No. _____

18-8364

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JAMES D. SULLIVAN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAMES D. SULLIVAN, 63990-060
(Your Name)

F.C.I. TERRE HAUTE
P.O. BOX 33
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TERRE HAUTE, IN 47808
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812-244-4400 (WARDEN'S OFFICE)
(Phone Number)

QUESTIONS PRESENTED

In a prosecution of a child pornography case under Title 18 U.S.C., Chapter 110, the government may seek to admit evidence of prior similar acts under Evid. R. 414 only after a hearing as required by Evid. R. 104. In turn, R. 104 conditions such admission only upon the "condition of fact" that the defendant is accused of any conduct proscribed by Chapter 110 of Title 18 U.S.C..

If a defendant subsequently pleads guilty, Crim. R. 11(d) provides that the defendant has a right to freely withdraw that guilty plea if the district court has not accepted the plea.

1. In an evidentiary hearing regarding the admissibility of prior similar acts (propensity) evidence under Evid.R. 414, does Evid.R. 104 require a trial court to initially determine, by a preponderance of evidence, a condition of fact that the defendant actually engaged in child molestation conduct as charged, or may that court rely solely on the fact that a grand jury has found probable cause that such conduct occurred?
2. Does a prosecutor abuse his/her discretion by spuriously charging a defendant with a child molestation offense for the sole purpose of admitting prejudicial 414 propensity evidence for use as evidence in chief when the prosecutor knows there is no factual basis that such conduct occurred?
3. Does this Court endorse the Sixth Circuit's precedent-setting ruling that the approval of a plea agreement now suffices as an acceptance of a guilty plea under Crim. R. 11(d)(1)?

LIST OF PARTIES

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

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

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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

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

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

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

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

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

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was October 24, 2018.

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

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 20, 2018, and a copy of the order denying rehearing appears at Appendix B.

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

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

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

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented implicate Article I Section 1 of the United States Constitution and its Fifth Amendment.

> All legislative powers granted herein shall be vested in a Congress of the United States, which shall consist of a Senate House of Representatives.
>
> Article I Section 1, Separation of Powers
>
> 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; not shall any person be subject for the same offence 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.
>
> Amend. V, Due Process and Equal Protection

Fed. Rules of Evidence 104 states:

(a) PRELIMINARY QUESTIONS CONCERNING THE QUALIFICATION OF A PERSON TO BE A WITNESS, THE EXTENTION OF A PRIVILEGE, OR THE ADMISSIBILITY OF EVIDENCE SHALL BE DETERMINED BY THE COURT, SUBJECT TO THE PROVISIONS OF SUBDIVISION (b). IN MAKING ITS DETERMINATION IT IS NOT BOUND BY THE RULES OF EVIDENCE EXCEPT THOSE WITH RESPECT TO PRIVILEGE,

(b) WHEN THE RELEVENCY OF EVIDENCE DEPENDS UPON THE FULFILLMENT OF A CONDITION OF FACT, THE COURT SHALL ADMIT IT UPON, OR SUBJECT TO, THE INTRODUCTION OF EVIDENCE SUFFICIENT TO SUPPORT A FINDING OF THE FULFILLMENT OF THE CONDITION.

FED. RULES OF EVIDENCE 414 STATES:

(a) IN A CRIMINAL CASE IN WHICH THE DEFENDANT IS ACCUSED OF AN OFFENSE OF CHILD MOLESTATION, EVIDENCE OF THE DEFENDANT'S COMMISSION OF ANOTHER OFFENSE OR OFFENSES OF CHILD MOLESTATION IS ADMISSIBLE, AND MAY BE CONSIDERED FOR ITS BEARING ON ANY MATTER TO WHICH IT IS RELEVENT.

...

(d) FOR PURPOSES OF THIS RULE AND RULE 415, "CHILD" MEANS A PERSON BELOW THE AGE OF FOURTEEN, AND "OFFENSE OF CHILD MOLESTATION" MEANS A CRIME UNDER FEDERAL LAW OR THE LAW OF A STATE ... THAT INVOLVED

...

