No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

James P. Burke — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

And Appellant seek this Honorable Court to apply to his petition all the benefits of the "liberal construction standard" generally made available to pro se litigant cases. See, Haines v. Kerner, 404 U.S. 519 (1972) (requiring that pleadings filed by incarcerated pro se litigant's not be held to the same stringent standards as licensed attorney's; hence, the liberal construction standards). Additionally pro se litigant requests counsel appointed if writ of certiorari is granted by court. See, Qualls v. United States, 718 A. 2d 1039, 1040 (D.C. 1998).

James P. Burke
Registration No. 93973-379
Federal Satellite Low Elkton
PO Box 10
Lisbon, OH 44432
(330)420-6200

## QUESTION(S) PRESENTED

1) Should evidence be suppressed under the "exclusionary rule" when obtained from Network Investigative Tecnique (NIT) warrants that violated Rule 41(b) of the Federal Rule of Criminal Procedure (prior to December 1, 2016), and /or the **Fourth Amendment**, especially given that the government was aware magistrate judges lacked jurisdictional authority to issue warrants to search or seize outside of their district?

2) Was the government's conduct in continuing to operate an illegal child pornography website ("Website A" or "Playpen") "so grossly shocking and outrageous" as to present Due Process arguments for dismissal when the government didn't just become involved in an ongoing criminal enterprise, but by assuming administrative control of "Website A", the government became the criminal enterprise?

3) When the statutes governing "accessing" of child pornography were written was the legislative intent to utilize the same criminal penalties and sentencing guidelines for defendants whose intent was neither sexual in nature, nor directed towards the victims (children in this case), but the perpetrators themselves (child predators)?

## LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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

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## Table of Authorities

### Cases



### Statutes and Secondary Sources

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

## OPINIONS BELOW

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

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

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

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

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

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

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

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

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

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

## OPINIONS BELOW (continued - timeline)

1) Pro se litigant (Appellant) has limited access to official and/or unofficial reports of opinions and orders in case by other courts or administrative agencies. Appellant will present court responses to best of ability, as incarcerated pro se litigant, and attach copy of orders accessible in Appendix. Below is timeline of "Citation of Reports of Opinions and Orders."

2) On August 14, 2015, Appellant was arrested as part of "Playpen Sting" by the FBI. On September 9, 2015 Appellant was indicted on one count of acessing with intent to view child pornography in violation of 18 U.S.C. §2252A(a)(5)(B) and 18 U.S.C §2252A(b)(2). On June 2, 2016, Appellant plead guilty to aforementioned charges (open plea). On April 6, 2017, Appellant sentenced to 84 months imprisonment, 15 years of supervised release, as well as restitution and special assessment totalling $9,000.00 USD.

3) CJA Counsel timely filed Appeal on behalf of Appellant on April 18, 2017, in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure. On August 28, 2017, counsel of record provided the United States Court of Appeals a 27 page Anders Brief (Anders v. California, 386 U.S. 738 (1967) stating no nonfrivolous issues (plain error only) as to the guilty plea and sentencing. On October 17, 2017, Appellant submitted a 19 page "Response" to counsel's Anders Brief highlighting multiple nonfrivolous issues regarding guilty plea and sentencing, as well as issues concerning counsel of record's refusal to challenge aspects of case of constitutional magnitude.

4) On February 16, 2018, Appellant received notification from the U.S. Court of Appeals for the Fifth Circuit that after reviewing both counsel's Anders Brief and Appellant's Response they found no nonfrivolous issues for Appellate review (plain error). Accordingly counsel's motion to withdraw was Granted and Appeal Dismissed. In addition Appellant's request for new counsel pending post convicition remedies was Denied. Note: Appellant has not submitted official 28 U.S.C. §2255 Motion yet.

5) Appellant requested timely petition for rehearing on March 5, 2018, and was denied by Court of Appeals on April 3, 2018. On April 25, 2018, Appellant's request for clarification of final conviction date and court opinion as to why Appeal/Petition were dismissed/denied was also Denied.

6) Appellant requested pertinent case documents from CJA counsel prior to dismissal and received a compact disk (CD) from said counsel. As incarcerated pro se litigant Appellant has no way to access CD (CD located in inmate "folder" held by Bureau of Prison officials). As such Appellant has limited ability to prepare sections of petiton for writ of certiorari requiring court opinion(s), transcripts, etc.

7) Content attached in Appendix that is "voluminous" will contain pertinent material/excerpts only as to not take up unnecessary time of the court.

## JURISDICTION

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

The date on which the United States Court of Appeals decided my case was February 16, 2018.

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

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 3, 2018, and a copy of the order denying rehearing appears at Appendix C.

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

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

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

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

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

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

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

## Jurisdictional Basis (Continued)

Jurisdiction of this court is invoked under Article III of the United States Constitution, as a Petition for a Writ of Certiorari from a final judgment of conviction and sentence in the United States District Court for the Southern District of Texas, as well as dismissal of appeal by the United States Court of Appeals for the Fifth Circuit.

Pro se litigant (Appellant) provided timeline of events leading to the Supreme Court having final appellate Jurisdiction as to the issues of Constitutional magnitude directly related to this case on page 2 of the petition (Citation of Reports of Opinions and Orders). As such Appellant will repeat as little of timeline as possible.

Conviction and Sentence occurred on April 6, 2017 followed by timely appeal on April 28, 2017, per Rule 4(b) of the Fed. R. App. P. Counsel of record filed Anders Brief on August 28, 2017, with U.S. Court of Appeals for the Fifth Circuit stating no nonfrivolous issues found in regards to guilty plea and sentence (reviewed for plain error only). Appellant filed "Response" to Anders Brief on October 17, 2017, stating multiple nonfrivolous issues regarding guilty plea (Fed. R. Crim. P. 11) and sentencing (Fed. R. Crim. P. 32). Appellant challenged review for "erroneous standards only" as CJA counsel advised Appellant to remain silent during court proceedings for the same issues CJA counsel stated in Anders Brief needed to be brought up in District Court.

On February 16, 2018, Court of Appeals concurred with CJA counsel's Anders Brief, granted motion to withdraw, and dismissed appeal. Appellant's request that counsel be allowed to withdraw, Anders Brief stricken, and new counsel appointed (See, Parker, 2006, U.S. App. Lexis 11060) was Denied. Appellant filed petition for rehearing on March 5, 2018, which was Denied on **April 3, 2018.** As such Appellant concluded as pro se litigant that deadline to file petition for writ of certiorari to be **90 days** from **April 3, 2018.**

The Supreme Court has repeatedly affirmed that one of the fundamental rights with the due process clause of the 14th Amendment is the right of access to the courts. Essential to the concept of due process of law is the right of an individual to have "an opportunity...granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case.

Appellant believes the statutory and constitutional provisions to confer this court jurisdiction to review on a writ of certiorari the judgment or order in question include violations of the Fourth Amendment, Rule 41(b) of the Fed. R. Crim. P. and Due Process Clause. In addition Appellant questions the legislative intent of enforcing the statute for which he was charged as he exhibits none of the culpabilities described in the U.S. Sentencing Commission Report to Congress: Federal Child Pornography Offenses(2012)["Child Porn Report"].

As the Supreme Court recently warned in Riley v. California (2014), "modern computer devices are capable of storing entire warehouses worth of information", a reality that highlights the frightening potential of NIT Malware (Challenging Government Hacking in Criminal Cases, 2017).

Central to this case is the FBI (or government's) use of software/malware that it calls a Network Investigative Technique ("NIT"). The FBI used the NIT

after obtaining a warrant from a magistrate judge in the Eastern District of Virginia ("NIT Warrant"). The FBI installed the NIT on Playpen ("Website A"), the child pornography website it assumed administrative control over and was operating out of Virginia. The NIT maleware attached itself once computers accessed Playpen, regardless of where those computers were located. The NIT searched computer's of user(s) who had unknowingly downloaded the maleware and transmitted certain information back to the FBI., such as the Internet Protocol (IP) address, operating system information, operating system username, and the Media Access Control (MAC) address (unique number assigned to each network modem). Most courts have agreed that NIT is a search that passes the Katz reasonable expectation of privacy test and/or the physical trespass test (Challenging Government Hacking in Criminal Cases, 2017), thus deployment of NIT maleware on a suspect's computer is a search. Defendant's need only demonstrate a reasonable expectation of privacy in the place to be searched to trigger Fourth Amendment protections. Likewise the NIT maleware searched the computers at the physical location of said computers, not in the Eastern District of Virginia where the warrant issued by the magistrate judge was signed, which is a violation of Rule 41(b) of the Fed. R. Crim. P. and 28 U.S.C. §636(a)(1). The FBI also operated Playpen for two weeks during which time tens of thousands of suspects visited the website and posted thousands of images and/or videos. The FBI could have acquired probable cause just by someone logging into the site with a username and password, but elected to not only allow distribution on a massive scale, but by being administratively in control of the website they became the criminal enterprise. This in itself is "so grossly shocking and outrageous" as to violate the due process clause of the United States. **In comparison** if the government were charged with any of the 18 U.S.C. §2252A child pornography statutes they violated by operating "Playpen", using the same sentencing guideline calculations used to sentence the Appellant (will address later), then the government would be accountable for distributing, receiving, accessing, possession, etc. of hundreds of thousands if not millions of images and/or videos. In Sherman Supreme Court Justice Frankfurter stated, "Even where the defendant admits his guilt, it is the methods which the government uses that cannot be tolerated...If the acts of the police authorities are so reprehensible, the problem transcends the individual defendant and the crime", (Sherman v. United States).

