolving the claims of errors in the Rule 60 Motion?

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Raymond Alfred Gagnon, pro se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Court is asked to review the denial of petitioner's Rule 60 Motion and Appellate Court Order that affirms that denial which is based on the Appellate Court's earlier affirmation of the denial of the petitioner's Section 2255 Motion. Both Appellate Court Opinions are included in the Appendix. The Magistrate's Report and Recommendation, adopted by the District Court as the final judgment, is also included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the Appendix.

REASONS FOR GRANTING THE PETITION

Petitioner requests that the Court exercise its supervisory powers over the lower courts. The district court refused to permit the facts to be developed reliably and resorted to distorting statements in the record instead as its manner of fact-finding and would not permit rebuttal. The court ignored my evidence and pleadings which showed the court's errors and insisted that I showed no errors. The Appellate Court permitted numerous procedural deviations and broadening of the scope of my conviction. My claims of errors were presented numerous times to the lower courts. Both courts refuse to acknowledge the errors and the prejudice caused by the court's due process violations, which resulted in facilitating what amounts to a fraud scheme. I can not get the lower courts to issue a C.O.A. on any issue because the errors undermine my ability to make the required showing, until the errors are acknowledged and corrected. I am locked in a Catch-22.

1. THE HABEAS COURT DENIED DUE PROCESS, BROADENED THE SCOPE OF MY CONVICTION, SHOWED BIAS, REFUSED TO ALLOW RELIABLE FACT DEVELOPMENT, REFUSED TO FOLLOW PROCEDURE OR RESOLVE ISSUES, AND FACILITATED AND PARTICIPATED IN THE GOVERNMENT'S SCHEME TO CONCEAL THE INADMISSIBILITY OF THE EVIDENCE

I claimed that my counsel was ineffective for providing erroneous legal advice and for failing to file a motion to suppress the evidence in my case because the search warrant was tainted by my coerced statements. Counsel conceded she was ignorant of the coercion in her Affidavit. The Magistrate refused to resolve my claim of coercion and broadened the scope of my conviction to include a box of floppy disks provided to the FBI by Lowell Chumley outside the search warrant. The Magistrate said I could not show a prejudice for my counsel's ineffectiveness because I would still be convicted for the Chumley disks. But the government never prosecuted me for the Chumley disks. The government never alleged there was any child pornography on the Chumley disks until the habeas proceedings, and the court would not permit me access to any evidence to rebut the government. The court refused to take notice that the Chumley disks were also inadmissible because here was no search warrant for them and no valid warrant exception.

After the R&R was issued I discovered evidence that showed the trial prosecutor had misled my counsel about my suppression defenses, and I submitted that evidence through the Petitioner's Third Motion to Supplement. The court ignored the evidence and would not rule on the Motion.

Having been denied on several motions and appeals to correct the errors and due process violations, I filed the Rule 60 Motion at issue, raising several claims of procedural defects and fraud on the habeas court where the government made misrepresentations concerning the "independent conviction" for Chumley disks. The Rule 52/59 Motions were denied by the district court on the basis that I was merely "relitigating the case", while the Rule 60 Motion was denied as "already argued". The purpose of the post-judgment motions was to correct the manifest errors, but the court left all of the errors intact. The Appellate Court reaffirmed the Appellate Court's prior merits review without examining whether my Rule 60 claims of defects had any effect on the merits review or the final judgment, in violation of the review process set forth in Miller-El v. Cockrel and Buck v. Davis, and then denied issuing a C.O.A. Under Miller-El, 537 U.S. 322, I must only demonstrate that my claim had "some merit" to meet the substantial showing requirement for a C.O.A., but the court's errors were, by design, intended to thwart my ability to make the showing.

A. STATEMENT

I was convicted by plea for one count of 2252A(a)(5)(B) for owning a Zip disk and a computer in 2008 which contained child pornography. The element of scienter was not established in the factual basis. The images were recovered from the computer's recycle bin of the computer's operating system and a few came from the password-protected Zip disk. The Alabama computer was used to delete the images from the hard drive of my Transportation offense in the Western District of Texas.

The Zip disk and computer were seized through a search warrant that was obtained after police told me that my missing stepdaughter was chained to a pipe in a basement by a sex club, and that I may only provide my information toward her recovery if I first admit to receiving oral sex from a different juvenile. After six and half hours of coercion based on this ultimatum, the detective obtained the confession. The detective then used the same ultimatum to force me to waive my attorney after I requested a lawyer. The detective stopped the interrogation to ask the FBI Agents if his conduct was acceptable, and the FBI Agents gave their approval. My illegally obtained statements that my laptop contained child pornography and was discarded prompted investigators to seek several search warrants and became the probable cause for the search warrants. The warrant affiant used a template prepared by FBI Agent David Fallon that contained illegally obtained and false information.

AUSA Billingsley argued that I could show no prejudice for my counsel's failure to file a suppression motion because one count under 2252A(a)(5)(B) would still be "valid" for the box of disks provided to the FBI by Lowell Chumley. But I was not convicted for these disks and the government never obtained a search warrant for the Chumley disks so they are inadmissible. Billingsley deceived the court.

