No. 23-5339

IN THE SUPREME COURT OF THE UNITED STATES

JEAN BUTEAU REMAROUE
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

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

PETITION FOR CERTIORARI

Jëan Buteau Remarque
Pro Se Petitioner
Reg. No. 64509-037
FCI Allenwood Low
Federal Correctional Institution
P.O. Box 1000
White Deer, PA 17887

PETITION FOR CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Whether an unprecedented legal theory of receipt that relies on file name of unauthenticated screen shots as relevant unit of prosecution under Section 2252A(a)(2) is so standardless that it invites arbitrary and discriminatory enforcement, and double jeopardy.

2. Whether a Barker analysis in which only the reason for the delay is considered as dispositive while totally ignoring three other factors that weigh heavily in favor of dismissal is allowed to stand.

3. Whether Gates totality of the circumstances test should be modified so as to embrace a new per se rule that grants automatic credence to informant's uncorroborated tip merely by a talismanic virtue of being named in the affidavit.

4. Whether a probable cause finding based on a fabricated WhatsApp messages that, even if true, would not constitute evidence of a crime under Section 2422(b), coupled with an uncorroborated implausible accounts from an "informant of unknown reliability" could ever pass constitutional muster.

5. Whether this Court's decision in X-Citement Video, Inc., requires that an indictment under 18 U.S.C.S 2252A pleads the knowledge of the sexually explicit nature of the materials as well as the inovlvement of minors in the materials' production as an essential element of the offense to be constitutionally valid.

6. Whether the use of a foreign national defendant's putative admission in obtaining a trio of convictions was a denial of due process, when a demonstrably false portion of the un-Mirandized statement was presented at trial and the defendant was denied a fair and full voluntariness hearing.

LIST OF PARTIES

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

TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, Rules, and Policies

OTHER

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

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished at United States v. Remarque, 2023 WL2810288 (4th Cir. Apr. 6, 2023), affirming the convictions in all respects.

The United States District Court entered its unreported and unpublished judgment on December 20, 2021. JA 687.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 6, 2023. Petitioner timely filed Petition for Rehearing en Banc. The court below entered an Order (reprinted as Appendix B) denying the petition on May 5, 2023. This petition is filed within 90 days of that date, so that this Court has jurisdiction to review the judgment of the Fourth Circuit on petition for certiorari pursuant to 28 U.S.C 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution provides:

> "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." U.S. Const. Amend. IV

2. The Fifth Amendment, United States Constitution, provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor 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." U.S. Const. Amend. V.

3. The Sixth Amendment, United States Constitution, provides:

"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 crime 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 the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense." U.S. Const. Amend. VI.

4. The Fourteenth Amendment, United States Constitution, provides:

"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 privileges 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." U.S. Const. Amend. XIV.

5. The Statute under which Petitioner was searched and seized was 18 U.S.C. 2422(b), which provided that:

> "Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life." 18 U.S.C. 2422(b).

6. The Statutes under which Petitioner prosecuted were 18 U.S.C. 2252A(a)(2), which provided in relevant part:

> "(a) Any person who -- ... (2) Knowingly receives or distributes -- (A) any child pornography [or B., any material that contains child pornography] that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer...shall be punished as provided in subsection (b)." 18 U.S.C. 2252A(a)(2). And

18 U.S.C. 2252A(a)(5)(B) provides in relevant part:

> "(a) Any person who --... (5) ... (B) Knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed or shipped or transported...including by computer...shall be punished as provided in subsection (b)." 18 U.S.C. 2252A(a)(5)(B).

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated as follows: In 2018, Petitioner Jean Remarque, a 38 year old married man with no priors and a known attraction to adult females, was accused by his then-estranged wife and immigration sponsor, Wanna Nedgie

Crevecoeur ("the Government's Informant"), of being engaged in questionable conduct, via the "WhatsApp application," with a "minor female in Haiti," ECF 69, Ex. 1 at p. 8-18. The information in question came to law enforcement, over three months after the supposedly triggering event occured, through a tortious complaint filed against Petitioner with the U.S.C.I.S, in which the Informant attempted to prevent her husband from renewing his Green card. In her unsworn complaint, Crevecoeur alleged that she successfully and surreptitiously gained access to "Remarque's password-protected cell phone," left at the apartment they shared while Remarque was working overnight shift, by supposedly "swiping" it to turn off the alarm. Crevecoeur claimed that she managed to extract and transfer the WhatsApp messages and also visited the photos gallery contents in which she discovered photos of other, "unclothed, minor females," and that some had "ejaculate" on their genitalia," id. pp. 17-18, although no basis of this "knowledge" has been supplied.

In the same complaint, Crevecoeur provided a totally contradictory and factually implausible account. She admitted that she did not know the passcode when she gained access to the cellphone contents, and that she would have never discovered her husband's wrongdoing but "God" wanted her to get the opportunity to get proof of his actions. Bates #JBR_0035-0036.

Homeland Security Investigation ("HSI") Special Agent Christine Carlson, without making the most basic investigative efforts to corroborate Crevecoeur's factually implausible story and unsubstantiated allegations, applied for a search warrant to search Petitioner's entire residence and electronic devices. In Carlson's warrant application, she summarized the aforementioned facts, while omitting from the affidavit information bearing directly on Crevecoeur's credibility and reliability. She also included excerpts of the unverified and unauthenticated purported WhatsApp messages turned over by Crevecoeur, without providing any basis on how the "messages" violate the United States

law. Based on that evidence, Carlson concluded "that probable cause exists that evidence pertaining to attempt of enticement of a minor (Section 2422(b)) as the offense in relation to which a search was requested. Additionally, however, Carlson requested permission to search for evidence of possession of child pornography (Section 2252A(a)(5)(B)) without appending a copy of the photograph or including a detailed description of its contents in her affidavit.

Magistrate Judge Thomas DiGirolamo issued the warrants which were executed on July 17, 2018. The Petitioner's cell phones were searched and seized, which yielded no evidence of wrongdoing and resulted in no criminal charges for enticement of minor (Section 2422(b)). But the apartment's search revealed images that appear to be child pornography found on a single flash drive used by both the Informant and the Petitioner.

On January 28, 2019, the Petitioner was indicted on One-count for possession of material that contained child pornography by a grand jury for the District of Maryland. ECF No.1. On January 30, 2019, the Petitioner was arrested and arraigned, entering a plea of Not Guilty and requested a Speedy Trial by a jury. ECF. No. 6. Over nine months later, the government had shifted its theory of the case by bringing two receipt charges in a superseding indictment, but it has never persuasively demonstrated that the evidentiary landscape has materially altered, that it was previously impossible to bring a receipt charge(s) carrying a harsher sentence. The Third Superseding indictment was entered on February 17, 2021, over two years after the original indictment, charging the Petitioner with two counts of receiving child pornography (Section 2252A(a)(2), and one count of possession of child pornography (Section 2252A(a)(5)(B)). JA 213-JA 217. The three counts are predicated on the same conduct of possessing a flash drive containing a set of images retrieved during the search on July 2018.

Petitioner remained incarcerated (at the D.C. jail) through the time of his trial and sentencing -- a period of 35 months, under a finding that his immigration status as a permanent resident of the United States makes him a "flight risk." While bail was denied, it merits noting that at the proceeding, the Government recognized that the amount of child pornography discovered was of a minimal amount, viz., "I don't want to overstate that this is some massive amount of child pornography." "It is a small amount of child pornography." Hr'g Tr., 02/01/2019, P. 13, PP. 19-20, 22-23, respectively.