As stated in "Challenging Government Hacking in Criminal Cases (produced by the American Civil Liberties Union, Electronic Frontier Foundation, and the National Association of Criminal Defense Lawyers in March of 2017)", "In the FBI's 2015 "Playpen" sting, part of "Operation Pacifier", the agency seized control of a server running a child pornography website referred to as "Website A, and covertly operated it between February 20, 2015 and March 4, 2015. Court documents state that the site was devoted to child pornography and was named "Playpen". The website had more than 158,000 members, and allowed members to upload or view images of their choosing. According to a transcript from one evidentiary hearing, the FBI obtained over 8,000 IP addresses, and hacked computers in 120 different countries in the operation using a Network Investigative Technique (NIT). All of these NIT deployments were authorized by a single magistrate judge, sitting in the Eastern District of Virginia".

As this court knows certiorari is generally granted only in cases involving principles the settlement of which is of importance to public as distinguished from parties, and in cases where there is real and embarrasing conflict of opinion and authority between courts and appeals (NLRB v. Pittsburgh S.S. Co., 1951).

The Appellant believes this case raises multiple issues of constitutional magnitude that only the Supreme Court of the United States has the judicial power to resolve. There have been so many diverse decisions, in both district courts as well as appeals courts, concerning the questions presented within this petition. The questions presented in this case will likely come down to the "exclusionary rule" (Mapp v. Ohio) versus the "good faith exception" (U.S. v. Leon), and whether the "deterent" benefits of exclusion vary with the culpability of the law enforcement conduct at issue". What is so conflicting about this case is the child pornography precedent. The children of the world need to be protected at all costs and as such the Appellant was reluctant to provide any information that child predators (or any violent predator) could look to as a "precedent" in their case(s). The Appellant was unaware of the government's culpability and methods used to identify and prosecute suspects during the "Playpen" sting however.

To again quote Justice Frankfurter, although discussing the entrapment theory Appellant believes encompasses all government conduct, stated that, "the entrapment theory, be it objectove or subjective, starts with the disapproval of the methods of the government officials. Even where the defendant admits his guilt, it is the methods which the government uses that cannot be tolerated." Justice Franfurter reminded the Court that "the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice. To do otherwise would undermine the Court's standing as administrators of justice. The issue goes beyond the conviction of the individual defendant. At stake is the integrity of the process. Because of the integrity of the courts and their position in the scheme of government and ordered liberty, under the objective standard, the acts of the defendant are not important to the disposition. If the acts of the the police authorties are so reprehensible, the problem transcends the individual defendant and the individual crime. For the courts to resolvethe issue, they would become corrupted by a process that is the fruit of corrupt police methodology". Justice Frankfurter looked to the language of Justice Roberts in stating, "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law".

The Appellant, as pro se litigant, leaves the decision of whether or not this case meets the juridctional requirements to this Honorable Court. As the court reviews the contents of this petition there may be issues concerning the rules for the content of a petition for writ of certiorari. The Appellant apologizes for this and asks that the nature of the content be viewed with the liberal construction standard. As the court will see the Appellant deserves to be heard, not only due to the government's constitutional violations, but also for the over twenty years of military (and twelve to law enforcement) service and more than half his life protecting the innocent.

## Constitutional Provisions and Statutes Involved

### Articles of the Constitution of the United States of America involved:

Article IV - "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article V - "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article VI - "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crim shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Article XIV, Section 1. - "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### Pertinent Federal Statutes and Federal Rules of Criminal Procedure involved:

1) Title 18 U.S.C. §2252A(a)(5)(B) and 18 U.S.C §2252A(b)(2) - "Accessing with intent to view" material that contained images of child pornography.

2) Title 18 U.S.C. § 2252A(a)(5)(d) - "Affirmative Defense" to a charge of violating subsection (a)(5) that the defendant (1) possessed less than three images of child pornography: and (2) promptly and in good faith, without retaining or allowing any person, other than a law enforcement agency, to access or copy thereof -(A) took reasonable steps to destroy such image; or (B) reported the matter to a law enforcement agency and afforded that agency access to each image. **Note:** The Appellant did not share (or distribute), receive, copy, or communicate with any person (on any category of forum, website, etc.), nor retain or allow any person to access or copy any image (or video). In addition the Appellant did not knowingly possess any image of child pornography (one image found on desktop that Appellant had no knowledge of).

## Constitutional Provisions and Statutes Involved

3) Title 18 U.S.C. §3553 - "Imposition of sentence", (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragrapgh (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -- see Appendix for complete subsection paragraph listing (1-7). (6) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

4) Title 28 U.S.C §636(a) - "Magistrate Jurisdiction". Congress provided judicial authority to United States magistrate judges" within the district in which sessions are held by the court that appointed the magistrate judge...and elsewhere as authorized by law." This authority may be modified by the Rules of Criminal Procedure via §636(a)(1).

5) **Title 18 U.S.C. §2510-2520** - Title III of the Omnibus Crime Control and Safe Street Act of 1968.

6) Title 18 U.S.C. §3509(m) - Requires that in any criminal proceeding, child pororgaphy "remain in the care, custody, and control of either the Government or the Court."

7) Fed. R. Crim. P. 41(b)(1) - "Rule 41(b) defines the territorial jurisdiction of magistrate judges." Prior to December 1, 2016, Rule 41(b) provided that "a magistrate judge with authority in the district...has authority to issue a warrant in order to search for and seize a person or property located within the district". The rule provided exceptions to this jurisdictional limitation for property moved outside of the jurisdiction, for domestic and international terrorism, for the installation of a tracking device, and for property located outside a federal district (Rule's 41(b)(2)-(5)). Most district and appellate courts agree that NIT warrant is a search, which would not authorize Rule 41(b)(4) granting magistrate judges 'authority to issue a warrant to install within the district a tracking device" even if the peron or property being tracked leaves the district. As of December, 1, 2016, new exemption, Rule 41(b)(6), now provides magistrate's expanded territorial reach for searches of "electronic storage media" if "the district where the media...is located has been concealed through technological means." This would apply to NIT warrants authorized by magistrate judges after December 1, 2016. **Note:** The Appellant was arrested on August 14, 2015. In addition the Appellant never attempted to conceal location of electronic storage media from law enforcement.

## Concise Statement of the Case

As stated in both the "Citation of Reports of Opinions and Orders" and "Jurisdictional Basis" the Appellant's "Appeal" was dismissed on February 16, 2018, and "Petition for Rehearing" was denied on April 3, 2018. Appellant was not made aware of the specific use of the Network Investigative Technique (NIT) until review of "Discovery" was done with CJA counsel just weeks before pleading guilty on June 2, 2016. At that time CJA counsel presented Appellant with FBI's reports, to which Appellant contested certain content, and showed Appellant activity logs of his (Appellant's) time spent at "Playpen". CJA counsel also showed Appellant multiple "censored" images contained within forum "posts" to which the Appellant had allegedly visited. The Appellant stated, as he had also done on day of questioning (August 14, 2015) to the FBI, that he had never seen said images. The Appellant once again stated his intent to CJA counsel of searching for the predators/monsters who preyed upon children (and/or the "innocent") and scanned posts (on any "violent predator" type forum/website) to identify targets. CJA counsel advised Appellant that "intent" had no bearing in this case as "accessing" a child pornography website was illegal in itself. CJA counsel also stated that the government had found one image on desktop computer and threatened to charge Appellant with "possession" if he did not plead guilty. Appellant told CJA counsel he had no knowledge of any image on any computer and asked what image was of but CJA counsel did not have that "Discovery" from the government (this was almost ten months since appellant's arrest and seizure of all computer devices from residence). CJA counsel also presented Appellant with a copy of the first "Suppression" of the Playpen case (U.S. v. Levin, 2016) regarding the issue of NIT warrant by magistrate judge out of the Eastern District of Virginia, in violation of Rule 41(b). The Appellant indicated to CJA counsel that he had knowledge of previous concerns by the government regarding the issuance of warrants, specifically Title III intercept, by magistrate judges out of the Eastern District of Virginia. The Appellant had attended a law enforcement conference in Houston, TX, approximately a year prior to arrest, in which members of the Department of Justice voiced specific concern about utilizing magistrate judges out of the Eastern District of Virginia for cases that would inevitably target individuals outside the judges jurisdiction. Appellant not aware what other agencies (other than DEA) were present, nor if there was anyone from out of the district present, but the Appellant does know that members of the AUSA office for the Southern District of Texas, Houston Division, were present. This was the same office that approved search warrants for Appellant, as well as prosecuted the Appellant. In addition the Appellant believes the Title III intercept being discussed, signed by magistrate judge out of Eastern District of Virginia, was being monitored by the FBI.