I sought the forensic reports and the search warrant for the Chumley disks through a discovery motion in order to prepare a Reply to the government's Response, but the court denied discovery. In the same order, the court denied my Second Motion to Supplement, in which I attempted to advance a double jeopardy and an innocence claim. The district court sided with the government and determined one count would still be "viable" for the box of floppy disks given to the FBI by Chumley, and misconstrued that the "over 700 images" of child pornography were on the Chumley discs to make it appear that I had already been convicted of the Chumley disks.

The PSR states:

> 35. On July 15, 2008, Tina and Lowell Chumley provided a box containing computer media that was found at their home. The Chumleys said that Gagnon had visited them on June 26 and June 27, 2008, because Tina's father had recently passed away. The Chumleys stated the box and its contents belonged to Gagnon and was in a metal toolbox with more of Gagnon's property secured with padlocks. The Chumleys did not remember the box being at their home prior to Gagnon's visit. Furthermore, they said Gagnon knew where the key was hidden.
>
> 36. On August 19, 2008, a forensic examination of the defendant's computer was conducted by the Federal Bureau of Investigation (FBI) Agent Tina Mauldin conducted a review of the images which revealed there were over 700 child pornography images that adhere to the federal definition of child pornography. Of those 700 images, 279 were known victims as identified from CVIP and 137 images depicted characteristics of torture, humiliation, bondage, sadism, masochism, or a combination of these acts. Additionally, there are numerous images recognizable as known victims for which the series name was not known, other images came from magazines which were produced prior to morphing technology.

The factual basis states that it was an examination of my "computer media" that revealed the over 700 images, while the PSR narrows the examination to my COMPUTER. The term "computer media" could refer to the computer, the Zip disk, or the Chumley floppy disks, or any combination of these, but the term "computer" in my PSR is more particular and can only mean my computer. The government did not object to the PSR, which narrows the over 700 images to just the computer.

The distinction between the PSR and the factual basis is material because the Magistrate stated "The evidence proffered by the United States put petitioner in possession of the media turned over to the government by the Chumleys. This media contained over 700 images of child pornography." R&R, pg.43. " ... even if the motion had been successful, the charges against him would not have been dismissed. The remaining evidence was ample evidence of his guilt." R&R, pg.42. There is no remaining evidence; the PSR places the images on the computer and there is no evidence of contraband on the Chumley disks. I showed this to the court, and the court stated I failed to show any errors.

Correcting this one error affects the entire resolution of the claim, so the courts refuse to acknowledge it.

B. THE COURT DENIED DISCOVERY ON CAPRICIOUS AND ARBITRARY GROUNDS

The Magistrate would not permit discovery, which was necessary to rebut the government's arguments and the court's findings and prove my claims. The Magistrate did not say in the Order denying discovery (Cv Doc 25) whether I showed "good cause", which is the standard for habeas petitioners. See Bracy, 520 U.S. at 920. The Magistrate denied discovery as "untimely", though there is no time limitations in the rules of procedure that control discovery for habeas petitioners, and as "not necessary" to decide the case, although the Magistrate's findings were not supported by substantial evidence and were contradicted by the record or disputed.

I had the government's fallacious version of facts forced down my throat with no meaningful possibility of rebuttal. It was the court's duty to make the facilities and procedures of the court available to me to prove my claims, but the court deprived me of the evidentiary materials I needed to prepare my Reply, which deprived me of rounded fact development and final arguments. A court's blanket denial of discovery is an abuse of discretion if discovery is "indispensable to a fair, rounded, development of the material facts." Coleman v. Zant, 708 F.2d 541, 547 (11th Cir. 1983)(quoting Townsend, 372 U.S. at 322).

C. THE MAGISTRATE'S FINDINGS WERE CONTRADICTED BY THE RECORD

The Magistrate stated "When the search warrant was executed later that day, two computers were found, including a computer with a manufacturer's label that indicates the hard drive was manufactured in China. The hard drive contained images of child pornography. The images were located in the recycle bin associated with the user profile entitled Ray." R&R, Cv Doc 26, pg.4, and "Furthermore, while petitioner points out that the pornographic images found on one of the computers were located in the recycle bin, they were still located on the computer and capable of being easily retrieved." R&R, Cv Doc 26, pg.29.

The Magistrate indicated twice that the images were in the computer's recycle bin, yet the Magistrate contradicted himself by saying the 700 images were on the Chumley disks in order to say that one count of conviction would still be viable for the Chumley disks. The court would not permit any rebuttal. The Due Process Clause of the Fifth Amendment requires that petitioners be allowed an opportunity to rebut officially noticed facts, particularly when, as in this case, those facts are crucial to - even dispositive of - the outcome of the proceeding. Kaczmarczyk v. INS, 933 F.2d 588, 596 (7th Cir. 1991).

The court also determined that I had altered Brooke's MySpace site to make it appear that she had been abducted by someone she met online. I have denied altering Brooke's site. The government has never linked me to Brooke's kidnapping and murder, so it is clear that I did not alter her site to make it appear that she had been abducted by someone she met online. The government's own affidavits state that Michael Jacques made the changes the court erroneously attributed to me. Had the court resolved the dispute of facts through reliable evidence in a hearing the court's finding would have been rebutted, but that finding was crucial to and dispositive of the probable cause in the reformed warrant, so the court protected its erroneous finding by denying discovery and deprived me of the fundamental fairness of rebuttal and reliable fact development.