Petitioner filed Motions to suppress. Motions hearings were held, more than one year later, on February 4, 2020, where the lower court denied the Petitioner's Motions to Suppress his un-Mirandized statements, and, challenging the search warrants as executed at his residence by law enforcement. The Government concedes that Remarque was subject to a lengthy custodial interrogation with accusatory questions eliciting incriminating responses successively in a closed police vehicle bracketed by two armed agents, and, in his bedroom with closed door by the same two officers. See ECF. 51 id. at 5. At the suppression hearing, SA Carlson admitted that she did not read the Petitioner's Miranda warnings because he was not under arrest and was told that he was "free to leave." Hr'g Tr., PP. 29-33. JA 121- JA 125. She also testified that all law enforcement agents participating in the search were carrying weapons visibly not concealed, id. at 57 pp. 2-3. Carlson was not part of the entry team, thus, she cannot see whether officers had their weapons drawn at Remarque, but confirmed that it was normal protocol, id. at 58 pp. 11-25.

However, when Remarque requested to take the stand to testify as to the voluntariness of his statement during the Suppression Hearing, the District Court refrained him from testifying by warning him of the consequences of his testimony and stated: "If you testify, your statement could be used against

you at trial." Remarque has no prior exposure to the U.S. criminal justice system, thus, he forewent his right to testify under the mistaken perception that he was protecting his Fifth Amendment privilege against self-incrimination. As a result, he was denied a full and fair voluntariness hearing.

Although, the Petitioner was never Mirandized, he did speak with Carlson. These conversations were recorded in English (without the benefit of an English-Haitian Creole interpreter. id. at 35, JA 127). In a manner of full cooperation, Remarque provided his cell phone passcode, on the basis that he had nothing to hide. id. at 41, JA 133. According to Carlson, Petitioner stated that the images at issue came from a website titled: www.4shared.com, that the Toshiba flash drive belonged to him (id. at 49 JA 141), and informed her that "he was addicted to child pornography." Nevertheless, he was not arrested at that time and did not flee the United States. Id. at 50, JA 142. According to SA Carlson, a DHS computer forensic expert was also present, and "he" informed Carlson that the Toshiba flash drive did contain what appeared to be child pornography. Id. at 45, JA 137.

Prior to trial, the Petitioner filed Motions in Limine to exclude two unauthenticated screen shots as inadmissible evidence and his statements as unreliable. These unopposed motions were arbitrarily denied by the Court without a formal evidentiary hearing, and no fact and legal findings.

At the Pre-trial conference on March 9, 2021, Petitioner's attorney informed the Court that Crevecoeur was evaded process service. Petitioner filed a motion under compulsory process requesting the Government to secure the presence of its star witness at trial. Crevecoeur was also on the government's list of potential witnesses, in an unprecedented move, the government opposed the motion and was terrified by the idea of putting Remarque's sole accuser on the stand. Hr'g T. 03/09/2021, at p.p. 23-24, JA 240-JA 241. Crevecoeur's testimony was deemed essential because independent forensic expert Patrick

Siewart (a former Detective of the Louisa County Sheriff's Office), forensic examination revealed the images found on the Toshiba flash drive bear a user ID that connects them to a user account titled "Owner" that belonged to Wanna Crevecoeur, the laptop's owner, and that no images were transferred or viewed under the user account titled "Jean Buteau Remarque" as the government's forensic report falsely suggests. See also colloquy at pp. 28-31, JA 145-JA 248.

The trial lasted from March 22, to March 25, 2021, when the jury returned a verdict of guilty on all counts. JA 271-JA 686. The Government's case consisted solely of the testimony of SA Carlson (JA 314-JA 390, JA 457 - JA 479) and HSI computer forensic examiner, Peter Baish (JA 391- JA 444). Carlson testified that Petitioner informed her that neither his user account on the Lenovo laptop, nor his cell phone would contain any child pornography. Id., at 64-65, JA 334-JA 335. This was confirmed when Baish testified. TT, 03/23/2021, at 132-134, 154. See also id. at 113, JA 402-JA 404, JA 424. This constituted the government's case. TT, 03/24/2021, at P. 39, JA 483.

The trial delay coupled with a troubling ruling granting the Government's Motion in Limine, has taken away Remarque's defense. Therefore, the defense presented no evidence as the sole determinative witness, Crevecoeur, had managed to avoid process service. See discussion infra, at Argument Point II.

Following this, the Court denied the defense Rule 29 Motion, id. at PP. 41-45, JA 485-JA 489. On March 25th, 2021, the jury convicted Remarque on all three counts. TT, 03/25/2021, at PP. 88-93. On December 20, 2021, Petitioner was sentenced. JA 635-JA 686. Although probation recommended a sentence range of 121 to 151 months, the Court sentenced Petitioner to 90 months' imprisonment, with ten years of supervised release. JA 680.

Remarque filed a timely notice of appeal on December 21, 2021. JA 694. The appeal was following its normal course, when suddenly the court below canceled the oral argument previously scheduled, and later issued that strange

decision, with flawed logic and a remarkable succession of mistatements of law and fact, while ignoring a number of constitutional claims raised by the Petitioner.

ARGUMENT FOR ALLOWANCE OF WRIT

All aspects of the decision below establish novel and irrational departures from well settled Supreme Court precedent on similar issues. Until this case:

- No Court has rewarded the government for subverting its integrity and making the court to become partner to an estranged spouse's illegal conduct by submitting in a search warrant application a fraudulent WhatsApp messages, previously used in a criminal scheme including blackmail;
- Neither the Supreme Court nor any court of appeals has created a per se rule that informants are inherently reliable by a talismanic virtue of being named in an affidavit;
- No court has ever abandoned its gatekeeping function by opening the courthouse doors for the government to use unauthenticated screenshots as trial evidence to secure convictions. It has been settled principles that authentication is condition precedent to admissibility. Fed.R.Evid.901(a);
- No court has applied the four-factor Barker balancing test by considering only a single factor -- the reason for the delay as determinative, by making mistatement of law and fact;
- No court has held that an essential scienter element of an offense is a simple "detail" that the indictment doesn't have to spell out; and
- It has been a settled principle that a criminal defendant's testimony at a suppression hearing could not be used against him at trial without violating his Fifth Amendment's privilege against self-incrimination.

The decision below is sufficiently unique to create a new legal landscape that splits standing law at the seams. The practical effects of the Fourth Circuit's strange, unprecedented, and illogical decision is vast and consequential. This fundamental decision is of national importance, if not reversed, the decision below will effectively collapse possession and receipt -- distinct substantive offenses at common-law into the same offense. As a result, the government will be able to convert every simple possession of child pornography case to a receipt case, under the same evidentiary landscape, by simply alleging in a superseding indictment the date and time the electronic file was created or saved on the medium in order to invite a mandatory 5-year sentence in prison. This will give rise to serious prosecutorial abuse and absurd results because each distinct file stored on a medium could be considered as a relevant unit of prosecution under Section 2252A(a)(2). This Court should grant certiorari to provide a fair and impartial adjudication of this issue in order to prevent further miscarriage of justice.

Further, it will eviscerate the need for police to seek Judicial review of indicia of reliability or unreliability of named informant's tips and will reduce the magistrate to a mere rubber stamp for police. Also, it will allow a breach in the wall erected by the Fifth Amendment that a defendant can only be prosecuted for offenses that a grand jury has actually passed up on. Finally, it will render the self-incrimination clause of the Fifth Amendment meaningless and will create an incentive for the government to use involuntary admission/ confession known to be false to secure convictions in violation of the United States Constitution and resulting in a fundamentally unfair and unreliable proceeding.