(2) ANY CONDUCT PROSCRIBED BY CHAPTER 110 OF TITLE 18, UNITED STATES CODE.

Title 18 United States Code §2252A states:

(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...

Shall be punished as provided in subsection (b)...

Title 18 United States Code §2251 states:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor ... with the intent that such minor engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct...

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this Title and imprisoned...

STATEMENT OF THE CASE

James Sullivan is a convicted sex offender pursuant to four (4) 1982 convictions. (Brief of Appellant, pg. 4). After being paroled in 2004, he was returned to prison several times for technical parole violations, eventually being granted judicial release on July 25, 2014. (Id).

Approximately one year later, a 46-year old female taking a shower in a state park campground complains that she saw a digital camera inside a drop ceiling above the shower stall. (Id). No one reports an alleged perpetrator or claims seeing Sullivan near the premises. (Id.). No other reports of suspicious activity are made. (Id.).

Ohio State Highway Patrolman Eric Souders investigates the report that indicates a person in the shower attic is using a silver camera to record men and women showering with no report that minors were present. (Id.). Trooper Souders enters the attic and observes body fluid on a ceiling tile directly over the women's shower stall. (Id., pg. 4-5). The ceiling tile is submitted for testing which verifies the body fluid is semen. (Id., pg. 5). A DNA profile is obtained from the sample which is associated with Sullivan; however, no evidence establishes when the sample was deposited. (Id.).

On August 26, 2015, Sullivan is arrested for suspicion of midemeanor voyuerism. (Id.). A search warrant is issued for Sullivan's apartment which he shares with 3 men where officers locate a computer in a common area hallway closet. (Id. pg. 5-6).

A preliminary analysis of the computer reveals the existence of suspicious file path/titles, one titled "little girl uncensored porn", that were accessed by the computer from an unidentified external storage device. (Id. pg. 6-7).

Based on the suspicious file path/titles, a warrant is issued to forensically search the computer for child pornography. On October 13, 2015, a forensic report of the computer identifies 97 thumbnail images of child pornography located in unallocated space.[1] (Id. pg. 7)

A federal grand jury issues a two-count indictment. Count One charges Sullivan with knowingly accessing with intent to view material containing child pornography in violation of 18 U.S.C. §2252A(a)(5)(B). (Id., pg. 9). Count Two alleges that on July 25, 2015 (the date of the campground incident), Sullivan attempted to produce child pornography in violation of 18 U.S.C. §2251(a). (Id.). It is noteworthy that Count One does not specify what, if any, material containing child pornography was accessed, nor does Count Two identify any minor used to attempt production of child pornography or indicates that minor's age. (Id.)

GOVERNMENT'S NOTICE TO ADMIT EVIDENCE

The government files a Notice of Intent to Admit Evidence pursuant to Evid. R. 414 seeking to admit evidence of Sullivan's prior bad acts from 1981 and 1982 to show his propensity to commit the current offenses. (Id., pg. 12). The district court rules the

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1. Unallocated space is space on a hard drive that contains deleted data, usually emptied from the [operating system's] trash or recycle bin folder, that cannot be seen or accessed by the user without the use of forensic software. U.S. v. Flyer, 633 F.3d 911, 918 (9th Cir. 2011).

evidence is permissible for use in a criminal case when a defendant is accused of child molestation. (Id., pg. 12-13). The court finds that both counts one and two involve child molestation offenses and, thus, 414 applies. (Id., pg. 13). The court denies Sullivan's motion in limine. (Id.).

GUILTY PLEA

Having lost his motion, Sullivan considers a conditional plea and proffers a plea of guilty to Count One while reserving the right to appeal his motion to supress and motion in limine. (Id. pg. 13-14). On May 2, 2017, a change of plea hearing is conducted before a magistrate where Sullivan's guilty plea is entered. (Appx. C, Report and Recommendation). The magistrate recommends that Sullivan's plea of guilty to Count One be accepted and that a finding of guilt be entered by the court. (Id.)