D. THE COURT APPLIED FEDERAL LAW IN AN OBJECTIVELY UNREASONABLE MANNER

The Magistrate would not resolve whether the coerced admission to receiving oral sex was admissible and saved that confession to use as probable cause when reforming the warrant. The Magistrate determined the coercion did not need to examined because the affiant was not aware of it:

> "Although not reflected in the police report, petitioner alleges that the atmosphere in Vermont was coercive. This is an unresolved issue. However, as explained below, it is unnecessary to address it. Suppression is an appropriate remedy only if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). There is no evidence that the FBI Special Agent who obtained the search warrant in Alabama was aware that petitioner had asserted his right to counsel during his questioning in Vermont or that it was obtained through any type of coercion." R&R, Cv Doc 26, pgs.10-11.

The Magistrate's reasoning is flawed because the intent of the exclusionary rule is to deter officers from violating the law by placing illegally-obtained evidence out of reach. "If clearly illegal police behavior can be sanitized by the issuance of a search warrant, then there will be no deterrence, and the protective aim of the exclusionary rule will be severely impaired if not eliminated." United States v. O'Neal, 17 F.3d 239, 243 n.6 (8th Cir. 1984). Leon specifically states that the "Reference to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable cause determination." Leon, 468 U.S. at 923, n.24.

Suppression is warranted here because the officer who viewed the illegal interrogation provided the information - knowing it to be tainted, but concealing that fact - to the affiant for use in the search warrant application. United States v. Woerner, 709 F.3d 525, 535 (5th Cir. 2013). Because the officer who prepared the warrant template had viewed the coercive interrogation, he knew or had reason to know that the information was tainted and included it anyway without full disclosure and explanation, so suppressing the evidence seized pursuant to that warrant "pay[s] its way by deterring official lawlessness" Illinois v. Gates, 462 U.S. 213, 258 (1983), so keeping the warrant affiant in the dark was not legitimate grounds for upholding the warrant under Leon nor was it grounds for refusing to resolve my claim of coercion under Franks. The detective threatened me numerous times using Brooke's recovery as leverage in order to obtain that confession while the FBI watched, and then the Agent concealed the threats from the Magistrate, so that confession should be placed out of reach of the government. If the court had examined the coercion and properly excised my illegally obtained confession, then there would have been insufficient probable cause, so the court sidestepped the procedure by misapplying the law first.

The Court should take this opportunity to hold that when examining the validity of a search warrant it is first necessary to examine the objective reasonableness of the officers who originally obtained the information whether the affiant knew of the taint or not, and that the court must excise all tainted probable cause information before reforming the warrant.

E. THE DISTRICT COURT WOULD NOT EXAMINE WHETHER SEEKING THE WARRANT WAS PROMPTED BY THE ILLEGAL INTERROGATION AS REQUIRED BY U.S. v. MURRAY AND ELEVENTH CIRCUIT PRECEDENT

There is a two-part test in the Eleventh Circuit for examining warrants that contain illegally obtained information. The Magistrate would not perform the second part of the test.

> ""The independent source doctrine involves a two-step process." United States v. Bush, 727 F.3d 1308, 1316 (11th Cir. 2013)(citing Noriega, 676 F.3d at 1260). First, this Court "'excise[s] from the search warrant affidavit'" any illegally obtained information and then "'determine[s] whether the remaining information is enough to support a probable cause finding.'" Id. (quoting Noriega, 676 F.3d at 1260). "Second, if the remaining information establishes probable cause, [this Court then] determine[s] whether the officer's decision to seek the warrant was prompted by" the illegally obtained information. Id. (citation and internal quote marks omitted). If the warrant would have been sought even without the illegally obtained information, "the evidence seized under the warrant is admissible." (citation omitted)." Response, Cv Doc 12, pg.18.

The second part of the procedure conforms with the 'derivative evidence rule' established by the Supreme Court in Murray v. United States, 487 US 533 (1988). That rule "prohibits the introduction of derivative evidence ... that is ... acquired as an indirect result of the unlawful [interrogation]". Id., at 536-37. The district court must determine if the officer's decision to seek the warrant was "prompted by" the information obtained through coercion or following the coerced attorney waiver. Id., at 542. To determine whether an officer's decision to seek the warrant was prompted by the illegalities, the court must ask if the officer would have sought the warrant without the illegally obtained information. Id., at 542 n.3. This Court should notice that in the subsequent warrant that issued my coerced confession continued to be used, while the information from the "independent source", the juvenile, was not used. For this reason, the examination of the warrant should be confined to the 'four corners" of the warrant to exclude the "independent source"

If the district court had performed the second part of the test, then the warrant would have been suppressed because 1) seeking the warrant was motivated by what was learned during the illegal part of the interrogation, 2) the government did not possess leads for the child pornography investigation prior to the coercive interrogation, 2) the government possessed most of the same information as in the reformed warrant before the illegal interrogation yet did not seek a child pornography warrant until after the illegal interrogation, 3) the FBI continued to use my coerced statements in a subsequent Alabama warrant but never used the information obtained from the juvenile, 4) the warrant template issued by FBI Agent David Fallon was strictly followed by the warrant affiant, and there is no evidence that the warrant affiant possessed any probable cause information other than the information provided through Fallon's template and Barksdale's uncorroborated hearsay, and 5) investigators are not usually allowed to say that discovery was inevitable after the investigators deliberately and flagrantly violate someone's rights to gather information to support a warrant. See Murray, 487 U.S. at 548, n.3.