CJA counsel did not present information to Appellant regarding the extent to which the government had operated "Playpen", other than to state the government had essentially been distributing child pornography during the time they controlled the website. No mention was made to the Appellant regarding the Rule 41(b) violation or what could be done regarding the Appellant's knowledge that the government was aware of the issue(s) of said violation. The Appellant's request for outside computer forensic expert's assistance was ignored (CJA counsel had limited knowledge regarding TOR, the "Dark Web", forums/websites, or computer/internet in general). Despite the Appellant's insistence that he had never seen any of the images, and that his intent was as previously stated, CJA counsel advised to plead guilty and that he(counsel) would ask judge to delay sentencing until Appellant completed last months of military service before reaching twenty years (for retirement). The Appellant was reluctant to plead guilty as he still believed that although what he had done was outside the law it did not meet the crit-

eria/intent for what he was being charged (18 U.S.C. §2252A(a)(5)(B) and §2252A (b)(2)). Ultimately the Appellant agreed with CJA counsel, based on counsel's advice, to plead guilty in order to save retirement and primarily as to not create a precedent by revealing knowledge of the government's awareness of problems with 41(b) violations by magistrate judges. On June 2, 2016, however, CJA counsel presented a copy of the "Factual Basis" that the prosecution was going to read before the court during the guilty plea hearing. The Appellant vehemently denied the majority of the factual basis to CJA counsel as it used terminology that placed the defendant in an extreme prejudicial stance before the court. The Appellant was unaware beforehand prosecution had utilized every image, contact sheet, or image/video file link in calculating the amount of "images" the Appellant had "accessed". The Appellant had never seen, nor attempted to access, 99% of the images calculated as that was not his "intent". The Appellant also contested much of what had been said during his interview with FBI agent's on August 14, 2015, (if requested will send "Response to CJA Counsel's Anders Brief" and "Petition for Rehearing" as argument regarding FBI interview and CJA counsel's advice/action is quite voluminous). The Appellant was advised to go forward with guilty plea, for as previously stated reasons, as well as to remain silent during proceedings except when spoken to by the judge. The judge accepted the plea and granted request to delay sentencing, which ultimately occurred on April 6, 2017. Prior to sentencing the Appellant once again vehemently objected to the content of the PSR, which contained false and/or second hand statements (opinions not fact). The PSR was turned in regardless and was the basis for which the Appellant was sentenced. During sentencing the prosecution made multiple false or inaccurate statements that CJA counsel failed to challenge. The Appellant addressed the court and for the first time since arrest was able to present his intent towards violent predators, as well as many of the reasons behind his actions. The Appellant accepted responsibility for the actions for which he had actually committed. The judge was unmoved by the Appellant's statement and sentenced the Appellant to the maximum sentence as calculated by the PSR (84 months). In addition the judge stated that it was because of the Appellant's service (military and law enforcement) that he was being sentenced at the high end of the guideline as he should have known better. Note: The Appellant was facing no minimum sentence.

The Appellant's statements in the previous two paragraphs are not to present any post conviction relief (28 U.S.C. §2255, IAC, etc.) requests, but for the court to understand that during the course of Appellant's case the only time any of the questions included as part of this petition were presented to the Appellant was the one time CJA counsel mentioned the Levin case. CJA counsel never once mentioned the ongoing conflict amongst district and appellate courts throughout the nation, and the possible additional violations of Rule 41(b), 4th Amendment, 5th Amendment, 6th Amendment, and 14th Amendment "Due Process Clause", that the Appellant could have used in his defense (or at least during sentencing or post conviction). The Appellant did not have access to the internet in order to acquire updates himself so had relied upon counsel to to do so. The Appellant is unaware when or if CJA counsel raised questions to the court regarding the Appllant's knowledge concerning Rule 41(b) violations. The Appellant does know that CJA counsel did not bring up Appellant's intent before court until day of sentencing, despite having knowledge of such since day counsel was appointed (concerns question #3 regarding "intent of defendant"). The appellant did bring up both his intent and reluctance to use knowledge for suppression at sentencing, although it was not until being incarcerated that Appellant became aware of blatant violation(s) of the Due Process Clause by the government. It was not

until the Appellant had access to Lexis Nexus, through the Bureau of Prisons, that he was able to view other cases involving "NIT" installation. The Appellant was made aware that most defendant's counsel contested 4th Amendment, Rule 41(b) violations, or Due Process Clause violations. In cases that evidence was not suppressed due to one or a mix of the said violations (either at district or appellate level) there was an overwhelming reliance upon the "good faith" exception" or the government's assertion that in order to identify suspects who conceal their location utilizing the "Dark Web" it had to become part of an ongoing criminal enterprise. What the Appellant was most unaware of was the government's reprehensible conduct in identifying said suspects through the NIT malware installation and controlling Playpen. As previously stated in this petition the government was in administrative control of a website that distributed thousands of child pornography images, videos, and other child pornography related material. Knowing that only a small portion of those prosecuted during this operation were actual child predators and/or producers/distributors would the court system and American people have approved? The majority of those caught and prosecuted were non-violent, non-contact, computer or internet-based offenders who became the "surrogate or proxy" targets in lieu of violent offenders (according to the 2012 Sentencing Commission as little as 3% of non-violent, non-contact offenders re-offend). If the DEA seized a warehouse full of fetanyl or heroin and distributed the narcotics in an attempt to identify and prosecute suspects, knowing the epidemic said narcotics have had in causing countless overdoses, deaths, as well as destroying the lives of countless individuals and families, would the court system and American people have approved? The Playpen sting was little different in the extremes the government went to in order to identify and prosecute suspects. Even if the government overcame the constitutional violations in this case, and the courts agreed that the distribution of thousands of child pornography images/videos was a necessary evil in identifying suspects, there would be little to no deterrent value as the violent offender's (child predators, child pornography producers and distributors, etc.) only made a miniscule portion of those actually arrested and prosecuted. For the amount of damage done by the government's operation of "Website A" (Playpen), the continued (if not increased) abuse the victims suffered during the two week sting was not justified. This does not mean non-violent or non-contact offenders should not be punished for their crimes, it just means the small amount of violent offenders caught did not justify the government's "demonstrated level of outrageousness" during the Playpen sting.

The Appellant will provide an "excerpt" from CJA counsel's Anders Brief within this petition containing the "Factual Basis" as read by the prosecution on June 2, 2016 (as stated previously Appellant does not currently have access to court transcripts). Note: Understand the Appellant contested the content of the "Factual Basis" to CJA counsel on day of guilty plea. Appellant once again brings this to the court's attention as statements within the factual basis cast the Appellant in a negative or prejudicial light. The Appellant repeatedly stated throughout case that his intent was not sexual in nature and not directed towards the victims but the perpetrators. None of these statements were included in either the "Factual Basis", the "PSR", nor were they brought to the attention of the court until the day of sentencing (may have placed the Appellant in a more favorable light before the district court judge).

## Statement of the Case

On September 9, 2015, Defendant James P. Burke was charged with intent to view material that contained images of child pornography in violation of 18 U.S.C.

## Statement of the Case

§2252A(a)(5)(B) and §2252A(b)(2) in a once count indictment. On June 2, Burke entered a plea of guilty to the indictment.

At the guilty-plea proceeding, the prosecutor submitted the following as the factual basis for the plea:

> The case was initiated pursuant to an international investigation which targeted the users of a TOR network child pornography website, referenced here as "Website A", whose primary purpose was to advertise and distribute child pornography.
>
> Following the February 2015 arrest of the primary site administrator and seizure of the website, the site remained operating at an FBI facility in the Eastern District of Virginia until approximately March 4, 2015. During that time period, Title III electronic intercepts were conducted on the site to monitor user' communications and a network investigative technique was deplyed in aneffortto defeat the anonymous browsing technology afforded by the TOR network and to identify the true IP addresses of site users. The NIT successfully revealed the actual IP addresses of more than 1,000 U.S.-based users who accessed the site. One such IP address came back to a computer which was located at the defendant's residence.
>
> On August 14 of 2015, FBI McAllen Special Agent Truong Nguyen executed a search warrant at the defendant's residence. The search warrant was obtained based on information that led investigators to believe that the defendant was accessing files from a website known to contain child pornography , which would be Website A.
>
> Through their investigation, agents were able to determine that on February 23 of 2015, the defendant access a file entitled "Valya thread." This post contained links and passwords to a video of what posts described as a nine-year old girl engaged in penetrative sexual activity with an adult male. This thread was posted in the "Preteen Videos, Girls HC", which means hard core, section.
>
> The Defendant also accessed a post that contained a link to a set of images that depicted a young prebuscent child being orally penetrated by the penis of an adult male.
>
> During the same date, the defendant additionally accessed a post that contained a link to a set of thumbnail images from a video that depicted a young prebuscent girl sitting with an adult male. The young girl is then shown being orally penetrated by the adult male's penis. The images depicted in these contact sheets meet the federal statutory definition of child pornography.
>
> In a post-Miranda interview after the execution of the federal search warrant on August 14, 2015, the defendant admitted that he had downloaded and viewed child pornography from various child pornography websites on the Internet. The defendant stated that he knew that it was wrong and illegal. The defendant further stated that he would delete the movies after viewing them and that he did not have any movies or images on his computer. Therefore, the defendant knowingly accessed with intent to view child pornography from various child pornography websites.

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A forensic exam was performed on the defendant's Asus laptop computer. Agents found remnants of the TOR browser which the defendant used to access Website A as well as forensic wiping software. Agents also found remnants of the movies titles that are suggestive of child pornography.

A forensic exam was later performed on the defendant's desktop computer, a Gateway CPU model DX4300 with a Hitachi one terabyte hard drive. Agents found a single thumbnail image which depicted child pornography that was linked to a video of child pornography. The file path of this image shows that it was downloaded on June 13 of 2012.

Further, this desktop also had remnants of the movie titles that are suggestive of child pornography as well as the TOR browser and forensic wiping software.

This desktop computer showed that the defendant had visited imgsource and motherless.com, which are known child pornography websites.

An examination was collected from the server site of Website A showed that the defendant had accessed a total of 77 threads, which contained 345 contact sheets, which had approximately eight images of child pornography per contact sheet. These images included children under the age of 12, bondage and acts of violence. Some of the images are of known victims identified through the National Center for Missing and Exploited Children.

Both of the defendant's computers were manufactured outside the state of Texas; consequently, the computer media that was used to access the child pornography at issue was transpoted in foreign or interstate commerce. Further, the defendant accessed child pornography via the Internet, which is a means and facility of interstate commerce.

Upon questioning by the court, Burke acknowledged these facts as true.

On April 6, 2017, the district court sentenced Burke to serve 84 months in the custody of the Bureau of Prisons, followed by a 15-year term of supervised release. The court did not impose a fine and ordered Burke pay to the United States a special assessmant of $100. Further, the court ordered restitution in the amount of $4,000. Finally, the court ordered a $5,000 special assessment for the Justice for All. Burke filed a timely notice of appeal.

