No. 10-999

In the Supreme Court of the United States

DAVID ROGER ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the good-faith exception to the Fourth Amendment exclusionary rule applies where a search warrant fails to describe with particularity the items to be seized but where such information is contained in the associated affidavit reviewed and signed by the issuing magistrate judge.

2. Whether information contained in a search warrant application established probable cause to search petitioner's residence.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 (1976) 10
Groh v. *Ramirez*, 540 U.S. 551 (2004) 11, 12
Herring v. *United States*, 129 S. Ct. 695 (2009) 6, 7, 9
Illinois v. *Gates*, 462 U.S. 213 (1983) 15, 16
Maryland v. *Garrison*, 480 U.S. 79 (1987) 10
Massachusetts v. *Sheppard*, 468 U.S. 981 (1984) 13
Texas v. *Brown*, 460 U.S. 730 (1983) 16
United States v. *Christine*, 687 F.2d 749 (3d Cir. 1982) 13, 14
United States v. *George*, 975 F.2d 72 (2d Cir. 1992) . . 13, 14
United States v. *Grubbs*, 547 U.S. 90 (2006) 10
United States v. *Johnston*, 268 U.S. 220 (1925) 16
United States v. *Lazar*, 604 F.3d 230 (6th Cir. 2010), cert. denied, 131 S. Ct. 973 (2011) 13
United States v. *Leon*, 468 U.S. 897 (1984) 9, 11, 12
United States v. *Tracey*, 597 F.3d 140 (3d Cir. 2010) 14

Constitution and statutes:

U.S. Const. Amend IV 5, 6, 8, 9, 10
18 U.S.C. 2252 3

Statutes—Continued: Page

18 U.S.C. 2252(a)(2) 1
18 U.S.C. 2252A 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 625 F.3d 830. The order of the district court (Pet. App. 29-46) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2010. The petition for a writ of certiorari was filed on February 2, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted on one count of receiving matter containing visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C.

2252(a)(2). The district court sentenced petitioner to 121 months of imprisonment, to be followed by ten years of supervised release. The court of appeals affirmed. Pet. App. 1-28.

1. In 2006 and 2007, federal agents developed evidence from an investigation involving the forensic examination of two computers that led the agents to conclude that petitioner had distributed child pornography. First, in July 2006, agents performed a forensic examination on a computer in Oregon that contained more than 1800 images depicting minors engaging in sexually explicit conduct. Pet. App. 3. The agents determined that the computer's owner had used a Google program called "Hello" to share those images, and that he had exchanged the images with an individual in Michigan later identified as Jerry Mikowski. *Ibid.* Next, in March 2007, federal agents seized Mikowski's computer and determined that it contained approximately 2000 images of child pornography. *Ibid.* A list of Mikowski's Google Hello "friends" showed that those "friends" included "mrhyde6988." *Ibid.* Agents also discovered a file on Mikowski's computer named "from mrhyde6988" that contained two images depicting female minors engaging in sexually explicit conduct. *Ibid.* Agents determined from further investigation that petitioner was "mrhyde6988." *Ibid.*

Based on that information, Immigration and Customs Enforcement Special Agent Timothy P. Stone submitted an application (Pet. App. 83-111) for a warrant to search petitioner's residence to a magistrate judge in the United States District Court for the Western District of Texas. Agent Stone's 21-page affidavit (*id.* at 85-111) was attached to that application, and it summarized the facts leading to petitioner's identification, described the