The Court should take this opportunity to hold that the district court must follow circuit precedent and perform both parts of the two-part test for improperly motivated search warrants.

F. THE DISTRICT COURT BROADENED THE SCOPE OF THE CONVICTION

i. PRE-PLEA PROCEEDINGS AND GOVERNMENT CONDUCT DO NOT SUPPORT THAT I WAS CONVICTED FOR THE CHUMLEY DISKS

The October 2008 Indictment charged me with one count of knowingly possessing materials containing pornography in the Northern District of Alabama on or about June 27, 2008 in violation of 2252A(a)(5)(B). The Indictment does not notify me which materials contained the contraband because it does not indicate which media I am being prosecuted for. Because of this notice deficiency, there was no meaningful way to determine which media I was being prosecuted for from the Indictment.

Since discovery is used to inform the defense about the government's "case-in-chief", then the discovery in this case would be where I derive notice from when discussing my charges and my defenses with my attorney prior to entering a plea. The Standing Discovery Order, Cr Doc 8, directed the government to provide information that went toward my guilt, punishment, or defenses.

As part of the discovery materials, the government provided a Criminal Complaint and an Arrest Warrant. These two instruments notified me that I was being charged for the Zip disk and computer seized on July 2, 2008 through the search warrant. The Criminal Complaint was issued on July 7, 2008 and the Affidavit only discussed the Zip disk and computer seized through the warrant. The Criminal Complaint was issued eight days before the Chumleys provided the floppy disks to the FBI on July 15, 2008, so the Complaint and Arrest Warrant were issued too soon to include the Chumley disks. There is no Criminal Complaint or Arrest Warrant for the Chumley disks, and the Criminal Complaint and Arrest Warrant provided through discovery do not notify me that I am being prosecuted for the Chumley disks. If anything, these two instruments limit my prosecution to the Zip disk and the computer.

AUSA Mary Stuart Burrell provided approximately 134 pages of discovery material and filed a document entitled "Government's Disclosure to Defendant", Cr Doc 9. In this December 28, 2010 "Disclosure" document, AUSA Burrell informed my counsel that "B. The defendant's statements to law enforcement are enclosed in the discovery packet", "E. Copies of all reports of tests, experiments, and examinations performed to date are in the discovery packet. additional reports generated in this case will be made available upon receipt by the government", and "G. Undersigned counsel is unaware of any exculpatory information or otherwise favorable material." Burrell did not provide forensic reports from the Chumley disks, nor did she disclose that there was no search warrant for the Chumley disks. If I had been prosecuted for the Chumley disks then Burrell affirmatively misled my counsel through the 'Government Disclosure to Defendant'.

Although Burrell stated that she had provided my statements in Paragraph B of the 'Disclosure' document, Burrell actually withheld the police reports, the FBI 302s, and the recorded media that contained my statements, in direct violation of the Standing Discovery Order and Fed.R.Crim.P. 16(a)(1)(B)(i) and (ii). Those same police reports and video records capture the police detectives telling me that Brooke was chained to a pipe in a basement by a sex club and repeatedly telling me that I may not provide my information toward Brooke's recovery until I admit to receiving oral sex from the juvenile and waive my attorney privilege. AUSA Burrell affirmatively misled my counsel about providing my statements and through this misconduct she concealed these vital records and the favorable information within these records.

Burrell stated in the 'Disclosure' document that she had provided all of the reports from the examination of my computer media. Burrell provided an SID report from my computer's operating system, and several reports from the examination of the Zip disk, and a report from FBI Agent Tina Mauldin's examination of my computer. The information from Mauldin's report was set forth in the factual basis and stated again in paragraph 36 of my PSR. The PSR clarified that the "computer media" which contained the over 700 images in the factual basis was only the warrant computer.

There are no computer reports that mention the Chumley disks in the record. If I were prosecuted in relation to the Chumley disks, especially if I had a conviction for the Chumley disks, then Burrell violated Fed.R.Crim.P. 16(E)(i), (ii), and (iii), and Fed.R.Crim.P. 16(F)(i), (ii), and (iii) through her 'Disclosure' statements, and interfered with my counsel's ability to research and prepare a defense by concealing that I was being prosecuted for the Chumley disks.

When producing the discovery materials, Burrell did not disclose that the government did not obtain a search warrant for the Chumley disks. The Chumley disks were not mentioned in the discovery material. Burrell assured my counsel that all computer media reports had been provided and there was no favorable information for the defense. If I were being prosecuted for the Chumley disks, it was being kept a secret by the government. If I had been prosecuted for the Chumley disks, or even if I was punished for the Chumley disks under the provisions for relevant conduct, then the fact that the disks were searched without a warrant would have been favorable information because a search without a warrant is per se unreasonable, warranting suppression of the disks, and this Fourth Amendment violation was concealed from my counsel, in direct violation of Fed.R.Crim.P. 16(E)(i) and the Standing Discovery Order.

