No. _____

IN THE SUPREME COURT OF THE UNITED STATES

NEIL SWEENEY,
Petitioner

v.

UNITED STATES,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

JOAN M. FUND
1035 Cambridge Street, Suite 16D
Cambridge, MA 02141
joanmfund@gmail.com
617-945-9693

Counsel of Record for the Petitioner
Neil Sweeney

TABLE OF CONTENTS

INDEX TO APPENDIX

QUESTION PRESENTED

Whether this Honorable Court should resolve the differing applications of the Circuit Courts as it applies to the use of Federal Rule of Evidence 414 and its balancing test under the Federal Rule of Evidence 403 to a uniform standard of review?

Whether the differing applications of the Circuit Courts balancing tests resulted in a violation the petitioner's rights afforded by the United States Constitution under the Fifth Amendment and the Fourteenth Amendment?

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

LEGISLATIVE REFERENCE

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

Petitioner, Neil Sweeney, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, First Circuit, file on April 11, 2018.

OPINION BELOW

The opinion of the United States Court of Appeals, First Circuit was issued on April 11, 2018 and is attached as Appendix A. The Court's opinion was entered on May 3, 2018.

JURISDICTION

The Court of Appeals issued its decision on April 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND RULES OF EVIDENCE INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

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.

Federal Rules of Evidence 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rules of Evidence 414(a)

In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

STATEMENT OF THE CASE

Petitioner Neil Sweeney was convicted by a jury in the District Court of Massachusetts of distribution and possession of child pornography pursuant to 18 U.S.C. §2252A. The conviction arose out of an investigation into the downloading of child pornography from a gigatribe peer to peer sharing site. An FBI agent logged onto the site under the name local boy and contact was made with user irishrebble. Files were downloaded from the irishrebble protected files. Through the investigation that included that Sweeney had two prior convictions from 1995 for indecent assault and battery on a child under fourteen, Sweeney was arrested and his room searched. No gigatribe software and no gigatribe downloaded images were found on Sweeney's laptop or in his room. The judge, over objection, allowed the government to introduce the two prior convictions of the defendant under Fed.R.Evid. 414.

Petitioner appealed his conviction. Among other claims, he argued that the admission of the prior sexual assault convictions should not have been admitted under the Fed.R.Evid. 414 and 403.

The First Circuit Court of Appeals considered the issue affirming the admission of the Rule 414 evidence holding that "no heightened or special test for evaluating the admission of Rule 414 evidence under Rule 403." *United States v. Sweeney*, No. 17-1325 (1st Cir. 2018) citing *United States v. Majeroni*, 784 F.3d 72, 76 (1st Cir. 2015).

Petitioner now seeks a writ of certiorari from this Court on the important issue presented in this case.

REASON FOR GRANTING THE PETITION

THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER A UNIFORM HEIGHTENED STANDARD OF REVIEW SHOULD BE APPLIED EQUALLY UNDER THE LAW TO THE ADMISSION OF RULE 414 EVIDENCE UNDER RULE 403.

Federal Rules of Evidence 414[1] was added by Congress[2] in 1995 to allow evidence in a trial that the defendant committed "any other child molestation. The evidence may be considered on any matter to which it is relevant." Rule 414.

The United States Court of Appeals admits Rule 414 evidence subject to the Rule 403 balancing test.[3] Of note, there is a split among the circuits as to the manner the district courts apply the Rule 403 balancing test to "exclude relevant evidence if its probative value is substantially outweighed by a danger of ….unfair prejudice, confusing the issues, misleading the jury" et al. Rule 403.

This case presents an important issue over which the circuits across the country are divided. There is a lack of uniformity in applying the Rule 403

---

[1] Federal Rules of Evidence 413-415 are included herein.

[2] Federal Rules of Evidence 413-415 were included under the Violent Crime and Control and Law Enforcement Act of 1994.

[3] See Martinez v. Cui, 608 F.3d 54, 60 (2010); Doe v. Smith, 470 F.3d 331, 346 (7th Cir. 2006), abrogated on other grounds by T.E. v. Grindle, 599 F.3d 583 (7th Cir. 2010); Seeley v. Chase, 443 F.3d 1290, 1294-95 (10th Cir. 2006); Blind-Doan v. Sanders, 291 F.3d 1079, 1082 (9th Cir. 2002).

balancing test to Rule 414 evidence. As delineated below, the circuits vary from the first, eighth and eleventh allowing no heightened review of the balancing test to that of the tenth, fourth, fifth, ninth, sixth which present a list of factors that are to be considered.

