No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JESSE DAVENPORT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is shackling a defendant during his or her jury trial for no asserted or actual reason proper, and thus not even an "error" under the plain error test, simply because the shackles are covered by a table skirt?

2. Where Mr. Davenport was deprived of his Confrontation Clause right to cross-examine the key government witness, did the United States Court of Appeals for the Ninth Circuit disregard this Court's precedent when it failed to analyze whether the error may have contributed to the verdict?

3. Where, construed in the light most favorable to the government, Mr. Davenport at most asked another person to produce child pornography, was the evidence sufficient to support a conviction for conspiracy to produce child pornography?

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I. Opinions Below

The order issued by the United States Court of Appeals for the Ninth Circuit granting in part and denying in part the Petition for Rehearing, and denying the Petition for Rehearing *En Banc* is unreported and is reproduced at Appendix A (App. A at 1a).

The citation for the unpublished Memorandum Disposition issued by the United States Court of Appeals for the Ninth Circuit affirming the district court judgment is: *United States v. Davenport*, 2019 WL 193663 (9th Cir. Jan. 15, 2019).

The judgment issued by the United States District Court for the Eastern District of California is unreported and is reproduced at Appendix C (App. C at 12a).

II. Basis for Jurisdiction

The Memorandum Disposition affirming the district court's judgment was issued by the United States Court of Appeals for the Ninth Circuit on January 15, 2019. App. B at 3a-11a. The Ninth Circuit partially denied Mr. Davenport's Petition for Rehearing and Rehearing *En Banc* on January 15, 2019. App. A at 1a. This Court has jurisdiction to review the judgment on a writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1).

III. Constitutional Provisions and Statutes Involved in the Case

1. 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 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."

2. Sixth Amendment: "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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

IV. Statement of the Case

A. Statement of Relevant Facts

Jesse Davenport came into contact with Angela Martin in the summer of 2013 through an online mobile game community. D. Ct. Doc. 261 at 316. Mr.

Davenport and Martin were both members of a "chat room" where users talked about "BDSM," a type of erotic role-playing involving dominance and submission. D. Ct. Doc. 261 at 316-17. Within a week or so they exchanged cell phone numbers and began communicating through phone calls and text messages. D. Ct. Doc. 261 at 318-19.

At the same time Martin communicated with Mr. Davenport, she was in touch with other BDSM enthusiasts. During the summer of 2013, Martin spent a good deal of her days and nights visiting websites that had "chat lines. Facebook . . . Kik and textplus." D. Ct. Doc. 261 at 325. Martin communicated with others "all day" and her conversations were "sexually charged." D. Ct. Doc. 261 at 325-26. Critically, Martin possessed child pornography that she sent to people with whom she had these BDSM exchanges. D. Ct. Doc. 261 at 345. Mr. Davenport, on the other hand, possessed no child pornography aside from the video Martin produced and distributed to others. D. Ct. Doc. 262 at 515-16.

In text messages exchanged between Mr. Davenport and Martin from August 23rd to August 27th, 2013, Mr. Davenport expressed an interest in sexual pictures of Martin, not of any children. Gov't Exh. 41, Bates Nos. 2217-2226. Martin and Mr. Davenport exchanged sexually provocative pictures of themselves with each other. D. Ct. Doc. 262 at 70-71; D. Ct. Doc. 261 at 112. On August 26, 2013, Mr. Davenport learned for the first time that Martin's job involved

babysitting children. Gov't Exh. 41, Bates No. 2224. When Mr. Davenport learned this fact, he did not send a text request for sexual pictures of the children Martin babysat.

Forensic evidence showed that on August 27, 2013, at 3:59 p.m. Eastern Time, Martin received a call from Mr. Davenport that lasted approximately 27 minutes. D. Ct. Doc. 262 at 72. At 4:34 p.m., Martin sent Davenport a text stating "It won't send." D. Ct. Doc. 262 at 86. At 4:46 p.m., Martin sent an email to a person at the address pucca2118@gmail.com, an address never associated with Mr. Davenport, with a video attached. D. Ct. Doc. 262 at 482-83. The video, which was 51 seconds long, showed Martin digitally penetrating and then performing oral sex on the toddler she babysat. The name of the digital file—VID_20130827_162931.mp4—suggested the digital file was created at 4:29 p.m on August 27, 2013. Martin testified that she made this video using her cell phone. D. Ct. Doc. 261 at 331. Martin made the video in the master bedroom of Jenny Doe's home (D. Ct. Doc. 261 at 343), undoubtedly because Martin knew that was the one room in the house without a security camera. D. Ct. Doc. 261 at 328.