On July 3, 2017, the district court approves the plea agreement. (R. 72, Plea Agreement, PID 674).

On July 5, 2017 the district court orders the adoption of the magistrate's report and recommendation and accepts Sullivan's guilty plea and enters a finding of guilty to Count One. (Appx. D, Order, pg. 2). EARLIER that same day Sullivan writes the court asking to withdraw his guilty plea. (R.76, Letter dated July 5, 2017).

On July 20, 2017, a hearing is held on Sullivan's motion to withdraw his guilty plea. (Appx. E, MEMO/OPINION ORDER). Also heard is defense counsel's motion to withdraw as attorney. (Id.) Sullivan personally presents his arguments pro se to the court. (Brief of Appellant, pg. 49).

The district court rules that Sullivan is not entitled to freely withdraw his guilty plea because his motion "was made after the Court had already approved his plea agreement and accepted his plea of guilty." (Appx. E, Order, pg. #3). The court further stated "Defendant did not withdraw his plea prior to the Court's acceptance. The Court approved the Defendant's plea agreement on July 3, 2017, two days before Defendant allegedly penned his motion to withdraw." (Id. pg. #4).

Citing Sullivan's prior record, the district court departs upward from a guideline range of 135 to 168 months and imposes the statutory maximum sentence of 240 months. (Brief of Appellant, pgs. 17-18).

THE COURT BELOW

Sullivan timely appeals his conviction to the Sixth Circuit Court of Appeals arguing, inter alia, the district court's erroneous allowance of propensity evidence under Evid. R. 414 despite there being a lack of a factual basis that Sullivan committed a child molestation offense (Id. pg. 18) and the court's error in denying Sullivan's motion to withdraw guilty plea which he was entitled to do since his guilty plea had not been accepted by the court. (Id. pgs. 49-50).

The Sixth Circuit affirms Sullivan's conviction. (Appx. A, Opinion, pg.1).

Regarding Sullivan's argument that a factual basis of a child molestation offense must first be determined before the allowance of propensity evidence under R. 414, the panel rules that such a determination is not a necessary factor because the indictment accused Sullivan of "child molestation under the statute". (Id., pgs. 7-8)

Regarding Sullivan's argument that he was entitlied to freely withdraw his guilty plea since it had not been accepted, the panel finds that Sullivan's motion was filed after the district court approved and filed the plea agreement; as a result the panel rules that Sullivan was not entitled to withdraw his guilty plea for any or no reason as that standard does not come into play. (Id., pg. 11)

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision in United States v. Sullivan, as well as the other circuits, has decided an important issue regarding the purpose, application, and consequence of Evid.R. 414 in such a way that has left a gaping hole in the Due Process and Equal Protection provided to ex-offenders by Evid.R. 104. Plainly, this Court should decide whether R. 104 requires a district court to scrutinize the factual basis of an allegation that qualifies the admission of propensity evidence under R. 414, or if a grand jury's indictment ipso facto establishes that qualification. This issue pits the interests of Due Process and Equal Protection provided to those charged with the worst offenses against the interests of Public Policy that seeks to diminish those protections.

In addition, the Sixth Circuit's decision regarding the denial of a defendant's motion to withdraw guilty plea is in direct conflict with Crim.R. 11(d) and this Court's precedent, and effectively amends the rule to hereforth allow the approval of a plea agreement to suffice as an acceptance of a guilty plea for purposesof determining whether a defendant may freely withdraw his guilty plea.

A) Evid.R. 104 requires that a trial court conduct an initial inquiry to determine whether a factual basis exists that child molestation conduct actually ocurred before allowing the admission of propensity evidence under Evid.R. 414.