This Court should review and reverse the decision below because (1) it contravenes the spirit, if not the letter of Gates v. Illinois, 462 U.S. 213, 240 (1983); (2) it is in conflict, on the Fourth Amendment ruling, with the Fourth Circuit's own decisions in United States v. Doyle, 650 F.3d 460 (4th Cir. 2011), United States v. Lull, 824 F.3d 109 (4th Cir. 2016); (3) it is in conflict, on the double jeopardy ruling, with the decisions of the Ninth Circuit in United States v. Lynn, 636 F.3d 1127, 1137 (9th Cir. 2011) cert. denied 565 U.S. 869 (2011), the Fifth Circuit in United States v. Buchanan, 485 F.3d 274 (5th Cir. 2007), the Tenth Circuit in United States v. Benoit, 713 F.3d 1 (10th Cir. 2013), it also conflicts the Department of Justice's own internal policy drawing on the Ninth Circuit decision in Lynn, supra, United States Attorney Bulletin, Vol. 59 No. 5. at 74 (Sept. 8, 2011); (4) it misinterprets the teaching of Barker v. Wingo, 407 U.S. 514 (1972), Doggett v. United States, 505 U.S. 647, 651-52 (1992), and Moore v. Arizona, 414 U.S. 25 ____, ____, (1973); (5) it ignores a number of constitutional claims and authorities presented; (6) it is based on an incredible series of omissions of material facts, mistatements of law and fact, and thus so far departs from the accepted and usual course of judicial proceedings as to call for the immediate and summary reversal.

I. THE RELIANCE OF THE COURT BELOW ON THE GOVERNMENT'S NOVEL LEGAL THEORY OF RECEIPT IS CONTRARY TO CONSTITUTIONAL MINIMUM OF DUE PROCESS, THE RULE OF LENITY, AND THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

The Fourth Circuit's unprecedented and unsupportable decision did not address the question whether in possessing a single medium that contained a number of purported screen shots of what appears to be child pornography under Section 2252A(a)(5)(B), a defendant also committed receipt of child pornography under Section2252A(a)(2), under an unprecedented legal theory of receipt that considers file name of screen shot-as-time stamp. Significant consequences are attached to the answer. If the defendant were to face a

single possession count, he would receive a prison sentence of Zero to Ten years. But, if the government were permitted to bring additional receipt counts based on its novel theory, the defendant would face severe mandatory sentences of Five to Twenty years, which prevent sentencing judges from considering the severity of the offense.

To secure a trio of convictions, the government relies on a legal theory of receipt which allows the government to hold individuals, who possessed a medium containing visual depictions of child pornography in the form of screen shots, criminally liable for multipe violations of both Sections 2252A(a)(2) and 2252A(a)(5)(B), by using the filenames of the screen shots as relevant unit of prosecution to determine the number of counts for violating 2252A(a)(2). The government's position is that a separate count for violating the statute, potentially carrying an additional prison term of 20 years, can be added each time the digits forming the "label" or "file name" of a distinct screen shot appears to be different. To introduce this theory, the government elicited testimony from two Homeland Security agents with no personal knowledge whatsoever on the truth or falsity of the screen shots, and recklessly speculated to the jury that the screen shots at issue were captured by an "Android Smartphone" from a purported third party "website", and that the file names, "automatically assigned to each screen shot," correspond to "date" and "time" when the images of child pornography were received. T.T. 03/24/21 id. at 17-20. When actually, there is no cellphone, no website visited, and no time stamp. The government experimented with a new form of "legal voodoo" that permits it simply create legal theory by relying on matters that were never adduced as trial evidence or allowed into the record. Thus, any government's argument or allegation based on cellphone, website, and time stamp is deceptive and must be ignored.

Under the government's sweeping reading of the statute, so long as the filenames are different, that is enough to constitute a violation of 2252A(a)(2)

to invite a mandatory 5-year sentence in federal prison. By that metric, if a defendant (with no prior criminal record) were to possess a unique flash drive that contained 200 screen shots, and if each of the 200 screen shots were to have a distinct file name, the defendant could be charged with 200 counts under Section 2252A(a)(2) for a potential sentence of 4,000 years in prison. This novel theory led to an absurd result and made a mockery of the United States Constitution's promise of due process and equal protection. Even assuming that the file names were indicative of actual "time stamps", they are of little probative value. The government's position in a similar case is that "the time stamps do not necessarily indicate when the pictures were received." See Buchanan, 485 F.3d 289 at *1. Unfortunately for the government, they have done just that here, because the record is devoid of any indication of when, how, and from where the screen shots were acquired. As a result, the government must still rely on Petitioner's possession of the screen shots on the date of the search to establish not only the possession offense, but also the receipt offense.

Under such a theory, the government's power to prosecute is boundless. For example, here, nothing in the indictment or the record prevents the government from randomly selecting more from the remaining screen shots from the same flash drive, to indefinitely file more indictments against Petitioner because all the government needs is more file names to file more charges. No principle of law, logic, or policy can be found to justify this novel legal theory of receipt. Such standardless and arbitrary enforcement is an extreme interpretation of Congressional intent that undermines the reliability and the credibility of the government's case against the Petitioner, and will lead to more abuse of the prosecutorial power, if not reversed.

In United States v. Buchanan, supra, in contrast to the decision of the Court below, the Fifth Circuit backed away from the government's seemingly

proposition of using actual time stamps, extracted from the copied electronic files, as the unit of prosecution to support multiple convictions and sentences for receipt of child pornography. Id. at 289 *1. There, the Court makes it clear that if the "'unit of prosecution' for a crime is the actus reus, the physical conduct of the defendant, ..., as it surely is, then we need to know more about the conduct of this particular defendant before we can sustain his four convictions." Id. at 289 (Benavides, concurring). Further, the DOJ's own internal policy, supra, argued exactly the Petitioner's side of the debate by instructing U.S. Attorneys to set forth each medium forming the basis of each count when charging defendants of both receipt and possession of child pornography, to avoid needless double jeopardy litigations. U.S. Atty. Bull., vol. 59 No. 5, at 74. As a result, the Fourth Circuit becomes the first court to actually open the door for the government to circumvent the standards provided by Congress and the DOJ itself.

Time and again, this Court has repeatedly flagged courts off the tracks that the Fourth Circuit is taking here. This Court has applied the rule of lenity in highly similar circumstances. In Bell v. United States, 349 U.S. 81, 82 ____, ____,(1955), Ladner v. United States, 358 U.S. 169, 177____, ____,(1958), Ball v. United States, 470 U.S. 856 ____, ____, (1985), this Court found ambiguity as to the proper unit of prosecution applied the rule of lenity, and held one violation existed. The rationale used by this Court in Bell, Ladner, and Ball should be applied in the context of multiple screen shots and images discovered on the same date from the same flash drive. The government cannot simply create a legally flawed theory to multiply one set of visual depictions in three separate receipt and possession, particularly when no evidence is available to meet the requisite elements of the statute. "What cannot be done directly because of constitutional restriction cannot be done indirectly by mean of an unprecedented legal theory designed to reach

the same legal result." "Criminal statutes are not games to be played in the car on a cross-country road trip. To satisfy the constitutional minimum of due process, they must at least provide ordinary people with fair notice of the conduct punish." Dublin v. United States, Case No. 22-10, 2023 U.S. Lexis 2420 (June 8, 2023) (Gorsuch, concurring).

Even assuming arguendo that the evidence supports both offenses' elements, the Prosecutor's choice to enforce Section 2252A(a)(2) based on a novel legal theory, which statistically was never used in the history of prosecution by the D.O.J, is the product of discriminatory animus based on Petitioner's immigration status as a non-U.S. citizen. United States v. Bachelder, 442 U.S. 114, 123-24 E 125 n.9, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) (statistical analysis of charging decisions could demonstrate a violation of equal protection). The Petitioner is entitled to a new trial because of the prejudicial spillover from the two unwarranted receipt charges.