It may be said then, that pursuant to Fed.R.Crim.P. 3, 4, 7, and 16, based on the discovery materials provided and the 'Disclosure' statements made by AUSA Burrell, and the complete lack of any information concerning the Chumley disks, that I was not prosecuted or convicted for the Chumley disks during my prosecution in the NDAL.

ii. THE PLEA COLLOQUY AND FACTUAL BASIS DO NOT SUPPORT THAT I WAS CONVICTED FOR THE CHUMLEY DISKS

Under Fed.R.Crim.P. 11(b)(3), the plea must have a factual basis, meaning that there must be evidence presented to the court that could have reasonably resulted in a defendant's conviction at trial. A district court must determine that there is a factual basis for the plea before accepting it. United States v. Frye, 402 F.2d 1123, 1128 (11th Cir. 2005). To prove its possession charge under 18 U.S.C. §2252A(a)(5)(B) the government had to prove that I (1) knowingly (2) possessed material containing an image of child pornography (3) that had been transported in interstate or foreign commerce by any means, including by computer. 18 U.S.C. § 2252A(a)(5)(B); United States v. Woerner, 709 F.3d 527, 535 (5th Cir. 2013); United States v. Moreland, 665 F.3d 137, 149 (5th Cir. 2011). The standard for evaluating challenges to the factual basis for a guilty plea is whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty. Frye, at 1128.

When reciting the factual basis, the prosecutor specifically named and described three images recovered from the Zip disk and three images recovered from the computer and set forth the countries of manufacture to establish the jurisdictional nexus. The prosecutor asserted that I owned the Zip disk and computer and that those two items contained child pornography, but did not set forth facts to establish the essential element of scienter so the factual basis that was established for the Zip disk and computer was deficient.

The Chumley disks were treated completely different than the Zip disk and the computer. The prosecutor mentioned the provenance of the Chumley disks, saying that they were provided to the FBI by Lowell and Tina Chumley, the Chumleys did not remember the disks being at their house, the disks were in a toolbox, and I knew where the key was hidden. But the prosecutor did not allege the disks contained any child pornography, nor did the prosecutor establish that the disks affected interstate commerce. The prosecutor did not establish that I knew there was child pornography on those disks. The factual basis was not just deficient, there was no factual basis at all for the Chumley disks. The government only explained their provenance.

Mention of the Chumley disks sandwiched between the information from the Criminal Complaint and the information from Mauldin's examination my computer was insufficient to establish a factual basis for those disks. The prosecutor also mentioned the kidnap and murder of Brooke Bennett and the obstruction of justice, yet I was not convicted by that plea of those matters. The mere mention of one more superfluous circumstance amongst several others should not be permitted to constitute a conviction when the government could not be troubled to notify me through Complaint, Indictment, Discovery, the 'Government's Disclosure to Defendant', or the PSR that I was being prosecuted for the Chumley disks, and did not even establish a factual basis for the Chumley disks.

It is not material that I did not object to or challenge what the government had to say about the Chumley disks because the government did not allege a crime in relation to the Chumley disks. The mention of the Chumley floppy disks was superfluous to my prosecution for the Zip disk and computer, just like the mention of Brooke's kidnapping and murder. When a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later habeas court to broaden the scope of his conviction. See Descamps v. United States, ____ U.S. ____, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438.

iii. THE PSR DOES NOT SUPPORT THAT I WAS CONVICTED FOR THE CHUMLEY DISKS

Eleventh Circuit courts routinely rely on presentence reports to determine the scope of convictions. See e.g., Turner v. Warden Coleman FCI, 709 F.3d 1328, 1336 (11th Cir. 2013); Rozier v. United States, 701 F.3d 681, 685-86 (11th Cir. 2012); United States v. Bennett, 472 F.3d 825, 833-34 (11th Cir. 2006).

A court may determine which particular offense a petitioner was convicted of by examining the charging document, and in the case of a guilty plea, the plea colloquy and factual basis, or some comparable judicial record of the factual basis for the plea. See Mellouli v. Lynch, 135 S.Ct. 1980, 1986 n.4, 192 L.Ed.2d 60 (2015). The PSR is analogous to the factual basis, but is more particular and narrows the scope of the conviction to the Zip disk and computer, and excludes the Chumley disks.

The Magistrate wrote:

> "The evidence proffered by the United States put petitioner in possession of the media turned over to the government by the Chumleys. This media contained over 700 images of child pornography." R&R, Cv Doc 26, pg.20.

The Magistrate is directly contradicted by paragraph 36 of the PSR. The "over 700 images" are on the COMPUTER rather than the Chumley disks, and since that fact was established by the PSR and not contested by the government, I don't have to prove it again.