At 5:36 p.m. Martin sent an email to Mr. Davenport with the video attached. D. Ct. Doc. 262 at 483. It was not until ***after*** Mr. Davenport saw the video that he expressed an awareness of or interest in child pornography from Martin. Gov't Exh. 41, Bates Nos. 2226-27.

The government's theory was that Mr. Davenport entered a conspiracy with Martin to produce the video. It contended that during the August 27, 2013, 3:59 p.m. telephone conversation, Mr. Davenport instructed Martin to make a pornographic video of the toddler she was babysitting. There was absolutely no forensic evidence regarding the content of the August 27th conversation. The ***only*** evidence that Mr. Davenport told Martin to make the video was Martin's own testimony. She testified, in exchange for a better sentence, that Mr. Davenport said that "he wanted a penetration and oral video, and to keep her still he suggested to give her a lollipop or toy or something to keep her hands busy so she wouldn't move around." D. Ct. Doc. 261 at 330. Martin testified that she considered saying no but decided to make the video because Mr. Davenport "kept asking and asking, and I gave in. I was weak, and I did it anyways." D. Ct. Doc. 261 at 343. The probative force of this testimony, the only evidence that Mr. Davenport entered a conspiracy, rested on Martin's credibility.

The veracity of Martin's testimony was questionable for a number of reasons. First, Martin testified that Mr. Davenport asked her for unclothed pictures of the toddler "for a while" before she sent a pornographic video (D. Ct. Doc. 261 at 327), but there was no evidence of such requests, and texts show that Mr. Davenport did not know Martin babysat until a day before she sent the video. Gov't Exh. 41, Bates No. 2224. Martin testified that she reluctantly made the

video because Mr. Davenport "kept asking and asking" and she "gave in," but when she was arrested she had an extensive collection of child pornography, suggesting her own interest in and high comfort level with the material. D. Ct. Doc. 261 at 273-74. Martin claimed she was hesitant to make the video, but she admitted sending child pornography to other people (D. Ct. Doc. 261 at 345), and she sent the video at issue to another person the same day she created it. D. Ct. Doc. 261 at 254. Furthermore, while Martin had a sizeable collection of child pornography, Mr. Davenport had only the one video Martin sent him. All of this suggested Martin had a much stronger interest in child pornography than Mr. Davenport, casting doubt on Martin's claim that it was a request from Mr. Davenport that prompted her to make the video.[1]

B. Relevant Procedural History

In Count One, Mr. Davenport was charged with conspiring to use a minor to engage in sexually explicit conduct for the purpose of producing child pornography, a violation of 18 U.S.C. § 2251(a) (Count One). He was also charged with two counts of receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2) (Counts Two and Four) and one count of distribution of child

[1] There were other serious problems with Martin's credibility. She had a prior conviction for 45 counts of fraud. D. Ct. Doc. 261 at 103. Moreover, at the time of the offense, Martin was taking numerous medications, including lithium, Zoloft, Syracol, trazodone and clonazepam (D. Ct. Doc. 261 at 128), some of which can cause confusion and memory impairment.

pornography in violation of 18 U.S.C. § 2252(a)(2) (Count Three). All counts involved the one video that Martin produced and sent to Mr. Davenport.

Mr. Davenport represented himself at trial. Without engaging in any inquiry or discussion, the district judge simply ordered Mr. Davenport to be shackled throughout the trial by chaining his leg to a cement bucket that would be cloaked by a table skirt. D. Ct. Doc. 260 at 4. The prosecution never asked to have Mr. Davenport shackled at trial. The district judge never gave a reason for shackling Mr. Davenport at trial, much less weighed the costs of doing so against an interest in having Mr. Davenport free from shackles while he defended himself against serious charges in front of a jury.

During direct examination, Martin admitted she produced and distributed the child pornography video at issue in this case. D. Ct. Doc. 261 at 19. She also admitted that in addition to the video, she had other child pornography images and videos on her phone and that she sent them to persons other than Mr. Davenport. D. Ct. Doc. 261 at 133. During cross-examination, Mr. Davenport asked her, "Approximately how long had you been involved in child pornography?" D. Ct. Doc. 261 at 134. The court sustained the government's objection to the question on relevance grounds. *Id*. Mr. Davenport also asked her, "Did you have any other photos or videos of child pornography involving a toddler?" *Id*. Again the court sustained the government's relevance objection to the question. *Id*.