A. **The Novel Theory of Receipt Rests on Inadmissible Evidence**

The Fourth Circuit's fundamental misconception of the law is demonstrated by its unsupported contention that "the Government introduced evidence that taken together, would allow a reasonable juror to conclude the two files came "from the Internet." App.A id at 5 . Such a contention was either unsupported by the record or only supported by two inadmissible unauthenticated screen shots. The government did not implicate Petitioner in any proscribed activity on the Internet nor is there evidence that the Petitioner ever owned an Android smartphone. See Motion ECF No. 273 (08/17/2021). Any reasonable and fair-minded jurist would acknowledge that the two screen shots, as introduced at trial, were plainly inadmissible and constituted a blatant violation of Fed.R.Evid.901(a). The government did not and cannot authenticate the screen shots through a witness with knowledge. Thus, the Court below extraordinary

reliance on the two screen shots at issue is such an extreme departure from accepted judicial proceedings as to warrant summary reversal by this Court. If unauthenticated screen shots is inadmissible in civil courts to support summary judgment, it is hard to see how they could be admissible in a criminal trial to prove, beyond a reasonable doubt, two offenses carrying a potential sentence of twenty years in prison. The opinion below on that question is so incontestably erroneous, and are so contrary to the law established by this Court and other courts of appeals, it should be summarily reversed, in accordance with Sup.Ct. R. 16.1 of this Court. The law is crystal clear that "Authentication is condition precedent to admissibility." Fed. R. Evid. 901(a). The Government did not even attempt to defend that the screen shots were inadmissible evidence or self-authenticating under Fed.R.Evid.902. See Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D.Md. 2007). If anything has wasted judicial resources and demonstrated a manifest corruption of the Judicial proceedings, it was these efforts.

B. **The Trio of Convictions Violate the Double Jeopardy Clause of the Fifth Amendment.**

In United States v. Lynn, supra, in contrast to the decision of the Court below, the Ninth Circuit held that the allegation of different dates of commission for each offense, by itself, is insufficient to carve out separate conduct. Once a person receives something, he also necessarily possess it as of that moment, based upon a single action (like downloading a file). Thus, merely citing different dates or date ranges for the receipt and possession charges alone does not suffice to separate the conduct for double jeopardy. Id. at 1137. See also Buchanan, 485 F.3d 282. Here, the Fourth Circuit unexpressly but necessarily rejected the holding in Lynn and held that "the operative Third Superseding Indictment lists the date and time for Remarque's two receipt charges, which are distinct from the date of the possession charge (the date

the agents searched Remarque's apartment and found child pornography)." Such reasoning not only is at variance with this Court's teaching in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.306 (1932), it creates a needless inter-circuit conflict with the Ninth Circuit in Lynn, supra, the Fifth Circuit in Buchanan, supra, and the Tenth Circuit in United States v. Benoit, 713 F.3d 1, supra. It also creates a palpable tension with the DOJ's internal policy articulated in the U.S. Atty. Bull., vol. 59 No. 5, at 74 (Sept. 8, 2011).

The government failed to adduce any affirmative and competent evidence or assert any tangiable facts in the indictment or at trial that, this particular Defendant acquired the pornographic images at different dates and through different transactions. The three counts involved the same set of images found on the same flash drive forming the basis of the possession count. The receipt and the possession offenses rest impermissibly on the same elements. The government must still rely on Petitioner's possession of the flash drive on the date of the search to establish both the receipt and possession offenses. To punish Petitioner for unlawful receipt, in view of the fact of this case, the government must be able to establish different specific acts or transactions of receipt. The only "evidence" proffered by the government to establish the receipt offenses consisted of the file names of two inadmissible screen shots. This evidence is entirely insufficient to sustain the trio of convictions and sentences in this case. The practical effects of the Fourth Circuit's illogical decision are to punish Petitioner for more than one offense for the same conduct. Therefore, it would be multiplicitous to sustain three separate convictions for possessing a single flash drive that contained one set of images of child pornography.

The Court below made no mention whatsoever of the Ninth Circuit's decision in United States v. Lynn, supra, which controlled the outcome here, nor does

it mention the DOJ's internal policy that prohibits the prosecution's actions. Instead of reviewing those authorities offered by the Petitioner to supply a firm answer to the double jeopardy question in this case, the court below makes a pass at the importance of case-specific inquiries by using a single quote from its decision in United States v. Fall, 955 F.3d 363, 373 (4th Cir. 2020). That case has no conceivable applicability to this case, whether it was correctly decided or not. However, there , the government apparently recognized that there was a double jeopardy problem, took substantial measures prior sentencing to dismiss two counts to minimize any potential double jeopardy issues on appeal, id. at 369. As a result, Fall's double jeopardy claim was highly hypothetical, untimely, and frivolous, id. at 373.

Here, the Petitioner has suffered both financial injury because of the special assessments for each counts, and he is serving time in federal prison for two receipt of child pornography offenses which were never proved at trial by admissible and competent evidence.

II. THE FOURTH CIRCUIT'S RULING DENYING THE CONSTITUTIONAL SPEEDY TRIAL CLAIM CANNOT BE RECONCILED WITH THE STANDARDS ESTABLISHED BY THIS COURT.

In affirming the denial of Petitioner's Sixth Amendment Speedy Trial Motions, the Court below identified the four factors of Barker test, but was in fundamental error in its reading of Barker v. Wingo, supra, and in its unprecedented standard applied to resolve this issue. The court below held a Barker test in which it considered only one Barker factor, which apparently has a talismanic quality for the Fourth Circuit. The court below then compounds the error by failing to state how heavily the unique factor considered in its "Balancing test" weighs against the identified party.

We respectfully urge that all aspects of the Fourth Circuit's decision on this issue is erroneous. The court below eliminated, with two conclusory

paragraphs, a difficult and sensitive balancing process established by this Court. See Barker, supra, 407 at 533. Because the result is so contrary to the law established by this Court and other courts of appeals, the decision below on the constitutional speedy trial issue raised in this petition should be summarily reversed, in accordance with Sup. Ct. R. 16.1 of this Court.

In Moore v. Arizona, 414 U.S. 25 ____, ____, (1973), this Court held that none of the four factors to be considered...is either a necessary or sufficient condition to the finding of a deprivation of the defendant's right to a speedy trial; rather, they are related factors, having no talismanic qualities, which must be considered together with other circumstances as may be relevant, as such a process must be carried out in full recognition that the accused's interest in a speedy trial is specially affirmed in the Constitution, Id. at .

Here, the court below completely ignores the explicit requirement in Barker and Moore by impermissibly considering only one factor - the reason for the delay - as a dispositive factor, while failing to give meaningful consideration to three other Barker factors that weigh heavily in favor of dismissal. The court below makes the truly remarkable assertion that has no foundation in fact, that "At bottom, most of the delay is not the fault of the government, but rather is attributable to Remarque's own decision to change counsel repeatedly -- and, we would add, to file dozens of pretrial motions -- along with the COVID-19 pandemic, which neither party could foresee." Surprisingly, the Fourth Circuit's Balancing test ends there.

Even assuming that the reason for the delay is not held against the Government, this Court's proper standard required that the Petitioner retains the burden of demonstrating actual prejudice to make out a speedy trial claim. Doggett, supra, 505 U.S. at 656. It was on this point that the court below erred, it was reversible error. Incontestably, reason for delay is only [one]

factor in considering whether a 26-month delay in bringing the Petitioner to trial, in a simple case like this, was excusable. It has no talismanic quality and must be analyzed with three more factors. Thus, such a finding of fact is erroneous and incomplete, and the case should be summarily remanded for reassessment under proper constitutional standards, like this Court did in Moore, supra.