BACKGROUND OF EVID.R 414

In 1994, Congress enacted Evid.R. 414 over the unanimous objection of every judicial advisory committee in the country... except the Department of Justice. The objectors voiced their concern that this rule would admit extremently prejudicial extrinsic evidence to show a defendant's propensity to commit certain sex offenses, a practise that had up to then been prohibited and is still prohibited by the States. The sole proponent of the rule, federal prosecutors and politicians, claimed it was needed in order to obtain convictions of those charged with a child molestation offense which would otherwise be difficult without such a tool.

With this new tool of prosecution, simply charging a defendent with a qualifying "child molestation" offense would permit a judgeto admit evidence of any prior "similar" acts nomatter how long ago such acts were committed.[2] No procedural protocol was required by the rule to inititally examine the factual basis of the charge or otherwise determine if child molestation conduct actually occurred in the circumstances leading to the charged offense. The only qualifying condition stated in the rule is that the defendant be accussed of a child molestation offense which the rule defines as "any conduct prohibited by 18 U.S.C. chapter 110." (See R.414(d)(2)).

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2. The term "similar" was not defined in the rule, nor is one meaning uniformly applied. As a result some circuits have limited "similar" to mean the same conduct as charged, while others have broadened the term to mean any sexual offense conduct.

During the debates on the floor legislators acknowledged that this propensity evidence would be inherently prejudicial, but argued that such prejudice would not be unfair under the circumstances when public policy demanded successful prosecution of these offenses in order to protect the public. (See 140 Cong. Rec. 15,209 (1994)).

In retrospect, any honest citizen would acknowledge that this new tool would be exploited by ambitious prosecutors to shore-up losing cases by strategically, and perhaps spuriously, over-indicting defendants with "child molestation" offenses with the barest of probable cause evidence in the hopes of gaining the admission of R.414 similar acts to show a defendant's propensity to commit that offense. The hearing of this disturbing prejudicial evidence would naturally taint any juror and would likely result in a conviction despite a complete lack of evidence, as well as discourage an innocent defendant from going to trial. With relative ease a prosecutor would gain significant leverage in a case by merely charging a defendant with a child molestation offense in a case that he/she would otherwise have to drop without this evidence.

PETITIONER'S CASE

Petitioner's case is just such an example where police and prosecutors suspected Sullivan, but had no evidence of guilt other than the circumstantial probable cause which was used to charge him with the offenses of Accessing Child Pornography and Atempted Production of Child Pornography. In turn, Sullivan's having been charged with those "child molestation" offenses was

the sole determining factor used by the district court in qualifying the admission of the R. 414 evidence, which in Sullivan's case was particularly damning as it involved the sexual molestation of four (4) minors in 1982. With the admission of this extremely prejudicial evidence, Sullivan's otherwise strong defense was doomed to fail, giving him little choice but to plead guilty in order to avoid a possible life sentence.

Petitioner submits that a proper application of R. 104 by the district court would have prevented this tragedy. Had the court properly conducted a R. 104 preliminary inquiry the court would have found inadequate evidence that Sullivan committed a child molestation offense and would have disqualified the use of R. 414 in his case.

THE REQUIRED CONDITION OF RELEVANCE UNDER R. 414

The admissibility of other acts evidence is governed by Evid.R. 104(b) which requires a district court to initially determine the admissibility of evidence based upon the fulfillment of a specific condition of fact. (Huddleston v. U.S., 485 U.S. 681, 689 (1988). Huddleston holds that the condition of fact is one of relevance. (Id.). Therefore, if the other act evidence is not relevant, it is not admissible. (Id.).

Evid.R. 414 conditions the relevance of similar acts evidence on the condition that the defendant is currently accused of an offense of "child molestation" which the rule defines as "any conduct proscribed by chapter 110 of Title 18 [U.S.C.]". (R.414). This conditional fact must be established by a preponderance of evidence. (Huddletston, id., Bourjaily v. U.S., 483 U.S. 171, 175 (1987)). Therefore, the condition of fact that establishes

relevancy under rules 104 and 414 are 1) whether the defendant engaged in any conduct in violation of 18 U.S.C. chapter 110, and: 2) whether that condition of fact is established by at least a preponderance of evidence.