investigation, and stated that, in the agent's view, the evidence developed to that point provided probable cause to believe that a search of petitioner's residence would find evidence of violations of 18 U.S.C. 2252 and 2252A. Pet. App. 86-87, 98-108. The affidavit, for instance, explained how forensic examinations of computers and subpoenas to Google, Yahoo!, and Clearwire (an Internet Service Provider) led agents to petitioner's name, Hello username ("mrhyde6988"), userID, and email address ("mrhyde6988@yahoo.com"). *Id.* at 98-103. The affidavit indicated a computer of another individual (Mikowski) contained a file with two images of children engaged in sexually explicit conduct and that the file's name ("from mrhyde6988") indicated that petitioner had sent the images. *Id.* at 103-104. The affidavit also explained that the investigation determined that the Internet Protocol (IP) address used to access petitioner's Hello and email accounts was associated with the street address at petitioner's residence. *Id.* at 101-102. And the affidavit provided a basis for believing that individuals who trade images of child pornography often have a sexual interest in children that leads them to collect and maintain such images in their home for many years. *Id.* at 105-107. In addition, the affidavit explained that computer files can often be retrieved years after their creation or deletion. *Id.* at 97.

Agent Stone requested a warrant to search petitioner's residence that would "authoriz[e] the search and seizure of the items listed in Attachment B" to his affidavit. Pet. App. 107-108. Attachment B, which was entitled "DESCRIPTION OF ITEMS TO BE SEARCHED FOR AND SEIZED," described the items subject to the warrant request, including "images of child pornography and files containing images of child pornography" stored

or found in, *inter alia*, computers, DVDs, books, and magazines. *Id.* at 109-110.

2. The magistrate judge reviewed Agent Stone's affidavit and the proposed warrant. 8/26/08 Tr. 32-33. After that review, the judge required Agent Stone to make changes to both documents. *Ibid.*

The magistrate judge subsequently issued a search warrant. Pet. App. 62-63. The warrant authorized federal officers to search petitioner's residence for and to seize "[p]roperty designed or intended for use or which has been used as the means of committing a criminal offense or that contains evidence of the commission of a criminal offense." *Id.* at 62. The warrant specifically stated that the magistrate judge was "satisfied that the affidavit(s)" submitted by Agent "Timothy P. Stone" had "established probable cause" to believe that the "property so described" was at the residence and "establish[ed] grounds for the issuance of this warrant." *Id.* at 62-63. The warrant itself did not expressly incorporate by reference Agent Stone's affidavit or attachments, nor did it expressly refer to "Attachment B." See *ibid.* The magistrate judge, however, contemporaneously signed both the search warrant itself, *id.* at 63, and Agent Stone's affidavit on which the warrant was based. *Id.* at 108.

Before agents executed the warrant two days later, each of the agents who participated in the search reviewed the affidavit (signed by the magistrate judge) and its attachments and "understood the proper scope of the search." Pet. App. 35-36; see *id.* at 8, 12. At the search, the agents gave petitioner a copy of the warrant, without a copy of the affidavit or its attachments. *Id.* at 32. During the search, agents contacted the U.S. Attor-

ney's office on several occasions to ask about what they could seize. *Id*. at 12.

The agents ultimately seized several computers and external hard drives. Pet. App. 64-82 (inventory). A forensic examination found approximately 3300 images of child pornography on petitioner's computer, including photos depicting children involved in bondage and bestiality. *Id*. at 3-4. The examination also found evidence of Google Hello chat sessions in which petitioner traded child pornography over the Internet. *Id*. at 32.

3. After his indictment, petitioner moved to suppress the fruits of the search. The district court denied petitioner's motion. Pet. App. 29-46.

The district court concluded that the magistrate judge had "made a probable cause determination based on [the magistrate judge's] review of [Agent Stone's] affidavit"; that the affidavit established probable cause for the search; that the agents who conducted the search "understood [its] proper scope" as specified in the affidavit and attachments; and that the agents thus "limited their search to what the Magistrate authorized." Pet. App. 35-36, 39, 41-46. The court noted that the warrant would have been "sufficiently particular" with respect to the items to be searched if "the Magistrate [had] written 'see attached affidavit' on the warrant." *Id*. at 36. Although the magistrate judge had erred by "fail[ing] to incorporate the affidavit by reference," *ibid.*, the district court concluded that that omission did not justify the remedy of exclusion. The district court found that "the agents acted in an objectively reasonable fashion" in conducting a search based on the warrant and, for that reason, it held that the good-faith exception to the Fourth Amendment's exclusionary rule applied to this case. *Id*. at 33-37.