The jury found Mr. Davenport guilty of all counts. In sentencing Mr. Davenport to fifty years, the district judge suggested he believed Mr. Davenport had somehow remotely operated the cell phone that Angela Martin used to produce the child pornography video. In response to Mr. Davenport's assertion that he did not make the video, the district judge stated:

> I reject that as well. Yes, he did. And in today's world of technology, you don't have to physically be present at the location and actually operate the equipment to say that you are not responsible for what is going on with that equipment.

D. Ct. Doc. 311 at 62. There was absolutely no evidence that Mr. Davenport exercised any type of remote control over the cell phone Angela Martin used to record and distribute the child pornography video.

The district court imposed a sentence of 360 months as to Count One (the conspiracy count), and 240 months as to each of Counts Two, Three, and Four (the receipt and distribution counts), to be served concurrently to one another and to be served consecutively to Count One for a total term of 600 months. App. C at 13a.

C. Appeal and Memorandum Disposition

On appeal, Mr. Davenport argued that it was plain error for the district court to shackle him with no justification during his trial. The United States Court of Appeals for the Ninth Circuit rejected this argument, reasoning Mr. Davenport failed to establish the first prong of plain error review, that the district court

committed an error. App. B at 6a-7a. The Ninth Circuit held that because the shackles were covered by skirts around the counsel tables, shackling a *pro se* defendant during his jury trial for no reason at all was not even a legal error. *Id*.

Mr. Davenport also argued he was deprived of his right to confront and cross-examine the government's witness when the district court refused to allow him to question Martin about her own history with child pornography. The Ninth Circuit concluded that even if the district court erred, the error was harmless. According to the Ninth Circuit, the error could not have made a difference because of supposedly "overwhelming" testimonial and forensic evidence supporting the conspiracy charge. App. B at 8a. This conclusion is gravely mistaken; the only evidence that Mr. Davenport asked Martin to make the video was Martin's testimony. She was an imminently impeachable witness, and her independent involvement with child pornography—the very type of crime she claimed she only committed because of an agreement with Mr. Davenport—was certainly relevant and critical to Mr. Davenport's defense. Had the Ninth Circuit engaged in the *Chapman* harmless error analysis, which asks whether the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *Chapman v. California*, 386 U.S. 18, 24 (1967), it would not have upheld Mr. Davenport's conviction for Count One.

A third argument Mr. Davenport made was that the evidence, construed in the light most favorable to the government, was not sufficient to sustain a conviction for conspiracy to produce child pornography. Martin's testimony was the only evidence that Mr. Davenport asked Martin to make the video at issue and, even if it was believed, at most it showed he asked her to make the video. Martin's testimony did not show an agreement between two people to jointly undertake a plan to produce child pornography. The Ninth Circuit rejected this argument, holding that Martin's testimony that Mr. Davenport "gave her specific and graphic instructions on how to abuse and distract the child victim during filming . . . supports a reasonable inference that Davenport and the filmer agreed to, and intended to, produce child pornography." App. B at 8a.

Although the Ninth Circuit affirmed the conviction on all four counts, it vacated the sentence due to errors in calculating the sentence. App. B at 9a-11a.

V. Reasons for Granting the Petition for a Writ of *Certiorari*

A. The Ninth Circuit's decision permitting shackling a defendant at trial with no justification as long as the shackles are cloaked is at odds with this Court's precedent and erodes the rights of the defendant and the dignity of criminal trials.

In this case, neither prosecutors, nor courtroom security officers, nor the district judge suggested there was any reason to shackle Mr. Davenport during his trial. The district judge simply ordered him shackled.

Shackling a defendant at trial in the absence of any individualized reason has long been recognized as improper. Revealing the widespread recognition that shackling a defendant during trial should only be allowed where justified, in 1986 this Court asked whether use of security personnel in the courtroom was an "inherently prejudicial practice that, *like shackling, should be permitted only where justified by an essential state interest specific to each trial*." *Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986) (emphasis added).[2] In *Deck v. Missouri*, this Court explained that the rule against restraining defendants during the guilt phase of a criminal trial has "deep roots in the common law." *Deck v. Missouri*, 544 U.S. 622, 626 (2005) (quoting 4 Blackstone, Commentaries on the Laws of England 317 (1769)).