**Note:** The Appellant challenged the terminology used by the prosecutor in the factual basis (to CJA counsel throughout the case, as well as in Appellant's "Response to CJA Counsel's Anders Brief"). The Appellant did not "access a file" entitled "valya thread", the Appellant may have searched a post entitled "Valya thread" as his intent was to scan forum (Website A or "Playpen" in this case) posts and comments in an attempt to identify targets (child predators). Website A was set up in forum and/or message board format, not like regular "websites" where there are images, videos, hyperlink advertisements, etc. The Appellant read user comments in the chance that those who posted anything (comments, files, links etc., may accidently reveal their identity. The Appellant was not viewing or accessing every thumbnail image, outside link (to forums/websites, image and/or video file), nor was he viewing "contact sheets" (CJA counsel showed examples to Appellant during "Discovery" of said contact sheets, which are tiny embedded image

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examples within posts that made up the majority of the prosecution's image calculations for PSR and sentencing). As previously stated the Appellant's intent was not sexual in nature, nor would the Appellant access posts/threads based on content, but due to the amount of traffic (more traffic/comments then more potential targets to identify).

The Appellant admitted he knew child pornography was "wrong and illegal" but was not specific in what he told the government he downloaded as he had no specific criteria other than if their was the possibility to identify violent predators. The Appellant stated during the interview with FBI agents that he had searched/visited many different types of forums, websites, discussion boards that were frequented by violent predators (to include terrorists, murderer for hire, human/narcotic/weapon traffickers, or any "group" that preyed upon the innocent). Child predators, or pedofiles, were just one of the primary groups the Appellant targeted for obvious reasons (child porn precedent). The Appellant accessed what he believed was necessary in attempt(s) to target said violent predators. The **TOR** browser is not illegal, nor was the "forensic wiping software" illegal or a complex hacking software program. The forensic wiping software the government alleged the Appellant utilized to mask his activity from law enforcement was in fact common, free software, downloaded and utilized by millions of people (CC-leaner and Glary's utilities). They are just as common as any virus/malware/wiping program like McAfee, Norton's, etc. (just free). The Appellant was unaware of any image (as previously stated), nor did he differentiate any material he accessed to identify targets based on subject matter. If they were a violent predator who preyed upon the innocent, especially children, the Appellant would search anywhere they frequented (in this case the "Dark Web"). The Appellant went into great depth concerning the prosecution's (government's) allegations and interpretations of Appellant's activities and intent in his Anders Brief response, as well as in follow on motions. As such the Appellant will not waste the court's time repeating all that has already been stated/provided. The Appellant was not aware ,while writing previous material, of many aspects of "Operation Pacifier" and/or the Playpen sting though. The Appellant would like the court to look at his years of service to this county, contributions to society, life as a loving husband and father, and the actual proof of his said intent of protecting the innocent. If the Appellant was the "monster" living the double life, as the prosecution contends, wouldn't there have been more evidence of such? "Website A" had between 150,000 and 200,000 members, in at least **120** different countries. The roughly **100,000** users who visited the website, while the FBI had administrative control, posted approximately **13,000** links to images or videos files of child pornography and clicked on at least 67,000 unique links to said images or files (adding tens of thousands of victims). During the time period in which the government operated "Website A" the Appellant had searched the "Dark Web" for multiple websites/forums operated and frequented by violent predators. "Website A" was just one of the websites with the most traffic. Despite this the Appellant **did not share, receive, copy, communicate with any person, nor retain or allow any person to access or copy any image (or video). In addition the Appellant did not knowingly possess any images of child pornography** (18 U.S.C. §2252A(a)(5)(d) - "Affirmative Defense" to 18 U.S.C. §2252A offenses). The Appellant would ask the court not to judge him by the few hours questioned "under duress" (concern for family - FBI threat of taking wife into custody resulting in children taken by Child Protective Services) but by the over 20 years placing himself in harm's way in or order to protect those who could not protect themselves (**end note**).

## Direct and Concise Argument Setting Forth Reasons for Granting the Writ of Certiorari

Prior to being arrested and incarcerated the Appellant was a highly decorated veteran who served over 20 years in the United States Army (active duty and National Guard). In addition to his military service the Appellant had also been a Federal Law Enforcement Officer for approximately 9 years, as well as a Criminal Investigator (Special Agent) with the Drug Enforcement Administration (DEA) for approximately 3 years. The Appellant deployed overseas with the military 6 times to multiple combat zones and/or hazardous duty areas (Iraq, Afghanistan, Kuwait, Balkans, etc.) as both an enlisted Non-Commissioned Officer as well as an Officer (Appellant was Direct Commissioned from SSG to 2LT in 2009). The Appellant is the recipient of multiple awards, medals, and commendations to include the Bronze Star. The Appellant is rated 100% service-connected disabled through the Veteran's Administration (VA) for physical (back, hip, shoulder, nerve damage) and mental health (PTSD, General Anxiety Disorder, Hypervigilence) issues. **Note:** The Appellant's mental health issues were diagnosed primarily as a result of protecting others at his own expense and not being able to "turn off", or re-adjust from combat to civilian status. Much of the Appellant's focus was on preventing others from being harmed, which may be the result of seeing so many innocents ravaged by war. The Appellant was reluctant in receiving mental health treatment (wife ordered him to go or she would divorce him) for fear of the affect it could have on his career and due to the stigma military personnel who receive treatment for "PTSD" receive (especially leaders).

The Appellant also was involved in the search for the Boston Marathon bombers in 2013, as well as voluntarily worked "Ground Zero" following the September 11, 2001 attacks on the World Trade Center (prior to deploying overseas). The Appellant was a contributing member of society who , despite spending much of his adult life putting his life on the line at home and abroad, still acquired a Bachelor of Arts, Bachelor of Science, and a Masters Degree. Most importantly the Appellant is a loving father with a loyal wife of almost 14 years and four amazing children.

The Appellant stated the intent and action(s) that led to his incarceration within this petition already and will now focus on the specific arguments for why he feels the writ of certiorari should be granted. The Appellant understands the actions that led to his arrest, as well as the time spent away from home protecting others instead of being with his family, were selfish. The Appellant's family lost just about everything upon his arrest (father figure, husband, provider, protector, etc.) leaving his wife essentially a single parent. The Appellant hopes to make amends for his mistakes and reunite with his family. In order to do so he must first take care of himself (primarily mental health), which he cannot do while incarcerated. The Bureau of Prisons does not provide mental health treatment for veterans, especially those with PTSD or combat related mental health issues, nor do they conduct "mental health evaluations" (as was ordered by court as part of sentencing). The Appellant will instead present to the court 4th Amendment and Rule 41(b) arguments for suppression, Due Process Clause violations relating to government conduct, and challenges to the criminal penalties and statutes (legislative intent) for the crime the Appellant was charged and convicted.

In United States v. Krueger Justice Gorsuch (then Judge Gorsuch of the 10th Circuit) concurred that a rule 41 violation may prejudice a defendant and that he believed jurisdictional errors under Rule 41 were errors of constitutional magnitude:

"For looking to the common law at the time of the framing it becomes qui-

ckly obvious that a warrant issued for search or seizure beyond the terroritorial jurisdiction of a magistrate's powers under positive law was treated as no warrant at all-as ultra vires and void ab initio to use some of the law's favorite Latin phrases-as null and void without regard to potential questions of "harmlessness" (such as, say, whether another judge in the appropriate jurisdiction would have issued the same warrant if asked)...The principle animating the common law at the time of the Fourth Amendment's framing was clear; a warrant may travel only as far as the power of its issuing official. And that principle seems clearly applicable-and dispositive here."

As most courts have found during the "Playpen" sting/operation the NIT installation was indeed a search, which brings up multiple "possible" 4th Amendment arguments (probable cause, specificty of warrant, general warrant, etc.). Some courts argue that visiting child porn sites creates probable cause, although others find that NIT deployment alone does not mean everyone suspected of criminal activity, due to their "propinquity" to others, is in fact intending to commit the same acts. As stated previously in this petition, "Defendants need only demostrate a reasonable expectation of privacy in the place to be searched to trigger 4th Amendmant protections" (Challenging Government Hacking in Criminal Cases, March 2017). It can be argued that some of the information seized during the NIT search, such as IP addresses, do not fall under the expectation of privacy rule because they are available to third parties while browsing the internet (even when "obscurred" by TOR). The Appellant concedes this as true (Appellant never attempted to hide location, even while using "TOR") but other information seized during the the "Playpen" sting, such as as a computer's MAC address, can only be acquired by searching an individual's computer (as was done through the NIT installation). As such under the Katz test, as well as the recently revived property based theory of 4th Amendment rights ("physically occupying private property for the purpose of obtaining information" is a search), the NIT deployment meets all the requirements of a search (Challenging Government Hacking in Criminal Cases, March 2017). This leads back to the question of if individuals who knowingly went to the Playpen site, which was primarily dedicated to illegal (child pornography) material, provided the government with the probable cause to search or seize said individuals (through "NIT" installation and search, followed by seizure of information, and then physical search/arrest of individuals)?