Petitioner pleaded guilty pursuant to a plea agreement that reserved petitioner's right to appeal the district court's suppression ruling. Pet. App. 2. Petitioner appealed.

4. The court of appeals affirmed. Pet. App. 1-28. The court held that the district court correctly declined to suppress evidence from the search under the good-faith exception to the exclusionary rule, *id.* at 6-18, and that Agent Stone's affidavit provided probable cause for the search, *id.* at 18-28.

a. The court of appeals concluded that the search warrant was constitutionally invalid because it failed to specify with particularity the items to be searched for and seized, a defect that could have been cured by "[s]imply incorporating [Agent Stone's] affidavit and attachments * * * by reference." Pet. App. 7-8. The court explained, however, that the warrant's invalidity did not resolve the separate question whether suppression would have been an appropriate remedy. *Id.* at 8-9. That question, the court recognized, is governed by the Fourth Amendment's exclusionary rule, which focuses on "deterring police officers from knowingly violating the Constitution" and applies only where "the benefits of [such] deterrence" sufficiently "outweigh [the] costs" of suppression. *Id.* at 9-10 (citing *Herring* v. *United States*, 129 S. Ct. 695, 699-702 (2009)). The court explained that exclusion is warranted "only if" law-enforcement officers had "'knowledge, or may properly be charged with knowledge, that the search was unconstitutional.'" *Id.* at 9 (quoting *Herring*, 129 S. Ct. at 701). In other words, "[t]o 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 paid by the jus-

tice system." *Id.* at 10 (quoting *Herring*, 129 S. Ct. at 702).

The court of appeals held that, in this case, the conduct of law-enforcement officers "was neither deliberate nor sufficiently culpable to warrant application of the exclusionary rule." Pet. App. 10. The court reasoned that "a reasonable officer could have easily concluded that the warrant was valid" because, although the text of the warrant was flawed, the officers were also given "the affidavit * * * signed by the magistrate judge" to which a "specific list of items to be seized was attached." *Id.* at 11-13. The court explained that the magistrate judge had "carefully reviewed the warrant, the affidavit, and the attachment," *id.* at 11; determined that the affidavit provided the probable cause needed to issue the warrant, *ibid.*; and "signed not only the warrant, but also the affidavit, to which the list of items to be seized was attached," *id.* at 15. The warrant and affidavit, in turn, were together "reviewed at many levels" in the government before and after the magistrate judge signed them, *id.* at 11-13; and "all of the agents and law enforcement officers who participated in the search were given the affidavit and attachments in advance." *Id.* at 12. Both documents were reviewed by the relevant agents, and the agents repeatedly contacted the U.S. Attorney's office when executing the warrant to confirm what they could seize. *Ibid.* Those circumstances, the court concluded, provided "good reason to believe in the warrant's validity" and reflected that "the agents involved acted in objectively reasonable good-faith in relying on the search warrant." *Id.* at 9, 12-13; see *id.* at 17-18.

b. The court of appeals additionally held that Agent Stone's affidavit provided sufficient information to sup-

port the magistrate judge's probable-cause determination. Pet. App. 18-19. The court of appeals explained that probable cause is a "practical, common-sense" determination that applies in the search context when there is a "fair probability" that evidence of a crime will be found "given all the circumstances set forth in the affidavit." *Id.* at 19 (citation omitted). After discussing the information establishing probable cause in detail, the court concluded that Agent Stone's affidavit was "clearly sufficient" to justify the search. *Id.* at 19-23.