In Petitioner's case, that preliminary inquiry was not conducted by the district court. Instead, the court bypassed that inquiry by simply finding that, by being charged with a child molestation offense, Sullivan had ipso facto engaged in that conduct.

This truncated analysis did not conform to rules 104 and 414 in two significant ways. First, the district court ignored the R. 104 requirement that it, not a prosecutor or grand jury (a member of the executive branch), make the finding that Sullivan engaged in child molestation conduct. In so doing, the court defferred to, or delegated to, the grand jury the duty it was charged to perform under R. 104. Second, by charging Sullivan with a child molestation offense, the grand jury only established the existence of probable cause that Sullivan committed the offenses, not a preponderance of evidence that he did so as is required under Bourjaily and Huddleston.

This truncated analysis violated the Due Process and Equal Protection clauses and the Separation of Powers Doctrine. Yet this is now the standard practise in all cases involving the qualification of R. 414 whereby district courts are simply assuming that where a defendant is charged by a grand jury with a child molestation offense, that any further inquiry is unnecessary.

R. 104 clearly requires a district court, not the grand jury, to establish by a preponderance of evidence that the defendant engaged in child molestation conduct before that court can qualify admission of propensity evidence under R. 414. Like the grand jury, this process requires the court to evaluate the facts of the case and determine whether a factual basis exists that the defendant actually engaged in the conduct as defined by R. 414(d)(2). Unlike the grand jury, however, this factual basis must be established by a preponderance of evidence, not merely probable cause, supposition, or suspicion.

Had the district court made the required R./ 104 inquiry it would have found no factual basis that Petitioner engaged in any child molestation conduct, to wit:

- Regarding Count One charging "Accessing With Intent To View Any Material Containing Child Pornography" (18 U.S.C. 2252A(a)(5)(B): No material containing any accessible child pornography was ever recovered, nor was any such material ever identified.*
- Regarding Count Two charging "Attempted Production of Child Pornography" (18 U.S.C. 2251(a): No minor was ever alleged or identified as having been used, or intended to be used, to produce child pornography.*

CONCLUSION

Petitioner acknowledges that, while a grand jury found probable cause to accuse him of a child molestation offense, there was no finding by the district court of a preponderance of evidence that such conduct actually occurred as required by Rules 104 and 414.

* NOR WAS THERE ANY ADMISSION OR WITNESS OF SULLIVAN DOING SO.

Petitioner submits that Due Process requires that there be some factual basis to support a district court's finding of conduct constituting a child molestation offense under R. 414(d)(2); merely being accused by a grand jury cannot, by itself, suffice. To allow otherwise would encourage the government to charge a defendant with a child molestation offense based only on speculation or suspicion in hopes of shoring-up a weak case by bringing in extremely inflammatory and prejudicial propensity evidence, knowing that a jury will tend to convict a defendant solely on those prior bad acts.

The facts as known by the district court failed to establish a factual basis that Petitioner engaged in any conduct prohibited by 18 U.S.C chapter 110 that would warrant classification as a "child molestation" offense under R. 414(d)(2). A proper inquiry under R. 104 would have provided Petitioner, and all similarly situated defendants, the Due Process and Equal Protection R. 104 was designed to provide, and would have been in accord with this Court's holding in Huddleston.

B) A prosecutor abuses his/her discretion by over-charging a defendant with a child molestation offense solely for the purpose of invoking Evid.R. 414 and seeking the admission of propensity evidence to use as its evidence in chief when that prosecutor knows there is no factual basis that such conduct occurred.

Petitioner asks this Court to consider the fairness of a prosecutor that uses the vast power of the government, the grand jury, and Evid.R. 414 to bring about the guilty plea of an ex-offender whom officials merely suspect has committed a crime but have no evidence to support a conviction. This example is one of many whereby merely charging an ex-offender with a child molestation offense a prosecutor can legally manipulate the grand jury system and R. 414 in order to introduce to a jury the extremely prejudicial evidence of the defendants' previous child molestation offense. With the admission of this evidence, any defense would be doomed in the face of an outraged jury who, having heard the lurid details of the previous offense, would likely convict a defendant who they believe deserves to be punished.