Under the 4th Amendment, the search authorized by a warrant may be "no broader than the probable cause on which it is based." Magistrate judges may not authorize warrant applications that state "the search will include any computer that accesses the site" as the statement is too broad to satisfy the 4th Amendment (Challenging Government Hacking in Criminal Cases, March 2017). However the Appellant agrees that in cases such as "Playpen", where not only are the website users visiting an illegal website but also utilized the TOR browser to do so, the establishment of probable cause is stronger (child pornography precedent). The issue at hand is that the NIT warrant failed to identify particular user's devices "until after the search had already occured" and "lacked particularity because it is not possible to identify with any specificity, which computers, out of all the computers on earth, might be searched pursuant to this warrant" (Challenging Government Hacking in Criminal Cases, March 2017). The NIT warrant searched thousands of computers in at least 120 countries, which, despite the child pornography precedent, could be considered so overly broad as to be considered a general warrant. Although some courts have found that because the NIT warrant was deployed

from Playpen, a child pornography website operating on the "Dark Web" (and very unlikely for users to "accidently" come across), then the accessing of said site does in fact establish probable cause. Without knowing the "intent" of each individual however, "it is not clear that an analogous brick-and-mortar warrant would survive juducial scrutiny-for example, it is not clear that courts would approve of a warrant that sought to search each individual who entered or left a low income housing unit where drug dealing was known to be rampant" (Challenging Government Hacking in Criminal Cases, March 2017). The use of a warrant to search so many computers is alarming as it may pose the exact threat the "warrant requirement" was designed to avoid: "unbridled discretion of executive and administrative officers." The authorization to search so many computers, through the shear breadth of the NIT deployment, could be considered unconstitutional in itself.

In reference to Riley (Riley v. California, 2014) computers store so much personal information about an individual that the amount of data the NIT deployment gathered, seven specific categories of data in the Playpen NIT, there could have been a viable basis to challenge the warrant for being "unconstitutionally overbroad". Unlike in the In re Warrant case however, where the magistrate judge was troubled by family or friends **uninvolved** in **any crime** using computer(s) with NIT installed, the Playpen NIT was only triggered when users logged into the website in question and proceeded past the homepage. Although this favors the government's position, even more so with the use of TOR as a necessity to access Playpen, the government's reluctance to explain how the NIT installation gathered user data (source code) and why they allowed said users to continue to download child pornography (when accessing Playpen through user/password was all the probable cause they needed-child porn precedent) brings up the question of if the NIT warrant was **so overly broad** as to be a deliberate, reckless, or grossly negligent disregard for 4th Amendment rights.

As previously stated in this petition the magistrate judge who issued the NIT warrant in question had no authority to do so prior to the December 1, 2016 rule change (Rule 41(b)(6)). As Justice Gorsuch stated in the Krueger case, "a warrant issued for search or seizure beyond the terroritorial jurisdiction of a magistrate's powers under positive law was treated as no warrant at all", or "void ab initio." The majority of courts seem to agree that there was indeed a Rule 41(b) violation but vary on if said violation was merely technical (also referred to as "procedural" or "ministerial" defects) or instead rises to the level of a violation of the 4th Amendment (United States v. Krueger, 10th Circuit, 2015). If the NIT warrant was "void ab initio" from the start (Rule 41(b) violation) then any search or seizure conducted pursuant to said warrant is the equivalent of a warrantless search. As the Appellant understands it a warrantless search is a violation of the 4th Amendmant that cannot be overcome. If on the otherhand a Rule 41(b) violation is considered "merely technical" it may not rise to the level of a constitutional violation. In Hyten the court stated, "Absent a constitutional infirmity, the exlusionary rule is applied only to violations of Federal 41 that prejudice a defendant or show reckless disregard of proper procedure", (United States v. Hyten, 8th Cir. 1993). In other words if the NIT warrant was a violation of constitutional magnitude (4th Amendment) than there is no need to address "prejudice against a defendant" or "reckless disregard of proper procedure" as the warrant was void ab initio and all evidence obtained from said warrant may be suppressed ("substantive" defects). If the court(s) believe the NIT warrant violation of Rule 41(b) was "merely technical" then the defendant (Appellant) must show that the evidence obtained from said

warrant prejudiced the defendant or that the violation was intentional. As Rule 41(b) "implicates substantive judicial authority" (unlike the rest of Rule 41) the Appellant feels that the NIT warrant was the equivalent of a warrantless search, in violation of his constitutional rights, and all evidence obtained from the warrant be suppressed ("fruit of the poisonous tree"). Although some courts agree with this opinion (district and appellate) there are others that do not directly link the NIT warrant Rule 41(b) violation to the 4th Amendment but do feel suppression may still be warranted for technical and/or ministerial defects as the defendant was prejudiced when in fact "the search would not have occurred if the rule had been followed." In addition other courts also feel searches and/or seizures would not have been so abrasive if the rule(s) had been followed. There have been strong arguments that in NIT deployment cases, involving extra district warrants, the prejudice prong is satisfied because a jurisdictional defect in a warrant that authorizes an extra district search is incurable. In addition suppression for intentional disregard of a provision in Rule 41(b) is justified as "the constitutional defect in the execution of the NIT warrant was a creation of the Agents themselves, impermissibly expanding the scope and conducting searches outside the area in which the NIT warrant plainly limited searches to" (U.S. v. Carlson, 3/23/17).

Regardless of if suppression is warranted for Rule 41(b) or 4th Amendment violations, in order for evidence to be suppressed under the exclusionary rule it must overcome certain limitations. The limitations include the good-faith exception (United States v. Leon. 1984) and the exigent circumstances exception. Under the exclusionary rule, courts may suppress evidence obtained as a direct result of an illegal search or seizure as well as evidence that is the fruit of the poisonous tree. However, due to the significant costs of suppressing evidence of crimes, the exclusionary rule applies only where its deterrence benefits outweigh its substantial social costs. The deterence benefits of exclusion vary with the culpability of the law enforcement conduct at issue. When police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. However, when the police act with an objectively reasonable good-faith belief that their conduct is lawful or when their conduct involves only simple, isolated negligence the deterrence rationale loses much of its force, and exclusion cannot pay its way. In addition the 4th Amendment contains no provision expressly precluding the use of evidence obtained in violation of its terms. Neverless, the U.S. Supreme Court created the exclusionary rule as a prudential doctrine to compel respect for the constitutional guaranty. The exclusion of evidence obtained by an unconstitutional search is not a personal constitutional right but a remedy whose sole purpose is to deter future 4th Amendment violations (Sorrells v. United States).

In most of the Playpen cases that have not resulted in suppression the courts have not focused on the type of 4th Amendment violation at issue, but rather confined the "good faith inquiry to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances" (United States v. Leon, 1984). In Leon, the Supreme Court noted that "penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." The Appellant would argue that in the Playpen case the "good-faith exception" does not apply as not only was the Playpen NIT warrant written by **FBI Agents**, and approved at multiple levels (within the FBI leadership and through the AUSA), there was already knowledge within federal law enforcement that Title III warrants

issued and monitored out of the Eastern District Virginia violated Rule 41(b). As stated previously in this petition, as well as in previous motions/responses to the district and appellate courts, the Appellant was himself present at a law enforcement conference in 2014 in which concerns over Title III warrants signed/authorized by magistrate judges out of the Eastern District of Virginia were raised. The Appellant does not wish to get into the inner workings of federal law enforcement (still have loyalties to fellow agents, primarily within the DEA) but during his albeit limited time (3 years) within the DEA he had authored a Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-2520 affidavit. The Appellant also assisted in the monitoring and reaction to actionable events intercepted over multiple different Title III warrant intercepts with both the DEA and interagency operations. As such the Appellant is well aware, even with his limited experience, of the strict guidelines and extensive approval process Title III warrant affidavits must go through before even being placed before a judge. The aforementioned conference, which took place in Houston, Texas (Southern District of Texas) in 2014 specifically raised concerns regarding magistrate judges not having jurisdictional authority to authorize search warrants out of their district. The government's theory that Playpen user(s) made a "virtual trip" to the Eastern District of Virginia does not hold water as the "installation" of the (Title III) NIT malware occurred not in the Eastern District of Virginia, but at the "physical location" of the user(s) computer. In addition the search of the user(s) computer (or other eletronic device) also did not occur in the Eastern District of Virginia but also wherever it (computer/electronic device) was physically located. The Appellant stresses the pre-existing knowledge of magistrate judges issuing Title III or NIT warrants out of their jurisdictional district as to show that even he, with limited Title III experience, knew of said jurisdictional issues. The likelihood that the original author of the NIT warrant in the Playpen case, a 19 year veteran of the FBI, knew nothing of the jurisdictional issue concern seems improbable at best. Even if the agent was unaware of said jurisdictional issues, and was acting in good-faith, a warrant of this significance would have to have been vetted at the highest level within the FBI as well as with the United States Attorney's Office. This same process of "vetting" or approving of the warrants issued throughout the nation, in response to data ascertained from the NIT warrant, would also go through multiple government (FBI or task force) and AUSA (Assistant United States Attorney) screenings before being placed before local magistrate judges. That none of the 94 districts claimed to have identified the jurisdictional issues arising from the original NIT warrant is highly improbable and bordering on blatant deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights.