In the United States, courts have followed the rule of only shackling defendants at trial in "extreme and exceptional cases." *Deck*, 544 U.S. at 627 (quoting 1 J. Bishop, New Criminal Procedure § 955, p. 573 (4th ed. 1895)). Both lower federal and state courts have routinely held that a defendant should only be shackled at trial if there is an individualized need for such restraint. *See, e.g.*, *United States v. Cazares*, 788 F.3d 956, 965 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2484 (2016) (to ensure due process, a "trial court may order that a defendant be shackled during trial only after the trial court is persuaded by compelling

[2] *See also Illinois v. Allen*, 397 U.S. 337, 344 (1970) (observing that "no person should be tried while shackled and gagged except as a last resort.").

circumstances that some measure is needed to maintain security of the courtroom and if the trial court pursues less restrictive alternatives before imposing physical restraints") (internal citations and quotation marks omitted); *United States v. Haynes*, 729 F.3d 178, 188 (2d Cir. 2013) ("It is beyond dispute that a defendant may not be tried in shackles unless the trial judge finds on the record that it is necessary to use such a restraint as a last resort to satisfy a compelling interest such as preserving the safety of persons in the courtroom"). In 1981, the Supreme Court of Washington similarly observed that trying a defendant in restraints has "been viewed historically as an extreme measure to be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape." *State v. Hartzog*, 96 Wash. 2d 383, 398, 635 P.2d 694, 702 (1981).

The rule that defendants may only be shackled at trial if there is a reason to do so has been codified in the American Bar Association Standards for Criminal Justice,[3] as well as in many state statutes.[4] Courts in various jurisdictions have

[3] American Bar Ass'n, ABA Standards for Criminal Justice: Discovery and Trial by Jury Standard 15-3.2 (3d ed. 1996) (providing that defendant should not be "subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order.").

[4] *See*, *e.g.*, Cal. Penal Code § 688 ("No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."); IL R S CT Rule 430 ("An accused shall not be placed in restraint of any form unless there is a manifest need for restraint to

long recognized that the unjustified shackling of a defendant, regardless of whether jurors can see the shackles, requires reversal. *Davis v. State*, 1985 OK CR 140, 709 P.2d 207, 209 (1985) (reversing conviction of defendant tried in leg shackle); *People v. Burnett*, 111 Cal. App. 3d 661, 669, 168 Cal. Rptr. 833 (Ct. App. 1980) (reversing conviction for defendant tried with leg chain). As observed by the United States Court of Appeals for the Eleventh Circuit,

> [e]ven if the physical restraints placed upon the defendant are not visible to the jury, they still may burden several aspects of a defendant's right to a fair trial. In *Zygadlo*[5] we noted that leg shackles "may confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow." 720 F.2d at 1223. Physical restraints also damage the integrity of criminal trials in a less tangible, but no less serious, way; they are "an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Allen*, 397 U.S. at 344.[6]

United States v. Durham, 287 F.3d 1297, 1304 (11th Cir. 2002).

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protect the security of the court, the proceedings, or to prevent escape."); Nev. Rev. Stat. Ann. § 178.394 (no person "charged with a public offense [shall] be subjected, before conviction, to any more restraint than is necessary for the person's detention to answer the charge."); N.C. Gen. Stat. Ann. § 15A-1031 (trial judge may order defendant subjected to physical restraint in courtroom if judge finds restraint necessary to maintain order, prevent escape, or ensure safety): 22 Okla. Stat. Ann. § 15 (person charged with public offense may not be "subjected before conviction to any more restraint than is necessary for his detention to answer the charge, and in no event shall he be tried before a jury while in chains or shackles."). Courts have generally observed the same presumptions in civil cases. Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 Baylor L. Rev. 214, 233-36 (Winter 2015).

[5] *Zygadlo v. Wainwright*, 720 F.2d 1221 (11th Cir. 1983).

[6] *Illinois v. Allen*, 397 U.S. 337 (1970).

In this case, Mr. Davenport was shackled for no reason at all. This should have been deemed an error under precedent discussed above, but the Ninth Circuit instead carved out an exception to the requirement that shackling a defendant at trial be justified by a need. The Ninth Circuit held that shackling a defendant for no reason at all during his or her jury trial is not even an error as long as the shackles are covered by a table skirt. App. B at 6a-7a. In other words, a district judge can order shackling for no reason as long as the shackles are hidden.