The court's unreliable fact-finding and refusal to acknowledge that the Chumley disks were searched without a warrant contributed to the court's erroneous determinations: "Even if a motion to suppress had been filed and were successful in excluding the evidence found at Gagnon's Cullman home, the charge against him, one count of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B), would have remained viable based on other evidence unrelated to the warrant." R&R, Cv Doc 26, pg.17. "Thus, there was other evidence besides that seized under the search warrant sufficient to prosecute petitioner." R&R, Cv Doc 26, pg.18. "However, as noted above, even if the motion had been successful, the charges against him would not have been dismissed. The remaining evidence was ample evidence of his guilt." R&R, Cv Doc 26, pg.19.

But there was no other evidence. I have repeatly shown the court that it is contradicted by the PSR and that there are no forensic reports for the Chumley disks. The court's erroneous findings were disastrous to my claim because the court broadened the scope of my conviction to include the Chumley disks. It can not be fairly said that I was already convicted for the Chumley disks because the deficiencies in the procedures do not support that. I was "prosecuted" for the Chumley disks during the habeas proceedings without any due process rights.

G. THE GOVERNMENT PERPETRATED A FRAUD SCHEME TO CONCEAL THE INADMISSIBILITY OF THE EVIDENCE WHICH THE COURT FACILITATED AND PARTICIPATED IN, WHICH REQUIRES VACATING THE FINAL JUDGMENT

The government's "one count still valid" argument for the Chumley disks was a fraud scheme.

This was a fraud scheme because AUSA Mary Stuart Burrell deceived my counsel about producing my statements while she withheld them and did not reveal the lack of a search warrant for the Chumley disks but informed my counsel there was no favorable information. Burrell also said she produced all the reports from the examinations of my computer media yet did not produce any from the Chumley disks, did not establish a factual basis for the Chumley disks, asserted in the factual basis that the images were in the computer's recycle bin and did not dispute the PSR where the PSR states that the "over 700 images" were recovered through an examination of my computer.

Then AUSA Michael Billingsley cited my PSR extensively in his Response to my habeas petition but switched up and began citing the more ambiguous factual basis when he argued that one count of conviction would still be valid for the Chumley disks. Billingsley misled the court by making an unsupportable argument, admitted to having no search warrant to my sister by phone on November 25, 2014, but remained silent about this matter when he had a duty to be forthcoming with the court. Both Burrell and Billingsley resorted to deception to conceal the inadmissibility of the search warrant Zip disk and computer and to conceal the inadmissibility of the Chumley disks.

It is completely implausible for the over 700 images to be "located in the [computer's] recycle bin under the user profile entitled Ray" (R&R, Cv Doc 26, pg.4) and "capable of being easily retrieved" from the recycle bin (R&R, pg.26) while the court also states that it was instead the Chumley disks that contained the "over 700 images of child pornography" (R&R, pg.43). The court refused to correct this obvious contradiction, and it is clear that the court has refused to do so because had made up its mind to deny relief. The court's refusal to permit discovery, its refusal to examine the warrant for illegal motivation, its invocation of the good faith exception after the government waived the exception, and its refusal to resolve the claim of coercion were all because the court had made up its mind to deny relief without permitting a fair, rounded development of the facts.

When I submitted the 'Government's Disclosure to Defendant' as evidence that Burrell interfered with my counsel, the court shielded Burrell by ignoring my submission. I complained to the court about the government not having a search warrant for the Chumley disks, and informed the court that Billingsley admitted this to my sister, and pointed out that the PSR shows the images were on the computer rather than the Chumley disks. I also pointed out the court's unreasonable application of Franks and Leon. My complaints and Objections were not only ignored, the court said I failed to show any errors of fact or law. The court participated in the fraud scheme and used its power to keep the facts from being developed and its findings from being rebutted, and protected Burrell and Billingsley by ignoring my evidence that pointed to their misconduct. The court's numerous due process violations exceed any possibility of coincidence, serendipity, peradventure, or chance; the court's deviations from required procedure and its flawed fact-finding were intended to conceal the inadmissibility of the evidence and the government's misconduct. Given the numerous due process violations, the bias and favoritism, and the deviations from procedure described throughout this Petition, it is evident that I did not appear before an impartial tribunal:

> "It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case." Republican Party of Minn. v. White, 536 US 765, 775-76 (2002).

By refusing to take proper judicial notice of the evidence I submitted and, equally important, the evidence that did not exist in my case, and the court's refusal to permit me to develop the facts to prove the inadmissibility of the evidence used against me, the court denied me the meaningful opportunity to be heard. It was the court's duty to make the facilities and procedures of the court available to me to prove my claim, but the court cut me off at the knees instead. I was clearly denied the opportunity to persuade the court on the legal points in my case. The habeas court's due process violations were intended to conceal the inadmissibility of the evidence and thwart my ability to make the substantial showing that counsel was ineffective, thereby making the C.O.A. process extraordinarily and unfairly difficult.

Under Section 2255(b), I only had to allege facts which, if proved, warranted relief to proceed to a hearing to prove my facts. Congress never required of me that I must possess the skills to first expose a government fraud scheme and litigate in front of a biased court. Because fundamental fairness requires that a party have the opportunity to present evidence on the allegations in the complaint and the contested factual issues, the denial of this opportunity renders a court's ensuing judgment void. See Klapprott v. United States, 335 U.S. 601, 609 (1949). Bias is also a due process violation that renders the judgment void.