The petitioner submits that the admissibility to Rule 414 evidence can greatly impact a jury. Therefore, a heightened standard and uniform approach of the balancing test as applied to Rule 414 is appropriate for this Court's consideration. Failure to do so may result in a Constitution violation of equal protection and due process.

In the case at bar and in the First Circuit opinion of *Martinez v. Cui*, 608 F.3d 54, 60 (1st Cir. 2010) and its progeny, the Court held there is no reason to consider a higher standard than "any matter to which it is relevant" when applying the Rule 403 balancing. *United States v. Jones*, 748 F.3d 64, 69 (1st Cir. 2014). See also *United States v. Majeroni*, 784 F.3d 72, 76 (1st Cir. 2015).

Similar application of the Rule 403 balancing test for Rule 414 evidence includes the Eighth Circuit. The Eighth Circuit allows Rule 414 "evidence that the defendant committed a prior similar offense may be considered for its bearing on any matter to which it is relevant, including propensity evidence." *United States v. Gabe*, 237 F.3d. 954, 959 (8th Cir. 2001).

The Eleventh Circuit uses a similar approach. See *United States v. McGarity*, 669 F.3d 1218 (11th Cir. 2012); *United States v. Woods*, 684 F.3d 1045 (11th Cir. 2012).

Other circuits consider additional factors in the Rule 403 balancing test that are more than "any matter to which it is relevant." *United States v. Jones*, 748 F.3d 64, 69 (1st Cir. 2014).

The Fifth Circuit has held that "evidence may be considered on any matter to which it is relevant. But this evidence is still subject to the Rule 403 balancing test." *United States v. Lewis*, 796 F.3d 543, 547 (5th Cir. 2015) citing *United States v. Dillon*, 532 F.3d 379, 388 (5th Cir. 2008). The Court continued stating "[a]n alleged sexual assault does not need to have been identical to the charged sexual assault for it to be admissible but aspects of the assault must have sufficient probative value as to some element of the charged offense to not be substantially outweighed by its danger of unfair prejudice." *Id.* citing *Dillon supra* at 389.

The Sixth Circuit weighs in favor of admissibility when performing the Rule 403 balancing test regarding prior sexual misconduct. *United States v. Seymour*, 468 F.3d 378, 385 (6th Cir. 2006). Of note, additional factors are considered. The "district court found the prior-assaults evidence highly probative based on (1) the 'close[ness]…in time of the prior acts to the current charges, (2) the similarity of the prior acts, and (3) the alleged frequency of the prior acts. *Seymour, supra* at 386.

The Tenth Circuit takes a different approach in considering Rule 403 balancing factors to admit Rule 414 evidence. *United States v. Meacham*, 115 F.3d 1488, 1492 (10th Cir. 1997); *United States v. Enjady*, 134 F.3d 1427, 1429-1435 (10th Cir. 1998).

United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) held that the Court must look to four factor: (1) how clearly the prior act was proven; (2) how probative the evidence is of the material fact it is admitted to prove; (3) how seriously disputed the material facts is; and (4) whether the government can avail itself of any less prejudicial evidence." *Id.*

The Court continued and held "[w]hen analyzing the probative dangers, a court considers: (1) how likely is it such evidence will contribute to an improperly based jury verdict; (2) the extent to which such evidence will distract a jury from the central issues of the trial; and (3) how time consuming it will be to prove the prior conduct." *United States v. Enjady, supra* at 1433.

The Third Circuit approach also differs in part from other circuits. Although Rule 414 evidence can be admitted to show propensity, the Rule 403 balancing test includes the offenses are "demonstrated with specificity" and are "sufficiently similar to the type of sexual assault allegedly committed by the defendant." *Johnson v. Elk Lake School District*, 283 F.3d 138, 156 (3rd Cir. 2002). The Third Circuit "adopted a non-exclusive list of factors" to wit: "the closeness in time of the prior acts to the charged acts, the frequency of the prior acts, the presence or lack of intervening events and the need for evidence beyond the testimony of the defendant and alleged victim." *Johnson*, supra, at 156 citing *United States v. Guardia*, 135 F.3d 1326, 1330 (10th Cir. 1998).