Moreover, the Fourth Circuit's decision is also manifestly erroneous because the court below makes no finding that the Petitioner intentionally changed counsel as part of a delaying tactics, or did the court below determine whether this factor weighs heavily in favor of the Government. For this reason alone, the Court below erred in attributing the offending delay to Petitioner. See United States v. Larry, 446 F.3d 1332-1337 (11th Cir. 2006)(the district court made no finding that Ingram intentionally evaded prosecution. For this reason alone the Court clearly erred in attributing part of the delay to Ingram). It is clear on the record that the real reasons for the delay lay elsewhere. During the Petitioner's detention hearing at the outset of the case, the government announced that it was an"open-and-shut"case. Thus, the fundamental question is whether in the face of Petitioner's repeated demands for speedy trial, did the government discharge its constitutional duty to make a dilligent and good-faith effort to file a motion for a trial setting. See Smith v. Hooey, 393 U.S. 374, 383 ____, ____, (1969). It is clear that the offending delay was for the Government's convenience of filing multiple defective superseding indictments that contained insufficient and unwarranted receipt charges based on legally flawed receipt theory.

The court below found that Petitioner repeatedly changed his counsel, but made no mention whatsoever that the government had also changed its counsel multiple times and the district also changed its presiding judge. Thus, the Fourth Circuit's finding is fundamentally biased against the Petitioner. Neither the district court nor the government has moved for a trial setting for over

nine months. Thus, it is hard to see how a defendant detained without bail was responsible for his trial delay. After all, "A defendant has no duty to bring himself to trial; the government has that duty"...Barker, 407 U.S. at 527. Thus, the burden is on the government to explain why for over nine months, before the COVID-19 pandemic, there was no trial setting in this case. See United States v. Brown, 169 F.3d 344, 349 (6th Cir. 1999).

Surprisingly, the court below made no mention whatsoever of prejudice in its unprecedented decision, although the consequent prejudice in this case are so egregious to amount to a deviation from fundamental conception of justice. In this case, there is a presumption of prejudice resulting from a delay of 26 months, but, the Petitioner has also demonstrated by overwhelming and unrebutable evidence actual prejudice. The trial evidence, if anything, clarified the question of actual prejudice because Petitioner's defense consisted of only an opening and a closing statement. The excessive delay was unfairly prejudicial to the Petitioner because he has lost all his potential witnesses, including his then-ex-wife and sole accuser. The government's witness and informant was material to the Petitioner's defense because the forensic evidence in this case (swept under the rug by the government) tended to reasonably inculpate the government's witness (and, thereby, exonerate the Petitioner). See Trial Trans, 03/23/2021, p. 154-163. Prior to trial, the Government's witness was clearly evading process service, even though she had been subpoenaed to appear at trial by the defense. But the Petitioner's trial was once again postponed due to COVID-19 pandemic. Since then,Crevecoeur's whereabouts were unknown. The Petitioner filed a Motion to Secure the presence of the government's witness at trial under compulsory process; but the government terrified by the idea of litigating the case in presence of its sole witness, opposed the Motion to Compel Presence of its only witness at trial, to impeded the truth-finding process of trial. ECF #69.

The absence of this witness at trial permitted the Homeland Security agent to deceive the jury by making a number of perjurious statements by suggesting that, the Petitioner was the only adult residing in his apartment and having access to the flash drive at issue. TT, 03/23/2021, p. 92-93.

Further, a number of defense witnesses were coming either from Haiti or out-of-state. Due to the countless trial postponements, and because of the COVID-19 restrictions, none of these witnesses, on the defense witness list including the forensic expert were able to be present; they were unable to travel.

In addition, there were unusual circumstances where the Petitioner's oppressive pretrial detention at the notorious D.C. Jail, in the midst of the pandemic, that resulted in Petitioner contracting two life-threatening diseases both Tuberculosis and Coronavirus. Petitioner has also experienced liver damage (hepatitis) due to his over-medication to treat his latent TB infection. In addition to being placed in a 23-hour a day solitary confinement for over a year with no fresh air and exposure to sunlight. See Banks v. Booth, 2020 WL 1914896 (D.D.C. Apr. 19, 2020). See also "Problems at D.C. Jail Were Ignored Until Jan. 6 Defendants Came Along," The New York Times (Nov. 11, 2021). It also prevents him from attending a number of U.S.C.I.S interviews.

Petitioner's oppressive pretrial detention had disrupted his college education and employment, drained his financial resources, wasted the student loans and Pell grants that he obtained right before his detention, curtailed his associations, and created anxiety in him which had a specific impact on his health. The anxiety is enhanced by the fact that Petitioner had no prior exposure to any criminal justice system. All happened because of the unjustified delay engineered by the government prior to the COVID-19 pandemic to obtain a number of duplicative indictments. This is sufficient evidence to demonstrate a manifest corruption of the system.

This Court makes it clear that under the Sixth Amendment, a showing of unreasonable delay, plus substantial proof of prejudice, mandates the holding that the constitutionally guaranteed speedy trial has been denied. Barker, 407 U.S. at 514. Lacking any rational or principled basis of support, the decision below is clearly contrary to this Court's decisions in Barker, Moore, and Doggett.

Finally, one of the more arcane pronouncements of the Court below is its statement that "But we agree with the district court that the government's response was timely under the Court's routine scheduling practices." A practice that allows trial judges to indefinately delay disposing of pretrial motions to avoid the pressures of the Speedy Trial requirement by violating both its own Local Rule 105(2)(a), its speedy trial plan, and by exploiting a loophole created by Section 3161(h)(1)(D) (formerly codified at Section 3161 (h)(1)(F) -- delay resulting from any pretrial motion, from filing of the motion through the conclusion of the hearings, or other prompt disposition of, such motion). Such a practice is unconstitutional because it ignores: (1) Congressional intent and the legislative history of the Act, See S.Rep. No. 212, 96th Cong., 1st Sess. 34 (1979) (recognizing the possibility of potential excessive and abusive use of the exclusion), H.R. Rep. No. 96-390, at 10 (1979), reprinted in 1979 U.S.C.C.A.N. 805, 814; (2) the explicit instructions provided by this Court in Henderson v. United States, 106 S. Ct. 1871, 90 L ED 2D 299, 476 U.S. 321, that circuit and district court must include in their rules, specific timetables, thereby giving substance to the obligations of prosecutors and defense counsel under the Speedy Trial Act. Id. 476 U.S. at 328 *9. Actually, the court below announced that the basic standards for prompt consideration of pretrial motions do not exist in the U.S. District Court of Maryland which would render Section 3161(h)(1)(D) unconstitutional because it become the exception that swallowed the rule.

III. THE COURT OF APPEALS HAS DECIDED A FOURTH AMENDMENT QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE COURT.

A. The Search Was Constitutionally Invalid And Cannot Be Saved By Leon Because It Relied On a Fabricated WhatsApp Messages And An Improbable And Uncorroborated Story Told By a Named Informant With Unknown Reliability.

The Fourth Circuit's decision perversely rewards the government for submitting a search warrant application that relied entirely on a factually implausible story told by the Petitioner's then-estranged wife ("the Informant"), and fabricated WhatApp messages supposedly obtained from Petitioner's iPhone. The Informant used the purported WhatsApp messages in a tortious and criminal scheme including blackmail voicemail transferred in or affecting interstate commerce, threatened the Petitioner to file a police complaint against him using the fake messages, if he did not voluntarily surrender his Green Card to U.S.C.I.S and flee the United States with his minor son.

The Petitioner's Opening Brief asserts, and the government does not dispute, that the fabricated "WhatsApp messages" stemmed from the Informant's own cell phones, it was created and turned over to the Homeland Security agent by email in a Microsoft Word document with no metadata whatsoever. Ironically, the Agent further altered the document provided, by replacing the initial screen name by "Remarque" to make it appear genuine and thereby mislead the Magistrate. The document was created to make it appear that Petitioner was involved in a questionable romantic relationship with a purported self-identified minor female in Haiti, in order for the Informant to obtain a divorce, and discharge of her obligations under Section 213A of the Immigration and Nationality Act, to support financially her sponsored foreign national husband ("the Petitioner") and step-son until they become U.S. citizens.