The Ninth Circuit's holding is premised on an assumption that the only harm of shackling a defendant at trial is having jurors see the shackles. This Court, lower courts, and scholars, however, have found that shackling a defendant at trial involves numerous harms beyond having jurors view shackles. In *Deck*, 544 U.S. at 631, this Court recognized that shackles "can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf." Shackles can also interfere with a defendant's ability to communicate with his or her attorney during trial. *Id*. In addition, shackles impose "physical burdens, pains, and restraints" on a defendant and tend to "confuse and embarrass" a "mental faculties," and thereby tending to "materially to abridge and prejudicially affect his constitutional rights." *Deck*, 544 U.S. at 631 (*quoting People v. Harrington*, 42 Cal. 165, 168 (1871)). There is nothing about covering shackles in a table skirt that relieves the physical

constraint, pain, and personal humiliation to the defendant that is caused by shackles.

The rule requiring justification before shackling a defendant at trial should not be relaxed in cases where, as here, a defendant represents himself. Although defendants who exercise their right to represent themselves at trial are not immune from the possibility of being shackled if there is a justification, they should enjoy the same initial presumption of a right to be free of shackles during a jury trial as those who are represented by counsel. After all, shackles present extra problems for defendants who represent themselves. As the Eighth Circuit observed, the problems of shackling a defendant at trial "are aggravated when a defendant is representing himself because the defendant has the Hobson's choice of trying to move about as necessary in the course of his self-representation, thus drawing the jury's attention to the shackles, or conducting his defense while seated behind the counsel table." *Abdullah v. Groose*, 44 F.3d 692, 695 (8th Cir. 1995), *rev'd on other grounds*, 75 F.3d 408 (8th Cir. 1996). Defendants who are *pro se* and shackled cannot stand and face the jury during arguments or directly stand in front of witnesses. They cannot have a sidebar with the judge without having the courtroom cleared, destroying the coherence of direct or cross-examination and making it clear to the jury that the defendant is restrained from moving. Shackled *pro se* defendants have to be careful in how they move as they grapple with paper

and attempt to communicate with the paralegal or investigator who might be assisting them at counsel table. They cannot take the stand in their own defense without clearing the courtroom, again giving the jury a major hint that they are shackled and, as a result, prejudicing the jury against them. Finally, as they attempt to act as their own defense attorney, an undertaking that requires great focus and concentration in the best of circumstances, they are distracted by the embarrassment and discomfort of being chained to the floor.

Mr. Davenport was hampered by the problems above as he tried to represent himself. He could not stand to give opening and closing arguments, nor could he stand when conducting his cross or direct examination. When a side bar would have been appropriate to make a proffer or argue the relevance of evidence he sought to introduce, he could not have the sidebar unless he had asked the court to clear the entire courtroom. Mr. Davenport concedes that a particular *pro se* defendant might present such a high risk of flight or violence that shackling during trial is warranted, but there should be at least some justification before a defendant who is acting as their own defense attorney at trial is shackled. As the Fifth Circuit recognized, an across-the-board rule that every incarcerated *pro se* defendant be shackled during trial is insufficient "to justify shackling to justify shackling a particular defendant during his jury trial, *particularly when he represents himself*

pro se." *United States v. Banegas*, 600 F.3d 342, 346 (5th Cir. 2010) (emphasis added).

The rule requiring justification before shackling a defendant at trial is a rule of national importance and bears on this Court's supervisory power over lower federal courts. Rules of the Supreme Court of the United States, R. 10. If the rule recognized in *Deck*, and in countless other federal and state cases, that a defendant can only be shackled during jury proceedings if there is some justification can be avoided by cloaking shackles, lower courts can simply devise ways to hide shackles from the jury. Defendants who present no unique security concerns can be shackled for no reason at all during their trials, as happened in Mr. Davenport's case. Such a practice ignores the fact that shackles, even when covered by a table skirt, can interfere with a defendant's ability to communicate with his or her attorney during trial and inhibit making a choice to take the witness stand for fear that, when the courtroom is cleared to move the defendant to the stand, the jury will understand the defendant was not permitted to walk their on his or her own. Further, cloaked shackles impose "physical burdens, pains, and restraints" on a defendant that tend to "confuse and embarrass" the defendant's mental faculties, thereby tending to "materially to abridge and prejudicially affect his constitutional rights." *Deck*, 544 U.S. at 631 (quoting *Harrington*, 42 Cal. at 168). Allowing trial courts free reign to shackle a defendant at trial for no reason at all as long as

the shackles are cloaked hollows out the holding of *Deck* and will seriously infringe a criminal defendants' rights at trial and the dignity of federal and state criminal trials.