In the Appellant's case the author(s) of the NIT derived search warrant were not uniformed police officers who had to make a decision under duress during "exigent" circumstances. They also were not just "reasonably trained officer's" who had to ojectively question whether the NIT warrant and subsequent search was illegal in light of "all of the circumstances." This was the **FBI**, who pride themselves for being highly trained, educated, and experienced Criminal Investigators in all manner of crime. The FBI is regarded as the premier law enforcement agency in the country, and possibly even the world. Throughout the Playpen case FBI agents testifying on behalf of the government/prosecution have recited impressive resumes that leave no question as to their knowledge of criminal investigations (technology and computer crime-child pornography in this case). With all of this combined experience

and knowledge, even if there were several agents (throughout the nation and/or world) who were unaware that magistrate judges lacked jurisdiction to issue warrants to search and/or seize outside of their district, leadership within the FBI and government would have corresponded with each other on a national level regarding a case that would affect 94 districts and eventually over 120 countries. A warrant of this magnitude would have also faced tougher scrutiny due to the "child pornography precedent" and the need to protect child victims, as well as to bring loathsome child predators to justice. The Appellant could accept if in their haste to save possible victims the FBI and government/prosecution decided to risk violating Rule 41(b) and 4th Amendment rights to save said victims, but this does not appear to be the case. In addition to the FBI (government) operating a child pornography website for approximately two weeks (FBI had complete "administrative control" of Playpen), resulting in an untold amount of images and/or videos being distributed (further harming victims), they also did not act in an "exigent" manner in saving victims or targeting child predators. The FBI obtained over 8,000 IP addresses in 120 countries, to include over 1,000 IP addresses in the United States, during the time period they controlled Playpen. Despite this the FBI took months, if not years, before executing search warrants on suspects. During this time instead of acting in an "exigent" manner and immediately targeting suspects, and possibly saving child victims from continued abuse, the FBI (government) elected to build cases against suspects first. The Appellant would ask the court how many more children could have been saved and/or relieved of their suffering had the government focused on immediately acting in an exigent manner instead of focusing on the suspects first? The Appellant would accept the government's claim of "good faith" if from the start they admitted to violating aspects of suspects Constitutional Rights, as well as certain Federal Rules of Criminal Procedure, as long as they actually showed (not verbally stated in court or in press release(s)) that their primary goal was to save children from abuse(s) and not to "build cases".

In a recent Supreme Court decision (See, Dahda v. United States, U.S., No. 17-43, 5/14/18) the court stated that a wiretap warrant was defective because the issuing judge didn't have jurisdictional authority to issue said warrant/order outside the state of Kansas. In the case the Supreme Court made it clear that juges can't issue orders for wiretaps anywhere in the country as their territorial limitation "is an important and necessary check on the power of district court judges to authorize a particularly invasive form of government surveillance." In Dahda however the evidence was not suppressed because the government did not use evidence obtained outside of Kansas. Unlike the Dahda case the Appellant's case was not just a technical warrant case that can overcome jurisdictional or constitutional violations by just removing an "offending phrase" from the NIT warrant.

Under the United States Supreme Court's precedents, the **exclusionary rule** encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree. But the significant costs of this rule have led the Supreme Court to deem it applicable only where deterrence benefits outweigh its substantial costs. Suppression of evidence has always been the Supreme Court's last resort, not its first impulse. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price

## Direct and Concise Argument Setting Forth Reasons for Granting the Writ of Certiorari (Continued)

paid by the justice system. As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most effaciously served.

The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The Appellant believes that the FBI's (government's) violation of Fourth Amendment and Rule 41(b), in light of the information and arguments the Appellant has provided, are of constitutional magnitude and cannot be overcome. The Appellant, however, has no say in the matter and leaves the decision to this court as to whether said violations are "substantively defective" and/or void ab initio (warrantless), or "merely technical." In addition, if the court is in agreement, the Appellant requests suppression of all evidence, derived from "Operation Pacifier" or the "Playpen Sting", against him under the "exclusionary rule."

## Violation of Due Process Rights and Arguments for Dismissal of Indictment (Conviction)

The "Playpen Sting" was part of what has been called a "watering hole" investigation. In watering hole investigations, the government seizes servers known to be hosting websites dedicated to illegal activity-specifically, child pornography in all known bulk-hacking investigations to date-and continues to operate those illegal sites for a period of time in order to deploy NITs. Numerous Playpen defendants have argued that the indictment against them should be dismissed because the government's conduct in continuing to operate the illegal site was "so grossly shocking and outrageous" as to violate their due process rights (Challenging Government Hacking in Criminal Cases, 2017). There are instances when government conduct is so outrageous that, such as when the government becomes directly involved in the commission of a crime or when the government's conduct causes harm to third parties, dismissal(s) of the indictment are warranted. In the Playpen case it is not so much the idea behind the operation that reaches a "demonstrable level of outrageousness", as the government faces many obstacles in identifying and prosecuting criminals who conceal their activities via the "Dark Web", but the methods and operation of Playpen ("Website A") itself. The Appellant used the example of the DEA distributing mass quantities of heroin or fetanyl to identify and prosecute suspects earlier in this petition. Such an operation would never be approved in this day and age, especially due to the harm done to third parties. Another example would be the "Fast and Furious Operation" in which weapons were allowed to pass into the hands of known criminals (drug and weapon traffickers), which led to the harm of an unknown amount of innocent civilians and the death of U.S. Federal Agents. Operations such as these go beyond identifying and catching criminals (enforcing the law) as the government essentially becomes the criminal enterprise, not just part of "ongoing criminal activity". As Chief Justice Hughes concluded, "that to provide the opportunity to commit the crime or utilization of artifice or stratagem to catch criminals is beyond reproach. However, **the government may not incite or create crime for the purposes of punishing it.** It is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or deed, and evidently never would have been guilty of it if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it." The Appellant concedes that in the case of child pornography, and websites

such as Playpen that can only be accessed through the "Tor" browser or "Dark Web", the previous statement is different than a typical case involving law enforcement "entrapment". However, in the case of Playpen, the government stated that the "Producer's Pen would be returning in the future" possibly encouraging child pornography producers and/or distributors to produce and share new material. In addition the government has repeatedly acknowledged that "young victims are harmed every time an image is generated, every time it is distributed, and every time it is viewed" (Hammond, 2016 WL 7157762 - quoting **government press release**). As stated in Challenging Government Hacking in Criminal Cases (2017), "By that standard, the government repeatedly revictimized thousands of children over the two weeks that it hosted and operated Playpen-not only because the government enable continued access to the site, but also because use of the site grew exponentially while the government operated it. Whereas Playpen had an average of 11,000 unique weekly visitors before February 20, 2015, that number grew nearly five-fold, to approximately 50,000, while the government was operating the site. The roughly 100,000 users who visited Playpen while the government was operating the site posted approximately 13,000 links to images or video files of child pornography and clicked on 67,000 unique links to child pornography images and videos-adding tens of thousands of victims. And the harm resulting from the Playpen sting was caused not by tangential government involvement in an ongoing criminal enterprise, but by the government becoming the criminal enterprise." **Note:** The Department of Justice has previously stated in their Victims of Child Pornography (2017) report that,"Once an image is on the Internet, it is irretrievable and can continue to circulate forever." With the amount of visitors, unique links "clicked on" and/or posted, while the FBI (government) was administratively in control of Playpen, the circulation and victimization (or revictimization) of innocent children is uncountable. The Appellant, by comparison, had no sexual intent, did not share, receive, copy, or communicate with any person, nor retain or allow any person to access or copy any image (or video), had no collection of child pornography, and did not knowingly possess any image of child pornography (referring to the one contested image found on desktop). The Appellant was not involved in any way in the posting of links (images or videos), "accessing" of said links (did not "click on" links to outside websites, forums, files, images, or videos, or contact sheets), and only "culpability" in reference to child pornography was stated intent (mens rea) of targeting or hunting (actus reus) child predators (in case of child pornography websites such as "Playpen"). Any material the Appellant accessed in targeting of any type of violent predator he took "reasonable steps to destroy" (Affirmative Defense, 18 U.S.C §2252A(a)(5)(d)) (**end note**).

Another example of government outrageousness conduct in the Playpen case is the contrast between the usual "sting operation", where the government sets up a phony drug operation or another staged crime for example, and the government encouraging suspects in this case to go out and commit a real crime, with real victims in order to later arrest and prosecute said suspects. In addition the government violated **18 U.S.C. §3509(m)**, which requires that, in any criminal proceeding, child pornography "remain in the care, custody, and control of either the Government or the Court." During the Playpen sting the FBI (government) not only "facilitated the continued availability of a site containing hundreds (thousands) of child pornographic images for criminal users around the world" but also "improved Playpen's technical functionality,""re-victimized hundreds (if not thousands) of children," and "**used the child victims as bait**" (Challenging Government Hacking in Criminal Cases, 2017 - quoting court case).

Direct and Concise Argument Setting Forth Reasons for Granting the Writ of Certiorari (Continued)

As stated earlier in this petition, while discussing violations of the 4th Amendment and Rule 41(b), the government claims that operation of an illegal website (Playpen) is necessary due to the exigent circumstances involved, namely the identifying and rescuing of child victims. The government simply did not act in an exigent manner, however. In Workman the court rejected the government's exigent circumstances argument not only for conducting a warrantless search, but also because "the government manipulated the exigent circumstances by seizing the Playpen server and then running Playpen from an FBI facility for nearly two weeks", essentially contributing to the ongoing abuse of children. In the Appellant's case the government claimed the Appellant was a "danger to society who had been living a double life." Despite proof to the contrary (20 years of military service and a lifetime of protecting and defending the innocent) the government downplayed any achievments and/or contributions to society the Appellant had provided while "theorizing" that his activity at Playpen was but a "snapshot" of additional illegal activity involving child pornography (with no evidence supporting alleged illegal activity). The Appellant uses himself as an example to show that if he was in fact the "monster" living a double a life, as the government alleged, and the government was acting in an "exigent" manner, then why did the government never attempt any follow up investigation(s) on the Appellant? Why did the government never question the Appellant (or request CJA counsel) beyond the initial interview on August 14, 2015 (over 5 months after the FBI ceased operation of Playpen)? As a former Criminal Investigator the Appellant, even with his limited experience, would conduct multiple interviews of suspects/defendants. In addition if there was **any** chance that an innocent civilian, **especially a child**, was being harmed then the number one priority would be the safety of that innocent (even at the risk of ruining an investigation or case). The Appellant has four children and would **never** harm a hair on their head (or harm any child for that matter), but if he was the "monster" the government claims they (FBI/government) did not act in an exigent manner protecting possible victims as they have widely claimed throughout the entire (national) Playpen case. From the Appellant's experience it appears the FBI was more concerned with building cases against suspects/defendants than protecting the innocent victims they claimed the Playpen sting was focused on. The NIT warrant, running of an illegal child pornography website, and distribution of an unknown amount of child pornography during the two weeks the FBI (government) was in control of Playpen, was a blatant display of reprehensible government conduct. In addition the entire operation was a "systematic" violation of **due process of law**, where not only did the government act in a "shocking and outrageous" manner (by being administratively in control of Playpen), violate **Rule 41(b)** and the **4th Amendment**, but knowingly did all these things in the guise of "good faith". This was an international operation that affected 94 U.S. districts and at least 120 countries. If several U.S. districts were involved in the aforementioned violations the Appellant could understand them (law enforcement or local magistrate/district judges) being unaware and would believe they acted in "good faith". For the government to claim that **94 districts** and **120 countries** were unaware of said violations is an insult to the American people, the world, and this Honorable Court.