The record indicates that the officer knew or had reason to know that the WhatsApp messages was fabricated, this is the reason why she did not follow the Homeland Security Investigation's Standard Operating Procedures by conduc-

ting the most basic investigatory steps to verify the origin and the authenticity of the messages or conducting forensic examination on the electronic "evidence" turned over by the Informant. Nor did the officer present the Informant to testify in person under oath before the warrant-issuing judge, despite the fact she was available. But even assuming that the "WhatsApp messages" was real, nothing about the message is intrinsically illegal, thus, it does not constitute a violation of Section 2422 (b), because the Affidavit is silent about what "sexual activity" the "phantom self-identified girl in Haiti" was coerced to take part in, which would have constituted a crime in the United States. 18 U.S.C.S. 2422(b) does not criminalize conduct taking place in a foreign country, nor does it involve the deployment of American law enforcement personnel abroad. See United States v. Harris, 991 F.3d 552 (4th Cir. 2020). The principle animating the common law at the time of the Fourth Amendment's framing was clear: "A warrant may travel only so far as the power of its issuing official." United States v. Krueger, 809 F.3d 1109 (10th Cir. 2015) (Gorsuch, J., concurring).

But more importantly, it was unreasonable to believe that probable cause was demonstrated given the complete absence of any indication in the affidavit as to "when" and "where", the WhatsApp messages occurred. A reasonably experienced Homeland Security agent should be familiar with the fundamental principle that both the "commission" and "nexus" elements of probable cause include an essential temporal component. Doyle, supra, 650 F.3d at 475 (citing Leon, 468 U.S. at 920 n.20).

The fabricated "WhatsApp messages" forced the Magistrate to issue the warrants on the premise the evidence was authentic when it in fact was false and a fraud upon the Court, a result even more egregious than Leon, supra, contemplated. Probable cause depends on reasonably trustworthy information. Beck v. Ohio, 379 U.S. 89, 91 ___, ___, (1964).

This Court has held that "It is a violation of the Fourth Amendment to knowingly or with reckless disregard for the truth, to include false statements in the affidavit "outlining probable cause for a search. Frank v. Delaware, 438 U.S. 154, 155-56 ____, ____, (1978). Thus, if this Court set aside, as it must, the fabricated WhatsApp messages that is not a crime, nothing is left in the affidavit to support probable cause to search.

B. The Fourth Circuit Creates a Manifestly Erroneous Per Se Rule That Renders the Warrant Requirements of the Fourth Amendment Meaningless.

The court below creates a new per se rule to review indicia of reliability of named informants' tip that cannot be reconciled with principles established by this Court that the protection of liberty requires review by independent magistrates before a search is authorized, not just taking the government's word when it claims the need and justification to subject individuals to non-consensual searches of their property. Leon, 468 U.S. at 915. When the Constitutional validity of the search was challenged, it was incumbent upon the prosecution to show with specificity that what the Informant actually said, and why the officer thought the information was credible. Beck v. Ohio, 379 U.S. 89, 97 ____, ____, (1964). Here, the government intentionally omitted an absolutely critical material fact to the warrant-issuing Judge that seriously calls into question the Informant's reliability and undermined the Informants' story as lacking indicia of reliability as a whole and makes it simply improbable. The Informant made an unsworn statement that she surreptitiously gained access to Petitioner's cell phone (while he was at work) and gained access to a password-protected cell phone by supposedly "swiping" it to turn off the alarm, and had extracted data from the WhatsApp application and the photos gallery in which she discovered photographs of "butt naked girls," while admitting in the same complaint that she did not know the passcode when she gained access to the cell phone's contents. Bates #JBR_0035_0036. The Informant stated:

"He has a code on his phone and I believe that God wanted me to get the opportunity to get proof of his actions." In fact, an unexplained interval of over three months elapsed between the date of the supposed events and the Informant's police report. The tip does not describe with particularity the cell phone at issue nor the Informant makes it available to law enforcement for investigation. As a result, no effort was made to corroborate the unsubstantiated allegations in the affidavit. Moreover, for reasons unexplained in the record, the Informant did not personally appear and present an affidavit, or testify before the Magistrate, thus allowing the judge to evaluate the Informant's knowledge, demeanor, and sincerity.

Nonetheless, the Fourth Circuit did not find that the Magistrate issued the warrants by relying on reasonably trustworthy information. Instead, the court below tries to fill that gap with a conclusory assertion that "Remarque's then-estranged wife was a named informant - not an anonymous one - who described her personal knoledge of the facts. (App. A p. 7). In other words, the court below apparently concluded that it is irrelevant that the affidavit contained fabricated evidence and false statements, as long as the informant is named in the affidavit. The unexpressed but necessarily underlying premise of the court below is an astonishing and unprecedented per se rule that all informants are inherently reliable simply by a talismanic characterization of being named in a warrant application. Neither this Court nor any U.S. Courts of Appeals have ever given dispositive weight to an informant's tip merely by virtue of being named in the affidavit. The fact that an informant is named may contribute to the tip's reliability in cases where there are also other indicia of reliability. But that an informant is named does not mean [her] statements are automatically worthy of credence. United States v. Roerth, 312 F.3d 862, 868 (7th Cir. 2002) (finding no probable cause based on conclusory statement of named informant of unknown reliability).

The court below relied on a single quote in United States v. Perez, 393 F.3d 457, 462 (4th Cir. 2004). But in that case, there is no claim that an informant's tip is automatically worthy of credence merely by virtue of being named. There, in reaching its decision, the court considered among many factors, the informant's interest in the victim's well being as a motive to be truthful. Here, the Affidavit contains not even a conclusory assertion that the informants were known to be truthful and reliable, nor did the officer corroborate any of the Informant's unsubstantiated allegations beyond the innocent facts that Petitioner lived at the stated address and the irrelevant (to the determination of whether the suspect's home contained evidence of present-day crime) fact that Petitioner is driving a specific car. The fact that a suspect drives a car, has an employment, or was seen with a cell phone during a selfie, nudge the magistrate no closer to the conclusion that probable criminality occurred at a specific residence. United States v. Peck, 317 F.3d 754, 755-56 (7th Cir. 2003).

It has been this Court's consistent position for more than forty years that an Informant's veracity, reliability, and basis of knowledge are highly relevant, intertwined, and factors to be evaluated by a Magistrate...Gates, 462 U.S. at 230-238. To uphold the Fourth Circuit's ruling in this case would be to ratify the search of home based on the use of essentially fabricated evidence of non-crime and officer's conclusory statements with little or no corroboration.

There is also the Fourth Circuit's unsupported contention that the Informant's statement creates probable casue to search for child pornography. Because "Wanna also described images she personally saw in Remarque's possession, and her description left no room to doubt that those images were child pornography," but made no mention of the Informant's statements at issue (App. A p. 7). This is one of the more arcane and disingenuous pronouncements of the court

below, as nowhere in the record is there an allegation that Petitioner was seen in possession of child pornography by the Informant. The entire description of the "image," excluding the officer's own conclusory opinion that it was pornographic, was that the "photograph depicts unclothed minor females, that the Informant labeled as "butt naked girls." The U.S. Congress defined sexually explicit conduct as the lascivious exhibition of genitals -- not merely nudity. Visual depiction is lascivious only if it is sexual in nature. Doyle, supra, 650 F.3d at 473. Moreover, the officer's conclusory legal assertion that the "image" was pornographic does not save the affidavit because there was no basis for that assertion as the officer was never afforded the opportunity to view the purported "image." Thus, the emphasis by the Fourth Circuit is simply rhetoric and has no foundation in fact, because neither the officer nor the magistrate has viewed the image. Whether the activity in a given photograph constituted child pornography was a matter for the Magistrate to decide without deferring to a zealous officer's legal conclusion, let alone a biased estranged spouse with zero credibility. Gates, 462 U.S. at 239. "A detached and independent review is especially important in the context of determining whether images involve child pornography, a determination that by its very nature will involve a high degree of subjectivity. United States v. Brunette, 256 F.3d 14 (1st Cir. 2001).