Consider the following scenario:

- Officials highly suspect an ex-offender, previously convicted of child molestation 35 years ago, has committed an offense but have no evidence, other than probable cause, that a crime was committed and that the ex-offender committed it

Normally a prosecutor would drop such a case due to a lack of evidence. However, with the enactment of Evid.R 414, a lack of evidence would no longer be a concern. By simply charging the ex-offender with a child molestation offense, R. 414 could be invoked that would allow a jury to hear the disturbing and inflammatory evidence of horrendous act committed long ago. With

this powerful evidence being heard, evidence of actual guilt of the crime charged would not be necessary to convict this horrible man who needs to be sent to prison in order to protect the community. Of course, the chance of a fair judge admitting such prejudicial evidence (or denying a Crim.R. 29 motion) would be a crap-shoot, but there would be every reason for a prosecutor to over-indict that defendant with a child molestation offense in the reasonable hope of landing a marginal judge who would do just that, particularly with the state of the law that gives a judge the discretion to allow such evidence as long as the defendant is charged with a qualifying child molestation offense.

PROSECUTORIAL DISCRETION OR ABUSE?

It has long been acknowledged that a prosecutor has unbridled discretion to pursue criminal charges against a defendant as long as it is not done in retaliation or in violation of the Consitution. (Bordenkircher v. Hayes, 434 U.S.357, 364(1978)). So long as a prosecutor has probable cause to believe that the accused has committed a crime, the decision whether to prosecute generally rests entirely within his/her discretion. (Id.). A prosecutor may even pursue these charges knowing full well that the evidence is weak and done solely for its effect on other core charges. (Id.). This common practise of over-indicting a defendant is a tool designed to give the government maximum leverage at the plea bargaining table and has been ruled kosher.

It has also been acknowledged that a grand jury serves at the behest, and as a tool, of the prosecutor where the refusal to indict is a rare occurence. The "Ham Sandwich" aphorism,

quoted by Hillary Clinton during the Whitewater investigation of the 90's, originated some 30 years ago when a New York appellate judge famously remarked that a prosecutor could convince a grand jury to "indict a ham sandwich" if that is what they wanted (U.S. v. Davis, 793 F.3d 712, Dissent fn. 3, (7th Circuit 2015)) and that the instances in which a grand jury refused to indict "was as rare as hen's teeth." (Tyson v. Triggs, 50 F.3d 436, 441 (7th Circuit, 1995).

Again, this symbiotic relationship between a prosecutor and his grand jury has been ruled kosher as long as the grand jury found probable cause that criminal conduct occurred: a standard which requires only a substantial chance of criminal activity, not an actual showing of such activity. (D.C v. Wesley, 583 U.S. ___, 138 S.Ct. 577, 586 (2018)).

However, while a prosecutor may legally over-indict a defendant for the purpose of gaining leverage in a case, no court has yet determined whether this legal manipulation may be done solely to invoke R. 414 as a means of ginning-up propensity evidence to use as evidence in chief in place of, and in spite of, the absence of any evidence of actual guilt. In actuality, the more lurid and inflammatory the propensity evidence, the better for a prosecutor with no evidence of guilt. Only R. 414 allows such use of propensity evidence as evidence in chief in a case where a defendant has only to be accused of child molestation conduct as defined by R. 414(d) with no consideration of the veracity of such accusation being necessary.

CONCLUSION

The above scenario is the state of Evid.R. 414 and its use by prosecutors to convict ex-offenders who only are suspected of committing an child molestation offense. The question is: will this Court stand by and remain silent in the name of Public Policy as this rule is abused, as well as the constitutional rights of ex-offenders? Or will this Court bravely stand up for the principle of fair treatment of all citizens, including the most vilified and voiceless members?