The Court should take this opportunity to hold that when the habeas court denies due process, then the petitioner need only show the bias, fraud, or due process violation in order to vacate the judgment and remand for a habeas proceeding that conforms with due process regardless of whether the substantial showing of the denial of a right under 2553(c) has been made, because due process violations obviously interfere with the petitioner's ability to make that showing.

2. THE COURT WOULD NOT PERMIT ME TO DEVELOP THE FACTS TO PROVE INNOCENCE OR DOUBLE JEOPARDY AND DID NOT RESOLVE THE DOUBLE JEOPARDY CLAIM

I raised an actual innocence claim on grounds I deleted the images three years earlier, so I did not knowingly possess the images in the Northern District of Alabama in 2008 as alleged in the Indictment. The court will not permit the facts to be reliably developed through discovery or an evidentiary hearing and has never resolved the double jeopardy claim.

I was subjected to back-to-back federal prosecutions in Texas and Alabama stemming from the same investigation following the murder of my stepdaughter. I was prosecuted in Alabama for two separate media using a one count indictment charging a violation of 2252A(a)(5)(B) for a Zip disk and a computer. The use of 2252A(a)(5)(B) in this case is confusing because the Indictment only charges one count in the indictment, but the government used the one count to prosecute for two different media. Now the government wants to include the Chumley floppy disks in that one count ex post facto. Each type of media has special circumstances which must be considered.

I alleged the Zip disk contained mostly, if not all, artistic nude images permitted by Congress. The Zip disk also contains adult pornography. The government's descriptions of the purported child pornography images do not necessarily mean that the images are actually child pornography since there is no allegation of lascivious exhibition of the genital region, sexual contact, sadism or masochism, bestiality, or masturbation. Images are analyzed by the courts to determine if they are lascivious depictions of child pornography using the "Dost factors" (U.S. v. Dost, 636 F.Supp. 828 (S.D. Cal. 1986)) which requires something more than the presence of mere nudity. The government did not allege more than nudity and did not establish a second factor as required under Dost. I unknowingly acquiesced to the government's version of facts during my plea hearing, but that plea was not well counseled and the government's attorneys have been deceptive so their own self-serving assessment is unreliable. My counsel never reviewed the images and did not discuss the images or the definition of child pornography with me at any time.

I sought discovery and an evidentiary hearing to prove these images were merely artistic nudity. The court denied discovery, denied the hearing, and said I failed to enumerate how many images were mere nudity and therefore I lost the argument. The record did not affirmatively contradict my allegations, and the court did not appear to disbelieve that some of the images were depictions of mere nudity. The court's reasoning for rejecting my argument of artistic nudity on the Zip disk was I failed to state the exact quantity, but to satisfy the court on this claim I needed the facilities and procedures of the court to prevail, so it was the court's duty to make the discovery available to me and the court refused. The court acted unreasonably. The court denied due process by denying me access to the very information it demanded from me.

I had deleted the images from the Texas hard drive by attaching it to the Alabama computer in 2005 and used the Alabama computer to perform the deletion. The process of deleting the images from the hard drive moved the images to the Alabama computer's recycle bin automatically. I did not know the images were moved to the computer until I was charged and prosecuted, so I did not know the images were even on the computer until after my arrest. I did not "knowingly" possess the images on the computer, and "knowing" is an essential element of the offense that I was not required to stipulate to in my plea. And the images were fully deleted so I also did not "possess" the images on the computer in 2008 because I could no longer exercise dominion and control over the deleted images as explained in United States v. Flyer, 633 F.3d 911 (9th Cir. 2011).

Paragraphs 27, 36, and 37 of the PSR indicate that many of the images are from the same series, and there are 137 images that depict sadism or masochism in Alabama, while there are "about 150" in Texas. There is a very high likelihood these are the same images, deleted from the hard drive and inadvertently moved to the Alabama computer, with the additional factor that with usage the unallocated space of each of the hard drives have been randomly overwritten so not everything is exactly the same.

I alleged that the images had been completely deleted. The government argued that the images were easily recoverable from the recycle bin. However, the evidence does not show whether the images were fully deleted and recovered forensically using special tools, or whether the images were only deleted from the attached external hard drive and still waiting in the recycle bin to be restored to the external hard drive, and it was not clarified in the plea hearing. The government is not supported by substantial evidence, and considering Billingsley's misrepresentations about the "validity" of the independent conviction for the warrantless Chumley disks while concealing the inadmissibility of the disks, the government's attorney is a very unreliable source of information.

My counsel told me that deletion was not a defense in our very first meeting. That was the substance of our first meeting. Our second meeting was so she could inveigle the execution of the Speedy Trial Act waiver as a favor for the government. That was the substance of the second meeting. Then counsel immediately notified the court to arrange for a plea hearing. I entered an involuntary, unknowing plea without ever reviewing any discovery with counsel and after being misled about deletion as a defense.