The court of appeals rejected petitioner's claim that the information in the affidavit was too "stale" to constitute probable cause. Pet. App. 23-27. The court explained that the evidence indicated that the information establishing probable cause was no more than 18 months old at the time of the search; that agents had a basis for concluding that petitioner "had a sexual interest in children" based on his apparent exchange of child pornography; that such individuals "often maintain their collection [of pornographic images] for several years"; and, in any event, that computer files can be recovered years after they have been viewed or deleted. *Id.* at 24-25. Finally, the court reasoned that its determination was consistent with those by other courts that have addressed whether information in child pornography investigations are too stale to establish probable cause. *Id.* at 25-27.

ARGUMENT

Petitioner renews his arguments that the good-faith exception cannot properly apply when a search is conducted pursuant to an invalid warrant that fails to satisfy the Fourth Amendment's particularity requirement (Pet. 7-19) and that Agent Stone's affidavit failed to es-

tablish probable cause to search petitioner's residence (Pet. 20-25). The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. The court of appeals correctly applied the good-faith exception to the Fourth Amendment exclusionary rule. It is well established that the exclusionary rule is a "judicially created remedy" that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States* v. *Leon*, 468 U.S. 897, 906, 916 (1984) (citation omitted). The rule therefore does not apply "where [an] officer's conduct is objectively reasonable" because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 919-920. Indeed, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 919 (citation omitted). Such "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" to justify suppression. *Herring* v. *United States*, 129 S. Ct. 695, 702 (2009).

As the court of appeals explained, the agents' conduct in this case was objectively reasonable and not deliberate or sufficiently culpable to warrant suppression. Pet. App. 10-14. Although the search warrant itself failed to specify with particularity the items to be searched for and seized, the warrant specifically referenced Agent Stone's affidavit as providing the justification for the search, and "the magistrate judge signed not

only the warrant, but also the affidavit, to which the list of items to be seized was attached," *id.* at 15. The agents who executed the search not only were given the warrant but were also given the magistrate-signed affidavit and attachments. They carefully reviewed that material and conducted their search accordingly. In those circumstances, it was objectively reasonable for the officers to have taken the warrant and affidavit together as specifying the bounds of their authority to search, because, among other things, the magistrate judge was actively involved in reviewing the affidavit materials and ultimately signed both the warrant and affidavit. Although the government has since acknowledged that the warrant was itself legally deficient, the officers' conduct in relying on it was objectively reasonable for purposes of the good-faith doctrine. See pp. 3-5, *supra*.

Petitioner does not dispute that the warrant's flaw could have been cured by "[s]imply incorporating the affidavit and attachments * * * by reference." Pet. App. 8. The agents treated the warrant as doing so. Although the warrant ultimately failed the Fourth Amendment's particularity requirement because it did not make that incorporation express, the central purpose of the particularly requirement was largely satisfied. "[T]he requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987); see *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976); cf. *United States* v. *Grubbs*, 547 U.S. 90, 98-99 (2006) (rejecting other policy rationales for the particularity requirement). The magistrate judge gave his written assurance that he had considered

the scope of the search in relation to the probable cause and approved the specific request submitted to him. Pet. App. 15-16. And the agents in this case limited the search to the items specified in the attachment to the magistrate-signed affidavit and, as such, complied with the scope of the authorization that the magistrate judge plainly attempted to confer.[1]

Petitioner contends (Pet. 6, 8-10, 19) that the court of appeals' decision is inconsistent with one passage in *Leon* and the court's ruling in *Groh* v. *Ramirez*, 540 U.S. 551 (2004). Petitioner is incorrect. The *Leon* Court recognized that, "depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." 468 U.S. at 923.