Finally, the court below did not address, nor could it have addressed, the question of whether the search met the Constitutional nexus element of probable cause in light of this Court's decision in Zurcher v. Standford Daily, 436 U.S. 547, 556 ____, ____, (1978). The officer includes a boilerplate description of child pornography collectors in her affidavit, which was not drafted with the facts of this case nor this particular defendant in mind. The foundationless expert opinion does little to support the nexus element of probable cause because there is not a whit of evidence in the affidavit

indicating that the Petitioner is a "child pornography collector." It goes without saying that the government could not search individuals' home for evidence to prove that they are collectors merely by alleging they are collectors. United States v. Weber, 923 F.2d 1338, 1344 (9th Cir. 1990). A reasonable officer might have known that a blunderbuss warant was unjustified.

IV. THE DECISION BELOW IS IN CONFLICT, ON THE INSUFFICIENCY OF INDICTMENT ISSUE, WITH THE APPLICABLE DECISIONS OF THIS COURT.

In its Opinion (App. A P.3), the Fourth Circuit seems to hold that the knowledge of the sexually explicit nature of the materials as well as ... the involvement of minors in the materials' production is an essential element of the offenses. But the court below held that the indictment doesn't have to spell that out in detail. That holding is contrary to standards established by Chief Justice Marshall in the early case of the Schooner Hoppet and Cargo v. United States, 7 Cranch 389, 394, 3 L. Ed. 380, which has consistently been adhered by this Court in a long series of decisions such as United States v. Hess, 124 U.S. 87, reh. den. 419 U.S. 885 (1974). But, it is also a radical departure from the Fourth Circuit precedent established over a century that an indictment that fails to allege all the elements of the charged offense is fatally defective. Edwards v. United States, 266 F. 848 (4th Cir. 1920).

This Court has made crystal clear in United States v. X-citement Video, Inc., 513 U.S. 64 ____, ____, (1994) that the Statute such as Section 2252 is construed to require to have an element of scienter -- whether present in the language of the statute or implied by the Courts to prevent the prosecution of the morally innocent. It is well-settled that both Sections 2252 and 2252A of Title 18 are functionally the same. The requirement that every ingredient of the offense charged must be clearly and accurately alleged in the indictment is compelled by the Sixth Amendment and is specifically directed by Fed. R. Crim. Proc. 7(c). This is a matter of substance and not form. Hess, supra,

124 U.S. at 483. As Justice Field has explained, "No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be directly and not inferentially, or by way of recital." Id. See also United States v. Sherin, 1987 U.S. Dist. LEXIS 458 (S.D.N.Y 1987) (indictment dismissed because it failed to allege that defendant knew the actors depicted in sexually explicit material were children, which was an essential element of distribution of child pornography); United States v. Hillie, 227 F. Supp. 3d 57, 69 (D. D.C. 2017). Thus, in view of these principles, it is not sufficient as the Government and the Fourth Circuit suggest that, the allegation of the First element of the offenses of receipt and possession of child pornography is sufficient and that the Fourth element of Knowledge -or-awareness of the sexually explicit nature of the materials as well as...the involvement of minors in the materials' production is detail or proof that must be offered at trial.

The court below misread the Petitioner's Opening Brief as "failing to challenge the district court's finding that he was sufficiently on notice of his charges -- when actually the Opening Brief dedicated seven pages (p. 7-14) to lay out how the indictment failed to provide proper notice and protect him against double jeopardy. The Petitioner was prejudiced by the defective and incomplete indictment, because whether a defendant has to defend against allegations of his knowledge and awareness of the underage status of the actors, what form the purported pornography was allegedly received, the medium forming the basis of separate conduct, and the specific means of interstate commerce used to commit the crimes should not be a matter of guesswork on the part of the defendant charged under Section 2252A. As a result, the protections provided by the Grand Jury clause were compromised. If a defendant is to have a fair opportunity to defend himself, he is entitled to be informed of the charge and to have the indictment specify the Fourth element (Scienter) --

the charge and to have the indictment specify the Fourth element (scienter) - just as the indictment must plead every other essential element. An element of a crime is an essential factor without which there is no crime. United States v. Winnicky, 151 F. 2d 56, 58 (7th Cir.). The Fourth Circuit made a highly questionable ruling that represents a breach in the wall erected by the Fifth and Sixth Amendments. It is sufficiently unusual that it is imporant that this court extends its holding in X-Citement Video, Inc., to 18 U.S.C.S 2252A, and makes it clear what an indictment charging a defendant of both receipt and possession of child pornography, must allege to pass constitutional muster.

V. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTIONS ON THE BASIS THAT THE CUSTODIAL STATEMENT WAS TRUE DESPITE THE FACT IT WAS UN-MIRANDIZED, UNCORROBORATED, INVOLUNTARY, AND DEMONSTRABLY FALSE IN PART.

In reaching its decision to affirm, the court below decided that a number of settled established-principles were not to be applied to this case. Petitioner's trio of convictions impermissibly rest solely on an un-Mirandized, involunatary, uncorroborated, and demonstrably false putative admission that the Fourth Circuit mischaracterized as a "confession," thereby the convictions were obtained in violation of: Miranda v. Arizona, 384 U.S. 364 ____, ____, (1966); Opper v. United States, 348 U.S. 84 ____, ____, (1954), Jackson v. Denno, 378 U.S. 368, ____, ____, (1964), Simmons v. United States, 390 U.S. 377 ____, ____, (1968), and their progeny. It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused. Wong Sun v. United States, 371 U.S. 471, 488-89 ____, ____, (1963). This corroboration rule initially was intended to mitigate the risk that a false confession would lead to a conviction for a crime that not only had been committed by the defendant but also that had not been committed by anyone else. Smith v. United States, 348 U.S. 147, 153-54 (1954).

The Petitioner, the Government's own filing has claimed (ECF 69 at p. 8, & Ex. 3 at 18:25) stated (during his unMirandized custodial interrogation in a police vehicle bracketed by two armed officers after being evicted from his residence early morning by a dozen agents) that he did not know what "child pornography" was. Insofar, this shortfall in his understanding has not been rectified at any point. Certainly the experienced law enforcement agent conducting the interrogation did not undertake any step to provide a legal definition or any other measure of further clarity to him. Nonetheless, the trial court permitted the government to claim at trial (which is to say, to interpret Petitioner's less-than-clear responses to the agent in English without benefit of an interpreter) that the Petitioner "admitted" to saving child pornography images and to being "addicted" to child pornography. The admission of these extra-judicial statements as the only evidence to support the convictions without argument regarding them to determine their reliability, denied Petitoner of substantive due process and violated his Fifth Amendment right against self-incrimination, in that their technical meaning cannot be ascertained on their face, and further, that their probative value to prove the charges is fatally undermined by an entire lack of definitional component. This thereby would shift the burden of persuasion onto Petitioner. What he, a foreign national who has been living in the United States for only eleven months prior to his custodial interrogation, thus, unfamiliar with U.S. law, understood at the time to comprise "child pornography" does not necessarily correspond or overlap with the legal definition in federal law, which is all the Homeland Security agent should have been seeking. Absent adequate definition, we are left with the quintessential "failure to communicate." Lacking an understanding, Petitioner responded with what he understood to the question seek, the record, however, does not have any information as to what that particular understanding was at the time he responded because the Petitioner's unopposed Motion in

limine to exclude the statements as unreliable was arbitrarily denied by the trial court without an evidentiary hearing.