In United States v. Black (9th Cir. 2013), it was noted that there is no bright line test to determine whether the government acted outrageously, but outlining the following factors for consideration: (1) known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime; (4) the government's encouragement to commit the offense; (5) the nature of the government's participation in the offense; and (6) the balance of nature of the crime and the necessity of the conduct.

Direct and Concise Argument Setting Forth Reasons for

Granting the Writ of Certiorari (Continued)

Understandably in the context of the Playpen investigation it would be difficult for the government to "know the criminal charcteristics of the defendants" beforhand (1), especially given the anonymity of the "TOR" browser and the "Dark Web". Given the nature of Playpen (illegal child pornography website) one can reasonably deduce that the majority of inviduals who went through the steps of finding Playpen, registering, and going beyond the "homepage" had nefarious intent. Likewise the Appellant concedes that (2) "individualized suspicion of the defendants" is justified for the same reasons, especially if the defendants were active contributor's at the website. Although the government had no role in (3) "creating the crime" initially, once in control of Playpen they made no attempt to restrict or account for the vast majority (thousands of child pornography images and videos) that were posted and distributed (links, files, etc.), in violation of 18 U.S.C. §3509(m), further harming the victims they swore to protect. The Appellant previously compared the example of mass distribution of narcotics in order to identify and prosecute suspects (DEA seizing then re-distributing heroin and/or fetanyl). Both this "fictional" example and the Playpen case exhibit the same scenario(s) in which, although neither "produced" the original illegal item(s), they were complicit in the ongoing distribution of said illegal item(s). The government also made no attmpt to discourage users from accessing Playpen and even "posted" the site would return once they (FBI) assumed administrative control (4). Although sickening the argument could be made that the government "encouraged" suspects to "commit the offense" by allowing them to continue to access, view, and download child pornography. This argument is the same as if the government showed "drug addicts" their drug of choice and then arrested them once they took it (mind you the only probable cause the government needed was for suspects to "access" the website - **No dissemination of child pornography was necessary to establish probable cause**). (5) The government's "nature of participation" has been made abundantly clear in both this petition and in court cases throughout the nation. The government violated the 4th Amendment and Rule 41(b), in conducting illegal searches and seizures during the Playpen operation (jurisdictional violations and "warrantless" searches). The government had administrative control of Playpen, acting as a "criminal enterprise" in control of a website that distributed thousands of images and videos of child pornography, in violation of 18 U.S.C. §3509(m) and the Due Process Clause. (6) Finally the government, although claiming to act in the "good faith" of deterring the production and distribution of child pornography, made little impact against the violent child predators, producers, and distributors of child pornography. The government's conduct in allowing child pornography to be disseminated through Playpen exhibited reckless, and (arguably) deliberate behavior, the social cost of which far outweighted any objectively reasonable "good faith belief". The government's conduct also did not involve only simple, isolated negligence, and the Playpen sting's reliance upon "good faith" when harming so many innocent victims (re-victimization and possibly adding victims) once again offered little deterrent value against those who "physically" harm children. Under the "exclusionary rule" the "deterrent benefits of exclusion vary with the culpability of the law enforcement conduct at issue." "When police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs.

The Appellant believes he has presented substantial argument(s) for why the evidence in the case against him should be suppressed under the **exclusionary rule** as well as reversed and/or dismissed for violation(s) of his **due process rights.**

## Direct and Concise Argument Setting Forth Reasons for Granting the Writ of Certiorari (Continued)

The Appellant, as pro se litigant (incarcerated) realizes that many aspects of his argument(s) thus far have been repetitive and for this he apologizes. The first two questions of this petition represent government violations and conduct that presented alone may favor the government's challenge that law enforcement (FBI) acted in "good faith". The Appellant would like to point out, however, that it is the "totality" of the government's conduct during the NIT warrant/installation and Playpen sting that was of "constitutional magnitude". The **government** violated Rule 41(b), the **government** violated and/or stretched the 4th Amendment rights of thousands of individuals through an arguably "warrantless" search (even though many of those individuals had illegal "intent" in searching for child pornography), the **government** violated the Due Process Clause by administratively controlling a child pornography website, harming or re-victimizing thousands of children in being complicit in the distribution of thousands of child pornography images/videos (in violation of 18 U.S.C. §3509(m) - even though no accessing, distribution, or downloading was needed to develop probable cause), and finally the **government** was at least somewhat aware that they committed all these violations.

The Appellant repeatedly stated his intent towards child predators (as well as others who prey upon the innocent) throughout this case and petition. As such it was difficult in challenging the government's conduct for he too would do almost anything to track down those who harm children, or as the Appellant stated in other court documents, "do to them (predators) what he would do to the enemy on the battlefield." The Appellant stated he was reluctant in revealing government knowledge of known jurisdictional issues regarding Title III warrants signed by magistrate judges but was unaware of the extent to which the government went during this operation. The acts of the government in this case transcended the individual defendants and the crime to the extent of which only this Honorable Court has the ability to repair the integrity, through deterrence of law enforcement behavior, or risk corruption of our system of liberty and police methodology. Despite the Appellant's personal opinions, which are in agreement with the government and law enforcement when it comes to protecting children/innocents and "targeting" violent predators, investigations have to be within the limits of the Constitution, no matter how bad the crime is. There was no "legal exemption" for what the government did during this investigation (4th Amendment and Rule 41(b) violations). There is **no "statutory exception" for the government to distribute child pornography in the course of trying to make a case.** The Appellant hopes this court will set a precedent and grant his requests for suppression of evidence and dismissal of case as to deter law enforcement from going down the "slippery slope" of enforcing the law through reckless, outrageous, and "lawless" means. The victims in this case (children) deserved a more organized and specific investigation/operation that targeted those who were complicit in the production, distribution, and harming of children. Instead the government harmed those they justified the Playpen sting to protect, while providing little deterrence against child predators. Suppression and dismissal of case would show the government, as well as law enforcement across the country, why adherrence to Constitutional provisions is necessary in maintaining the liberties and freedoms this country was founded upon. The deterrent benefits of suppression and dismissal outweigh the substantial costs as the government would know in future (similar) operations the repercussions of not adherring to Constitutional provisions and/or Federal Rules of Regulation. The price paid by the justice system is minimal from what they gained in experience and knowledge of exactly how to conduct NIT warrant and internet investigations in the future. Most importantly the government (FBI) exceeded their objectives (regardless of any court decisions, suppressions, and/or dismissals) as 49 **children were rescued or identified from the images on Playpen.**

Direct and Concise Argument Setting Forth Reasons for

Granting the Writ of Certiorari (Continued)

The Appellant wish not to rehash the statements of this case already included within this petition, as well as in previous court documents, motions, responses, and other statements of note (procedural history). As such the Appellant will provide excerpts from said previous statements in questioning of statutes governing "accessing" of child pornography, to include legislative intent. The Appellant will focus on aspects of his case involving "fundamental miscarriage(s) of justice" that will show "no reasonable juror would have found the Appellant guilty under the applicable law" based upon the 2013 U.S. Sentencing Commission Report to Congress: Federal Child Pornography Offenses, "Affirmative Defense" (18 U.S.C. §2252A(a)(5)(d)) to charges, and other factors related to Appellant's intent (mens rea) and the acts he committed (actus reus). (See, Sawyer v. Whitley 505 U.S. 333 (1992)). The Appellant also challenges the "Constitutionality" of the statute (18 U.S.C. §2252A(a)(5)(B) and 18 U.S.C. §2252A(b)(2)) for which he was charged and convicted. (See, Loving v. Virginia (1967).

The February 2013 Sentencing Commission Report to Congress requested that specific offense characteristics related to the types and volumes of child pornography images, distribution, and use of a computer "be updated to account more meaningfully for the current spectrum of offense behavior regarding the nature of images, the volume of images, and other aspects of an offender's collecting behavior reflecting his culpability (e.g., the extent to which offender catalogued his child pornography collection by topics such as age, gender, or type of sexual activity depicted; the duration of an offender's collecting behavior; the number of unique, as opposed to duplicate, images possessed by an offender)," and to "reflect offenders' use of modern computer and Internet technologies". The Appellant does not meet any of the characteristics for which the Sentencing Commission wrote the report to Congress (Child Porn Report). The Appellant has no sexual interest in children (or anyone under legal age), has never had a child pornography collection and has never shown any behavior reflecting desire to do so (culpability). The Appellant's PSR calculation of images "accessed" was a reflection of his search/targeting of child predators (prosecution counted every image, link, or file the Appllant "might have" accessed, to which the Appellant has vehemently challenged). The Appellant never communicated with, shared, received, distributed, associated with, copied, retained, knowingly possessed, or allowed any other person to copy, view, or access any image or video of child pornography. The Appellant's use of "modern" computer and Internet technology was not at an "advanced" level (TOR takes only a few minutes to download and install). "TOR" (utilized to access the "Dark Web") was developed by the government by a non-profit organization, is not illegal nor used primarily for illegal purposes, and is downloaded for free by millions of people. Likewise the "forensic wiping software" the goverment stated the Appellant utilized to hide his activities is also not illegal, also used by millions of people, and functions similar to software such as McAfee or Norton (just free). The Appellant made no attempts to conceal his identity from law enforcement and has stated as such since the day of his arrest.