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[1] Petitioner asserts (Pet. 15 n.1) that "at least one of the officers who conducted the search" did not comply with the limits in the affidavit because the officer seized a "bottle of pills" containing petitioner's "prescription medicine." The record is not sufficiently developed to support petitioner's assertion. After petitioner filed his opening brief on appeal, he moved to supplement the record to include the inventory receipts for the items that agents seized during the search of his residence (Pet. App. 65-82) and argued in his reply brief that the inventory showed that the search of petitioner's residence exceeded the scope of the affidavit because petitioner's medicine had been seized. See Pet. C.A. Reply Br. 10-11 & n.11. Because petitioner belatedly raised this contention, the evidentiary record does not reflect whether the prescription label included petitioner's name, address, and a date so as fall within the affidavit's category of items to be seized. Cf. Pet. App. 111 ¶ d (including "records evidencing occupancy or ownership of [petitioner's residence]" as items to be seized). Cf. also 8/26/08 Tr. 10-11, 30 (discussing what appears to have been other items subsequently and separately seized from petitioner when he was arrested); C.A. R.E. Tab 6, p. 18 (inventory of items seized from petitioner at the time of his arrest on May 19, 2008).

That observation is fully consistent with this case. *Leon*'s emphasis on "the circumstances of the particular case" leaves open the possibility that a warrant's failure to particularize the things to be searched may not be "so facially deficient" as to preclude objectively reasonable reliance by agents, *ibid*., where, as here, the associated affidavit specifying the things to be searched is signed by the magistrate judge and carefully followed by those conducting the search. Indeed, *Leon* makes clear that "all of the circumstances" of the case must be considered when evaluating the objective reasonableness of law-enforcement conduct. *Id*. at 922 n.23.

Similarly, as the court of appeals recognized (Pet. App. 15-16), *Groh* does not speak to the circumstances presented here. The Court in *Groh* confronted a *Bivens* claim based on a "glaring deficiency" (*id*. at 15) on the face of a warrant that other circumstances in the case failed to mitigate. Instead of enumerating the items to be seized, the warrant in *Groh* simply included a description of the two-story house to be searched. *Groh*, 540 U.S. at 554. The Court concluded that it could not be assured "that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit." *Id*. at 560; cf. *id*. at 558 (noting that the officer had only orally described the items to be seized). In this case, in contrast, the agents who conducted the search were armed not only with the warrant in question but also with the magistrate-signed affidavit and attachments that specified the items to be seized. The record makes clear that the magistrate judge "carefully reviewed the warrant, the affidavit, and the attachment" before signing both documents. Pet. App. 11. And the magistrate judge's signature on the affidavit that "defined and limited" the scope of the search distinguishes

this case from the circumstances in *Groh*, and makes it more like *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), in which the magistrate's assurance that he would correct any mistakes in the warrant was a significant factor supporting application of the good-faith exception. See *id*. at 986 & n.3, 989-991.

b. Petitioner asserts (Pet. 6, 10, 16-19) that the court of appeals' decision in this case conflicts with *United States* v. *Lazar*, 604 F.3d 230 (6th Cir. 2010), cert. denied, 131 S. Ct. 973 (2011); *United States* v. *George*, 975 F.2d 72, 74 (2d Cir. 1992); and *United States* v. *Christine*, 687 F.2d 749, 758 (3d Cir. 1982). None of those decisions reflects a division of authority that might warrant this Court's review.

In *Lazar*, the magistrate judge issued a warrant to search the medical records of certain patients identified in a list that was presented the judge. Although the warrant did not "formal[ly] incorporat[e] by reference" that list, the court of appeals held that the list was "effectively incorporated into the search warrants." 604 F.3d at 233-234, 236. The officers who conducted the search, however, seized "records of patients whose names did not appear on a patient list presented to the issuing Magistrate Judge." *Id*. at 238. The Sixth Circuit ordered suppression of "only patient files seized beyond the scope of such list." *Ibid*. *Lazar* is thus a case in which a magistrate judge placed limits on the search that the officers exceeded by seizing records beyond the warrant's authorization. *Lazar* does not suggest that it would not have been objectively reasonable for officers to conduct a search within the limits of what they understood to have been authorized by a judge who signed both the warrant and the affidavit enumerating specific items to be seized. Indeed, *Lazar*'s conclusion

that an express incorporation by reference is not always necessary lends support to the conclusion that the agents here were objectively reasonable in reading the warrant and magistrate-signed affidavit together.