Petitioner submits that this Court should hold that the legitimate purpose of Evid.R. 414 cannot be subsumed by the desire to seek the conviction of ex-offenders (and the protection of society) by the abuse of this rule. This Court should hold that the practise of using Evid.R.414 propensity evidence to build a case-in-chief, particularly when there is no factual basis to support a conviction, is an abuse of discretion.

C: THE SIXTH CIRCUIT'S RULING THAT THE APPROVAL OF A PLEA AGREEMENT SUFFICES AS AN ACCEPTANCE OF A GUILTY PLEA IS IN DIRECT CONFLICT WITH THIS COURT'S PRECEDENT IN HYDE AS WELL AS EVERY OTHER CIRCUIT, AND EFFECTIVELY AMENDS CRIM.R. 11(d).

Crim.R. 11(d)(1) provides that a defendant may freely withdraw his guilty plea "for any or no reason" if that plea has not been accepted. (CrimR.11(d)(1)). This Court has also set forth the bright-line"prison mailbox rule" whereby a prisoner's motion is deemed filed when it is delivered to prison officials for mailing. (Houston v. Lack, 487 U.S. 266 (1988)). The Sixth Circuit has expanded this rule to when a prisoner signs the document. (Brand. v. Motley, 526 F.3d 921, 925 (6th Circuit 2008)).

In Petitioner's case there is no dispute that the district court adopted the Magistrate's recommendation and accepted Sullivan's guilty plea on July 5, 2017. (Appx. D, Order). There is also no dispute that Sullivan, in a letter to the court, moved to withdraw his guilty plea under the prison mailbox rule the same day. (Appx. A, Opinion; pg. 2; R. 76, Letter Dated July 5, 2017). Lastly, there was no misunderstanding of Crim.R. 11(d)(1) by the courts below that acknowledged a defendant's absolute right to freely withdraw an unaccepted guilty plea. (Appx. A, Opinion, pg. 11; Appx. E, Memorandum of Opinion and Order, pgs. 2-3).

Despite the lower courts' clear understanding of the law, they both ruled that Sullivan was not entitled to freely withdraw his guilty plea because his letter/motion was filed two days after the district court approved the plea agreement on July 3, 2017, and, as a result the "any reason" standard for withdrawal did not apply. (Appx. A, id.; Appx. E., id., pg. 3).

THE APPROVAL OF A PLEA AGREEMENT VS. THE ACCEPTANCE OF A GUILTY PLEA.

The simple question before this Court is whether the approval of a plea agreement suffices as, or is tantamount to, an acceptance of a guilty plea under Crim.R. 11. This Court has only to look at it holding in U.S. v. Hyde, 520 U.S. 670, 677 (1997), which held that a plea agreement and a guilty plea are separate and distinct considerations that are not to be considered as a single unit; that guilty pleas exist independently from the plea agreements upon which they rest.(Hyde, 677).

A district court's approval of a plea agreement determines the validity of a contractual agreement, while the acceptance of a guilty plea is a judicial finding that Crim.R. 11 has been scrupulously complied with and that the defendant is in fact guilty. One finding cannot stand for the other, Hyde bares out that distinction. Furthermore, while a plea agreement may implicate certain contractual obligations between the parties, the agreement itself is non-executable unless and until the guilty plea is accepted. Plainly, a plea agreement is meaningless until the guilty plea is accepted by the district court.

AN AMENDMENT OF CRIM.R. 11(d)?

By modifying the defendant's statutory right to freely withdraw a guilty plea, the courts below have effectively amended Crim.R. 11(d) in violation of the United States Constitution's Separation of Powers Doctrine which forbids such judicial law-making and instead, reserves such power solely to the legislature.

CONCLUSION

This Court should reverse the court below, clarify its holding in Hyde that a plea agreement is not the equivalent of an acceptance of a guilty plea, and confirm that a defendant has the right to freely withdraw an unaccepted guilty plea for any or no reason under Crim.R 11 (d).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James Sullivan

Date: February 14, 2019