B. By failing to apply the analytic framework this Court set forth in *Chapman* and *Delaware v. Van Arsdall* the Ninth Circuit upheld a prejudicial breach of Mr. Davenport's Confrontation Clause rights.

"[T]he Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id*. at 405. Mr. Davenport asked Martin, the key government witness as to the conspiracy count, questions that went to the credibility of her claim that it was a request from Mr. Davenport, and not her own habits regarding child pornography, that caused her to make the child pornography video at issue in this case. There was no dispute that Martin made the video; the only dispute at trial was whether Mr. Davenport entered an agreement with her to produce the video, which would make him liable for conspiracy to produce child pornography. The questions Mr. Davenport posed to Martin went right to the credibility of Martin's allegation that

Mr. Davenport requested production of the video, but the district judge sustained objections to the questions on the ground of relevance.

The Ninth Circuit did not disagree with Mr. Davenport's argument that his right to cross-examine the government's witness, and his right to present his defense, were breached by the district judge's rulings. Instead, it held that even if the district court violated Mr. Davenport's Confrontation Clause rights by refusing to allow him to cross-examine Martin regarding her own involvement with child pornography, the error was harmless. According to the panel, the error could not have made a difference because of supposedly "overwhelming" forensic evidence and testimony by other witnesses supporting Martin's testimony that she made the video at the request of Mr. Davenport. App. B at 8a.

Under this Court's decision in *Chapman v. California*, 386 U.S. 18, 24 (1967), the prosecution must carry the burden of showing that a constitutional trial error is harmless beyond a reasonable doubt. To do so, it must show there is not "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23 (citing *Fahy v. State of Conn.*, 375 U.S. 85, 86 (1963)). This Court has held that the *Chapman* test applies when a criminal defendant is deprived of his or her Sixth Amendment right to confront the prosecution's witness by the introduction of evidence that calls their testimony and/or credibility into doubt. *Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (*per*

curiam). "The correct inquiry," this Court held in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), "is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." In deciding whether an error is harmless in a particular case, courts are to look to "a host of factors," including,

(1) the importance of the witness' testimony in the prosecution's case;

(2) whether the testimony was cumulative;

(3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;

(4) the extent of cross-examination otherwise permitted, and;

(5) the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684.

In the present case, the sole evidence in support of the government's theory that Mr. Davenport was a co-conspirator in Martin's production of child pornography was Martin's testimony that Mr. Davenport asked her to make the video. Despite the fact that Mr. Davenport and Martin texted freely about taboo topics, there was no text or email in which Mr. Davenport asked Martin to make the video that is the focus of the conspiracy count. Moreover, when investigators searched Mr. Davenport's two cellphones they found no pictures of nude children or child pornography aside from the video Martin produced and e-mailed to Mr.

Davenport. D. Ct. Doc. 262 at 123-24. Martin, on the other hand, had 50-100 child pornography images and more than 20 child pornography videos on her cellphone. D. Ct. Doc. 261 at 61-62. Martin sent child pornography videos to others. D. Ct. Doc. 261 at 133. Martin emailed VID_20130827_162931.mp4 to another "dom" she was communicating with on the same day she e-mailed it to Mr. Davenport. D. Ct. Doc. 261 at 42, 129; D. Ct. Doc. 262 at 91-93.

The Ninth Circuit improperly conducted the *Van Arsdall* harmless error test by simply asserting that there was "overwhelming" evidence as to the conspiracy. There was overwhelming that Martin made the video and transmitted it to Mr. Davenport, but the only evidence of a conspiracy, that is an agreement between Mr. Davenport and Martin to make the video, was Martin's testimony. Had the Ninth Circuit gone through the analysis called for by *Van Arsdall*, it would have been clear that

(1) Martin's testimony was not only important but *critical* to the government's case as to the conspiracy charge. It was her testimony alone that claimed Mr. Davenport had any knowledge of the video before Martin made it and sent it to him. Had Mr. Davenport been able to establish, through cross-examination, that Martin had a longstanding interest in child pornography and/or possessed other images of child pornography involving toddlers, this would have

tended to show that she might have made and distributed the child pornography video without any prompting from Mr. Davenport. Such evidence would have cast reasonable doubt on the government's theory that Mr. Davenport asked Martin to make the video by showing Martin had her own independent interest in child pornography before she even met Mr. Davenport. It also could have shown that she was already comfortable enough with child pornography involving toddlers to produce and distribute the video without a request from Mr. Davenport.