In *George*, the Second Circuit concluded that a warrant was facially overbroad because the magistrate authorized a search for "any other evidence relating to the commission of a crime." 975 F.2d at 75. The court concluded that the good-faith exception did not apply because no reasonable officer would have thought such a broad, catch-all category was constitutionally valid. *Id.* at 78. *George* did not address circumstances like those in this case, where the magistrate judge signed both the warrant and its associated affidavit and the agents complied with limits on their authority to search that the affidavit specified.

Petitioner's reliance on *Christine* underscores the absence of a present division of authority warranting review. The Third Circuit decided *Christine* in 1982, two years before *Leon* established the good-faith exception to the exclusionary rule. Since *Leon*, the Third Circuit has applied the good-faith exception to the fruits of a search conducted under a warrant that was defective because it failed to incorporate an affidavit that identified the particular items to be seized. See *United States* v. *Tracey*, 597 F.3d 140, 152-153 (3d Cir. 2010). Indeed, *Tracey* concluded that, although the warrant on its face failed to particularize the items to be seized, the resulting search was conducted in good faith "because a reasonable officer" would have "assume[d] that the warrant incorporated and would be construed with the attached affidavit" that the magistrate judge had signed when he approved the warrant. *Id.* at 152.

2. Petitioner separately contends (Pet. 20-25) that Agent Stone's affidavit did not provide probable cause to believe that evidence of child pornography would be found on a computer in petitioner's residence. The court of appeals correctly rejected that fact-bound contention, which warrants no further review.

Petitioner appears to argue that the court of appeals erred in two respects. First, petitioner argues (Pet. 23) that the agents' location of a file named "from mrhyde6988" containing child pornography on Mikowski's computer does not sufficiently indicate that a computer in the home of the person with the user name "mrhyde6988" (*i.e.*, petitioner) will also contain child pornography. Second, petitioner contends (Pet. 23-25) that the court of appeals was wrong to conclude that the relevant child pornography would have been transmitted between petitioner and Mikowski no earlier than December 2006. In petitioner's view, the "alleged distribution could have been *any time* before" agents seized Mikowski's computer and, "without *any* date as to when the two images of child pornography were allegedly sent [from petitioner] to Mikowski" there was "no way" to determine whether the information was too stale to establish probable cause. Pet. 24-25. Petitioner misunderstands the nature of the probable cause inquiry and the court of appeals' decision.

The concept of probable cause entails "a practical, common-sense" evaluation of the facts supporting of a search warrant to determine whether there is a "fair probability that contraband or evidence of a crime will be found" at a certain location. *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). The facts presented to a magistrate judge in support of a warrant need not themselves show that the reasons to search are "correct or more

likely true than false"; they need only "warrant a man of reasonable caution in the belief" that evidence of a crime will be found. *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (citation omitted). "A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" *Gates*, 462 U.S. at 236 (citation omitted). The court of appeals correctly articulated this standard (Pet. App. 19) and properly applied it to the facts of this case (*id.* at 19-27).

The file discovered on Mikowski's computer named "from mrhyde6988" provided ample reason to believe that the file came from petitioner, who used the username "mrhyde6988" and was one of Mikowski's Hello "friends." Other evidence showed, *inter alia*, that the IP address used to access petitioner's Hello and email accounts was associated petitioner's residence. Petitioner's contention (Pet. 24) that the distribution of pornographic files between petitioner and Milkowski could have occurred before petitioner opened his Hello account does not undermine the reasonableness of the belief that the files were traded through the Hello account (for which petitioner's user name was "mrhyde6988").

Petitioner does not contend that the court of appeals' probable-cause determination conflicts with any decision by this Court or any other court of appeals. Petitioner simply appears to seek this Court's review of the court of appeals' fact-bound application of the probable cause standard to his case. That question warrants no further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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