The court denied my claim on the basis that my solemn plea contradicted my claim of deletion, but my counsel conceded in her affidavit that she told me that deletion was not a defense, so my involuntary, unknowing plea is no basis for saying the record contradicts my habeas claim. It was the government who stated the files were recovered from the recycle bin and their evidence shows that EnCase was used to recover them. All I was required to admit to was that I owned the computer and it had contained child pornography. All we know from the plea colloquy is that the images were recovered from the computer's recycle bin, without knowing the exact status of the deleted images. Neither the district court or the appellate court will address that the scienter element was never established. The courts should not be permitted to infer the scienter from the misadvised plea of guilty.

In the Report and Recommendation, the Magistrate distorted the facts and said that I had a prior conviction in Texas for POSSESSION which an Alabama jury could consider, so I would not have won had I proceeded to trial and therefore could not prove innocence. My conviction was for Transportation, and the "transported" images had been deleted two years before the Transportation was alleged to have occurred, so misconstruing my Transportation conviction as another Possession conviction unfairly negated my defense because it not only ignored my defense, it furthered the government's argument on erroneous grounds.

My innocence claim is two-fold; not only could I not "possess" the fully deleted images that were forensically recovered from the Alabama computer's recycle bin, I did not even "know" that they were moved to the Alabama computer merely by deleting the hard drive that was later transported to Texas. The court states that does not matter because I was the one who deleted them and therefore I am still "culpable" for those images because there is no statute of limitations, but that position pays no respect to the essential elements and the particularity of the media under 2252A(a)(5)(B). The court should have required the government to show that I knowingly possessed contraband on the specified media in the specified district in the specified time frame as alleged in the Indictment. The court's determination that I can show no prejudice because of the statute of limitations relieves the government of its burden of proof without taking into account the involuntary nature of my plea, the deficiencies in the plea colloquy and insufficiency of the factual basis, and the defense I have advanced. Each and every essential element alleged by the indictment should be material rather than superfluous.

Making each essential element material is just and fair because of the potential for severe punishment through multiple sentences for multiple convictions under 2252A(a)(5)(B), which requires the particularity of elements be respected by the lower courts. This is not a procedural issue, but a substantive due process requirement that the lower courts failed to respect.

My position is that the government got their pound of flesh in Texas by prosecuting me for

Transporting the images in 2007 after they were deleted in 2005, which is an erroneous conviction, and now they are punishing me again for deleting those images because the government found the computer used to delete them in 2008. Deleting the images is not a crime; destroying the images was Congress's intent. Thus I have raised this matter as an actual innocence claim and a double jeopardy claim since I was already punished for these images in Texas and my culpability for them has been accounted for.

In order to prove my innocence or double jeopardy in Alabama, I would need to be able to show the district court that the images were on the Alabama computer as a result of deleting them from the Texas media, which requires permitting a forensic expert to also examine the Texas media and show that the images in Texas were in fact deleted in 2005. Thus, in proving my innocence claim in Alabama, I can also prove my innocence to the Texas 2007 Transportation conviction.

The district court will not permit that to happen.

Finally, I alleged that the Chumley disks had been deleted and formatted in 2004, when I lived in Tallassee, Alabama, which is the Middle District of Alabama. The Magistrate said it did not matter that these disks were deleted and formatted in 2004 because I was the one who deleted them and was therefore culpable. I certainly did not knowingly possess child pornography on the disks in the Northern District of Alabama in 2008 under these circumstances, and the government did not dispute my allegations. The court would not permit the facts to be reliably developed or proven because it had already misconstrued the "over 700 images" from the computer to be on the Chumley disks in order to defeat my IAC/Suppression claim.

The court said I could show no prejudice because there was no statute of limitations, but that pays no respect to venue, and venue is an issue here because the court also said that I would have entered a guilty plea based on the Chumley disks in order to have a reason to deny my IAC/suppression claim. The Chumley disks have no legitimate place in the calculus of whether I would plead guilty in the Northern District of Alabama. The court's preconceptions caused the court to act in a manner inconsistent with due process of law by denying discovery and any meaningful possibility of proving my claim.

Since there are considerations here such as venue and the inadvertent transfer of images to the computer's recycle bin, and the resulting lack of scienter in relation to the computer, the Court should take this opportunity to hold that the essential element of scienter can not be inferred from the plea itself when the defendant has shown his plea was induced by erroneous legal advice. The Court should also take this opportunity to hold that, under 2252A(a)(5)(B), once an image is deleted, it can no longer be possessed because the defendant can no longer exercise dominion and control over the image..

CONCLUSION

The court created ways of denying my claims through its numerous errors and deviations from procedure and by broadening the scope of my conviction. The due process violations were convoluted and formed into a complex Gordian knot in order to appear legitimate but were actually fundamentally unfair, and made my claims appear to lack merit in order to be able to deprive me of a CO.A. I showed the court its numerous errors several times, yet the court denied any errors. The court's due process violations were calculated and deliberate, and the court even collaborated with the government in perpetrating the Chumley disks fraud scheme. Now the court can not permit the errors to be redressed because doing so will reveal the fraud scheme and the court's crucial role in perpetrating the fraud. There can be no confidence in the resolution of my claims because of the manifest errors and due process violations. I should be permitted a fair evidentiary hearing in order to purge the fraud, develop the facts reliably, have the court follow procedures properly, and thereby enjoy the due process right to prove the merit of my claims without having them wrongfully discredited first.

For the foregoing reasons, the C.O.A.s should be issued.

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