Furthermore, the record contains ample unrebutted evidence showing that Petitioner's putative admission was inherently untrustworthy. The coercive tactics used by the Homeland Security Agent produced a demonstrably false admission in part, which included a supposed admission by the Petitioner that the images at issue in this case were obtained from a website titled: "4share.com," when in fact the website referred by Petitioner during his custodial interrogation was www.4shared.com. Despite knowing that this supposed admission was false and despite having in her possession exculpatory evidence that cast doubt on this portion of Petitioner's statement; the government not only presented the false statement before the jury, but purposefully mistated the title of the website stated by the Petitioner to reflect an inaccurate rendition of the original interrogation. Nonetheless, the Homeland Security agent admitted at trial that the "4share.com" website domain is not valid, but all the more troubling is that the website domain name "www.4shared.com" is a California-based online music entertainment file sharing website with zero pornographic content. See DFSB Kollective Co. v. Bourne, 897 F. Supp. 871 at *3, (N.D. Cal. Aug. 3, 2012). This explains why the government makes no attempt to offer even a scintilla of independent evidence to corroborate this portion of Petitioner's alleged statements. See T.T. 03/23/21, P. 60-61, P. 106-109, respectively.

The rhetoric that the Petitioner is "addicted" to child pornography is equally false. It is unusual to find an adult male with a known attraction to adult females, to suddenly develop from September 2017 to February 2018, an "addiction" for images of child pornography only for a 5-month period of his entire life (while he was living with the Informant), without prior foundational behavioral patterns. The government failed to adduce. The government offers no evidence showing his involvement in any illicit activity online related to child

pornography. Petitioner's cell phones were returned to his attorney at sentencing because they contain no evidence of any wrongdoing. Under these circumstances, allowing the government to use a number of false/uncorroborated extra judicial statements obtained in violation of Miranda, supra, to argue that such statements amount to admission or confession of technical conduct, the comprehension of which it cannot be established that the Petitioner, he knew at the time he made such statements, result in a fundamental miscarriage of justice. To hold otherwise would allow the government to imprison foreign national defendants based solely upon inherently untrustworthy or mistaken admission/ confession. Chavez v. Martinez, 538 U.S. 760, 767 _____, _____, (2003).

Turning now to the voluntariness issue, the district court erroneously refused Petitioner's request for a preliminary hearing on the voluntariness of his statement, preventing the Petitioner to give his own version of the circumstances surrounding his custodial interrogation and describing the coercing effect upon him. The district court applied a clearly erroneous standard and abused its discretion in light of this Court's decision in Simmons v. United States, 390 U.S. 377 ____, ____, (1968). The district court allowed the Homeland Security agent to testify, but made a mistatement of the law that impinged upon and incorrectly dissuaded the Petitioner from exercising his constitutional and statutory right of testifying through a request for a full and fair voluntariness hearing. The Judge incorrectly warned the Petitioner of the consequences of his testimony and stated: "If you testify, your statement could be used against you at trial." Upon such a warning, the Petitioner refrained from testifying to preserve his privilege against self-incrimination. Nonetheless, despite no voluntariness hearing occurred, the Judge made an unreliable finding that the statement was voluntary made and admitted it at trial. This Court has held that a criminal defendant's testimony at a suppression hearing could not be used against a defendant without violating

his Fifth Amendment's privilege against self-incrimination. Cf Simmons, supra, see also Jackson v. Denno, 378 U.S. 368 (1964); Wright v. United States, 250 F.2d 4, 102 U.S. App. D.C. 36 (D.C. Cir. 1957); United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965). It is also settled that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. It is hard to see how the district court can make a reliable and fair finding on the voluntariness issue when the court itself in its oral acknowledged that "the only way the issue of voluntariness could be addressed, is only if the defendant testified. See Supp. Hr'g Tr. at 89 pp. 2-8. Under the circumstances presented by this, the admission of the Petitioner's extra judicial statement without the requested voluntariness hearing and an evidentiary hearing to establish its trustworthiness and reliability, compounded with the government's failure to present independent evidence to corroborate such statement is a clear violation of the self-incrimination clause of the Fifth Amendment.

The extraordinary reliance of the district court on misstatements of law and the Fourth Circuit's failure to address the inpropriety of the admitted extra judicial statements is such an extreme departure from accepted judicial proceedings that warrants summary reversal by this Court in accordance with Sup. Ct. R. 16. 1 of this Court.

VI. THE QUESTIONS RAISED IN THIS PETITION ARE IMPORTANT, AND IN PART, UNRESOLVED AND MATTERS OF FIRST IMPRESSION IN THIS COURT

The Fourth Circuit, without affording the Petitioner an oral argument, has decided important questions of federal law that have not been, but should be settled by this Court and are a firm basis for granting certiorari in this case. The opinion below on the questions here presented is so deeply dependent on omission of material fact, and incontestably erroneous statements of law and fact that if they were deleted from the opinion nothing would remain to support its results. Because those results are so contrary to the law and applicable standard established by this Court, other courts of appeals, the DOJ's internal policy, and the Department of Homeland Security Standard Operating Procedures, the decision below on certain issues raised in this petition should be summarily reversed, in accordance with Sup. Ct. R. 16.1 of this Court.

1. The Fourth Circuit made a highly questionable ruling affirming an unprecedented and flawed legal theory of receipt based only on file names of inadmissible screen shots that has never been subjected to legal test in court, is standardless, and is a violation of the double jeopardy clause. No effort was made by the court below to determine the validity or reliability of the novel legal theory. Therefore, the question of whether the government can use the file name of screen shot as relevant unit of prosecution under Section 2252A(a)(2) has yet to be answered by this Court or any courts of appeals.

2. The Fourth Circuit also made a truly troubling ruling by creating a backdoor method to assess a named informant's reliability and upheld the fruits of a search based on a fabricated WhatsApp conversations previously used in a criminal scheme by the Infomrant. Nowhere in its opinion, the court below made mention of the WhatsApp messages which is apparently an acknowledgement that such evidence was damaging for the government's case on appeal. Nonetheless,

the Fourth Circuit held that the search was supported by "probable cause." The government's reliance on a fabricated evidence that does not constitute a crime whatsoever to open an investigation is anti-ethical to the notion of fundamental fairness embodied in due process. The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system.

3. This petition presents to this Court a more fundamental question for review -- may a trio of convictions that is based only on a defendant's uncorroborated and involuntary putative admission be allowed to stand. Particularly when (1) the statement was extracted from a Haitian National, with no familiarity with the U.S. law and the criminal justice system, without the benefit of Miranda warnings and an interpreter, (2) the government knew that substantial part of the statement presented at trial was false, (3) the defendant was denied a full and fair Jackson v. Denno hearing upon request in which he could testify. This Court has always held in the negative, and the decision of the Fourth Circuit is sufficiently unusual that it is important that this Court reiterate these principles to prevent any further miscarriage of justice. The presentation in part of a false putative admission at trial served only to inflame the passions and prejudices of the jury and violated due process of law. "A criminal trial marred by structural defect cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment resulting from such a trial may be regarded as fundamentally fair. Arizona v. Fulminante, 499 U.S. 279, 310 ____, ____, (1991).

CONCLUSION

Lacking any rational or principled basis of support, the decision below is a unique departure from decisions of this Court and existing precedent and practice of the Courts of Appeals. As such, it represents a breach in

the wall erected by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, the Federal Rules of Evidence, and decisions of this Court that were designed to protect citizens against governmental abuse of power that shocks the conscience. If allowed to stand, this decision will bring the Fourth Amendment two steps closer to death by a thousand cuts, render the stare decisis doctrine meaningless, and would effectively open the courthouse doors to the government's use of inadmissible evidence to secure convictions.

This petition for a writ of certiorari should, therefore, be granted.

Dated: August 2nd, 2023

Respectfully Submitted,

Jean Buteau Remarque
Reg. No. 64509-037
FCI Allenwood Low
Federal Correctional Institution
PO Box 1000
White Deer PA 17887