The Ninth Circuit also has listed factors to consider regarding the admissibility of prior sexual conduct of the defendant. Factors the trial court must

consider in Rule 403 analysis are: "similarity of the prior acts to the act charged, closeness in time of the prior acts to the acts charged, the frequency of the prior acts; the presence of or lack of intervening circumstances and the necessity of the evidence beyond the testimonies already offered. at trial." *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001).

The Seventh Circuit "has not expressly adopted" the Ninth Circuit five factors using a discretionary approach. *United States v. Hawpetoss*, 478 F.3d 820, 825 (7th Cir. 2007). The Ninth Circuit considers a more flexible approach than the *LeMay* analysis. *United States v. Julian*, 427 F.3d, 487 (7th Cir. 2005). The Seventh Circuit requires the district court judges to "carefully analyze and assess" the prejudicial effect of the prior evidence. *United States v. Loughry*, 660 F.3d 965, 971 (7th Cir. 2011); *United States v. Williams*, 216 F.3d. 611, 614-615 (7th Cir. 2000).

The Fourth Circuit allows Rule 414 evidence using the Rule 403 balancing test. Of note, "[i]n applying the Rule 403 balancing test …, a district court should consider a number of factors, including (i) the similarity between the previous offense and the charged conduct, (ii) the temporal proximity between the two crimes, (iii) the frequency of the prior acts, (iv) the presence or absence of any intervening acts, and (v) the reliability of the evidence of the past offense." *United States v. Kelly*, 510 F.3d 433, 437-438 (4th Cir. 2007) citing *United States v. Hawpetoss*, 478 F.3d 820 825-26 (7th Cir. 2007) and *United States v. LeMay*, 260 F.3d 1018, 1027-29 (9th Cir. 2001).

The Second Circuit considered the issue of remoteness in time of the prior acts of sexual misconduct. In *United States v. Larson*, 112 F. 3d 600, 604-605 (2nd Cir. 1997) the Court found that sexual misconduct committed twenty-one years prior to trial were to remote in time and the probative value was substantially outweighed by the danger of unfair prejudice. *Larson supra* at 602-603.

If the petitioner were tried under the heightened standard used in the Second and Fourth Circuits the admissibility of his two convictions from 1995 may have been considered to remote in time or lack similarities between crimes. See *Larson supra* at 602-603, *United States v. Kelly, supra 437-438.* Query whether such a situation could create a Constitutional challenge under the Due Process and Equal Protection of the Fifth and Fourteenth Amendments of the United States Constitution.

In the case at bar, if the Fourth Circuit analysis were to be applied, the prior convictions may not have been admissible. As applied, the first factor, to wit: similarity between the previous offense and the charged conduct does not exist – no child pornography existed in the prior offense; the second factor, to wit: temporal proximity between the crimes does not exist – in the case at bar approximately 20 years passed between the petitioner's prior convictions on indecent assault & battery on a child under 14 years; the third factor, to wit: frequency of the prior acts is limited to the 1995 acts; the fourth factor, to wit: the presence or absence of any intervening acts that do not exist and lastly the reliability of the evidence of the past offense – in this case the petitioner had plead guilty to charges making the

convictions reliable. Only one out of five factors would exist. Therefore, it is possible a different ruling resulting in evidence deemed relevant but unfairly prejudicial would have been excluded from petitioner's trial if he were tried before the Fourth Circuit and not the First Circuit. The petitioner is not afforded the same analysis under the First Circuit.

Although speaking of classifications the Court has held that, "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966). The petitioner submits that the application of such varied factors throughout the circuits in the Rule 403 balancing test for admissibility of Rule 414 evidence results in a violation of equal protection.

The Rule 414 evidence, in the case at bar prior convictions of indecent assault and battery on a child under 14 years, was unfairly prejudicial.

Spencer v. Texas, 385 U.S. 554, 574 (1967), CJ Warren dissenting, "evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due process Clause." "It seems to me that the use of prior-convictions evidence in these cases is fundamentally at odds with traditional notions of due process…because it needlessly prejudices the accused without advancing any legitimate interest of the State." So too can be said in the case at bar.

Petitioner urges this Court to take review in order to establish a uniform and heightened standard of review for admissibility of Rule 414 evidence under the Rule 403 balancing test applying the same standard equally under the law.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Respectfully submitted,
/s/ Joan M. Fund
Joan M. Fund
First Circuit Bar No. 1171442
1035 Cambridge Street
Suite 16D
Cambridge, MA 02141
(617) 945-9693