The Appellant has stated his intent throughout this case countless times, seemingly on deaf ears. The crime for which the Appellant was indicted, convicted, and sentenced (accessing with intent to view child pornography) effectively made the Appellant a social outcast from the day he was questioned and arrested. Regardless what the Appellant stated his intent was he understood immediately the position of extreme prejudice he faced from law enforcement, the government, and the courts (especially given his previous position in law enforcement). Adding to this

was CJA counsel's failure to object to statements and calculations (of images) made within the Factual Basis, as well as within the PSR, that the Appellant repeatedly insisted counsel object to. In Griffith (Griffith v. U.S., 2017 BL 340200, 11th Cir., No. 151-11877, 9/26/17) the Appeals court indicated that because counsel wouldn't object to the amount of drugs calculated by government the defendant was prejudiced and placed within a higher sentencing guideline range. In the Appellant's case CJA counsel not only failed to object to the calculation of images "accessed" but also delayed providing court with Appellant's intent towards the perpetrators (child predators) and not the victims (children) until day of sentencing. The failure to object had such an egrecious effect on the court's view of Appellant's culpability and character that in all likelihood the court was blinded to any of the positive contributions to society the Appellant had made. The Appellant was also given an ultimatum that the government would charge him with possession of the one image found on a desktop computer (ten months after being seized during initial raid on Appellant's residence) despite stating he (Appellant) had no knowledge of said image (nor did Appellant ever find out what the image was of). CJA counsel advised Appellant to plead guilty to "accessing with intent to view child pornography" and he (counsel) would request delay of sentencing until Appellant completed military service for retirement (National Guard not active duty). The Appellant risked facing additional charges, facing upwards of 20 years (losing retirement from military), or plead guilty (open plea - no plea agreement), face no minimum sentence, and possibly complete military service. As stated previously Appellant was unaware of prosecution's calculation methods (essentially calculating images the Appellant had nothing to do with in order to place him in a higher sentencing guideline) prior to guilty hearing, stated his objections to CJA counsel, but was advised to move forward with guilty plea and he (counsel) would confront issue as part of sentencing. What counsel did not do was acquire expert computer testimony to explain or investigate on behalf of the Appellant (confirm Appellant's assertions), investigate ongoing constitutional challenges to Playpen case, and inform Appellant that it is an "Affirmative Defense" (18 U.S.C. §2252A(a)(5)(d)) that the defendant (1) possessed less than three images of child pornography: and (2) promptly and in good faith, and without re-taining or allowing any person, other than a law enforcement agency, to access any image or copy thereof- (A) took reasonable steps to destroy such image; or (B) reported the matter to a law enforcement agency and afforded that agency access to each image. **Note:** Appellant possessed no images (that he was aware of), did not share, receive, copy, or communicate with any person, nor re-tain or allow any person to access or copy any image. In addition as part of Appellant's search for violent predators, of all types, he took all reasonable steps to destroy any materials related to said targets.

The Appellant would ask the Honorable court to consider what the "Legislative Intent" of Congress was when authorizing the laws pertaining to and sentencing guidelines encompassed by Title 18 U.S.C. §2252A(a)(5)(b) and 18 U.S.C. §2252A(b)(2)? The majority of statutes within the United States penal code require both "mens rea" (the criminal mind or "evil intent") and "actus reus" (the "criminal act"). The Appellant acknowledged he knew child pornography was wrong and illegal but his "mens rea" (intent) was not to specifically look for images of child pornography but identify the producers/distributors of such. Although the Appellant frequented a website (Playpen) that contained child pornography, completing the "actus reus" (act), the Appellant contends this does not necessarily complete the "access with intent" cycle. The Appellent concedes that in the "probable cause context" a reasonable officer could "infer" intent but proving that the Appellant viewed images

and/or videos beyond a reasonable doubt at trial may have proven difficult, esp- given Appellant's stated intent and acknowledgement that he stepped outside the law in search of child predators. Did Congress have individuals such as the Appellant in mind when enacting the criminal statutes for which he (Appellant) was charged and convicted? Someone who had no criminal history, no sexual intent, had served this nation beyond the call of duty for over 20 years, and placed his life on the line protecting the innocent from the tyranny of evil.

In Loving v. Virginia, in which Mildred and Richard Loving plead guilty to Virginia's ban on interracial marriage, but later challenged the ban's constitutionality, which led to the Supreme Court striking down the criminality of interracial marriage. The Loving's were not challenging their factual guilt but rather the statute itself. The Appellant is in a similar situation in that he plead guilty under the statute even though he lacked intent to access the child pornography website in order to view the children themselves but instead in order to identify the child predators. The Appellant questions if constitutionally he should have been prosecuted as the statute for which the Appellant was charged was written during the rapidly expanding technology and Internet period of the last 5-10 years. Although the statutes were justly written to protect innocent victims from both real (physical) and virtual (mental, online/internet, etc.) abuse, they are not up to date with said rapidly expanding technology and perhaps overly broad in their scope. In comparing accessing an illegal website, such as Playpen, to the "brick-and-mortar warrant" scenario, without knowing the intent of each individual leaving a known "low income housing unit where drug dealing was known to be rampant" it is not clear if searching each individual would survive judicial scrutiny. The Appellant's challenge to the constitutionality of the statute for which he was charged and convicted questions the threat "unbridled discretion of executive and administrative officers" brings to the right of the people to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In addition Congress more than likely, in their mission to create laws to deter Internet child pornography crime(s), didn't foresee individual's with non-sexual intent being prosecuted and sentenced as harshly as those who abused or profited from the abuse of innocent children. The Appellant does not believe that those other than violent "contact" offenders, producers, or distributors don't deserve punishment, but the focus and/or funds utilized to track down "non-contact" offenders (who show little likelihood of recidivism) would be better served targeting said violent offenders.

Case study has shown (See Appellant's "Sentencing Memorandum"-not attached to petition) that rarely are the predators, those who targeted and harmed children in child pornography cases, ever caught. Society (Appellant included) and the judicial system instead created "surrogate" or "proxy" targets to pay for child predator's crimes against children. Although deterrence is still needed for those individuals (non-contact or Internet only crime) that access, download, receive, share, etc., even the Sentencing Commission and many judges feel the current sentencing guidelines are too harsh and not up to date with the all but certain use of computers, as well as the Internet and emerging technologies. New sentencing guidelines are needed to differnetiate between violent and non-violent offenders, with unbridled focus on the loathsome monsters who harm children.

The Sentence the Appellant received reflects the lack of a "clear pattern",

regardless of culpability. Some defendants with similar charges received little to no time (12 months and 1 day or "time served") while the Appellant received a sentence at the max range of the sentencing guidelines, despite his service to country and challenges to the factual basis and PSR. CJA counsel's argument that deviations from the Federal Rules of Criminal Procedure 11 and 32, as well as Title 18 U.S.C. §3553, were "harmless" given the violations of constitutional magnitude in addition to Appellant's "Response to CJA Counsel's Anders Brief", was inaccurate and an example of the ineffective counsel the Appellant received throughout case. The Sentencing Commission stated that variations in sentencing should be influenced with a defendant's culpability. Title 18 U.S.C. §3553(a), under "unwarranted sentencing disparities", it states, "They are the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Not only did the Appellant receive a longer sentence than those with similar records (no record) and who had been been convicted of a similar crime, because the PSR was not challenged (as the Appellant had repeatedly requested counsel to do) the Appellant was both in a higher sentencing guideline and more than likely viewed less favorably by the court. The PSR contained "errors" and/or inaccurate statements that caused significant "prejudice" and "bias" before the court. The Appellant understands that the previous issues are best discussed in 28 U.S.C. 2255 "Ineffective Assistance of Counsel" motions but included them in order to highlight before the court that had counsel argued government violations and inaccuracies the Appellant would have been seen more favorably before the sentencing judge. In addition had the Appellant been aware of said government violations he would not have been so reluctant to withold information regarding government's knowledge regarding TIII jurisdictional issues. The Appellant firmly believes that no jury would have found him guilty if presented with all of the current knowledge regarding the Playpen sting (in addition to the Appellant's lack of sexual intent and/or culpability regarding child pornography).

In closing the Appellant accepts responsibilities for his actions and understands that he should have known better. The Appellant believed because of his position within the military and law enforcement that he was somewhat "above the law" and justified in his hunt for violent predators. The Appellant is extremely remorseful and sorry for the hurt he has brought upon his beloved family and all those who placed their trust in him. The Appellant failed his family, his peers, superiors (military and law enforcement), friends, and those he swore to protect. The Appellant continues to fight this case because he did not commit the acts claimed, especially those attributed to harming innocent children. Understand the Appellant was aware of possible government violations (Rule 41(b)) before pleading guilty but would have rather suffer himself than allow any precedent (from said knowledge) that may assist child predators. The Appellant was unaware of the government's culpability in the distribution of child pornography, in addition the widespread constitutional violations. The Appellant seeks not forgiveness, but a chance at redemption. The Appellant requests this petition be granted for the chance he can receive the help he needs (Veteran mental health treatment) and rejoin his family. Once again the Appellant thanks the Honorable Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James P. Burke

Date: July 25, 2018