(2) The testimony Mr. Davenport sought to develop through cross-examination was not cumulative. Martin did not offer any other testimony regarding her history of an interest in child pornography or whether she had other child pornography involving toddlers.

(3) There was no other evidence corroborating or contradicting the possibility that Martin had a longstanding interest in child pornography or that she possessed other child pornography images involving toddlers.

(4) The court did not otherwise permit Mr. Davenport to engage in extensive cross-examination of Ms. Martin. The transcription of the government's initial direct examination of Martin takes 32 pages (D.

Ct. Doc. 261 at 312-44), whereas the transcription of Mr. Davenport's initial cross-examination of Martin takes eight pages (D. Ct. Doc. 261 at 344-347, 355-357).

(5) Finally, the government's case with respect to Count One was weak. Although the government certainly introduced sufficient evidence that Martin sexually exploited Jenny Doe by making and distributing the child pornography video, the evidence that Mr. Davenport was a co-conspirator, *i.e.* a person who entered an agreement with Martin to produce the video, was minimal. Prior to the production of the video, Martin and Mr. Davenport freely texted each other about sexual topics without any self-censorship, and yet Mr. Davenport never texted a request to Martin for child pornography.[7] The government's sole evidence that Mr. Davenport asked Martin to make the video was Martin's testimony, but Martin herself may have already had a pattern of producing child pornography and/or sending it to the BDSM enthusiasts with whom she interacted before she met Mr. Davenport. Mr. Davenport was precluded from developing evidence to support a theory that Martin may have come up with the idea to make and

[7] Evidence of an exchange of sexually charged text messages, followed by the defendant's unprompted receipt of child pornography, is not sufficient evidence to support a conviction for production of child pornography under 18 U.S.C. § 2251(a). *United States v. Crooker*, 360 F. Supp. 3d 1095 (E.D. Wash. 2019).

distribute the video on her own because the district judge would not allow him to question Martin about how long she had been interested in child pornography and whether she had other child pornography images of toddlers.

For these reasons, the district court's error in cutting off cross-examination was not harmless beyond a reasonable doubt. Had the Ninth Circuit engaged in an analysis using the *Van Arsdall* factors, or anything resembling an analysis that focused on whether the improper limitation on cross-examination of Martin may have contributed to the conviction, it could not have concluded that the Confrontation Clause error in this case was harmless under *Chapman*. This Court should grant a writ of *certiorari* on this issue because the Ninth Circuit departed from this Court's precedent in failing to engage in an analysis that recognized the importance of Martin's testimony to the conspiracy count and, thus, the prejudicial impact of the trial court's refusal to allow Mr. Davenport to exercise his right to cross-examine and impeach her.

C. The Ninth Circuit's decision expands the definition of a conspiracy to persons who do not enter an agreement to participate in some way in the commission of an offense by another person.

Viewed in the light most favorable to the government, that is if one believes the testimony of Angela Martin, Martin made the child pornography video at issue in this case because Mr. Davenport said that "he wanted a penetration and oral

video, and to keep her still he suggested to give her a lollipop or toy or something to keep her hands busy so she wouldn't move around." D. Ct. Doc. 261 at 330. Martin testified that she considered saying no but decided to make the video because Mr. Davenport "kept asking and asking, and I gave in. I was weak, and I did it anyways." D. Ct. Doc. 261 at 343. There was no evidence that Mr. Davenport in any way agreed to join Martin in production of the video. At most, he asked for the video and gave Martin advice on how *she* could produce the video.

Mr. Davenport argued on direct appeal that the evidence was insufficient to support the conspiracy to produce child pornography count because even construing the evidence in the light most favorable to the government, he did not enter an agreement to act together with Martin in any way to produce the video. The Ninth Circuit rejected this argument, reasoning that "[Martin] testified that Davenport gave her specific and graphic instructions on how to abuse and distract the child victim during filming. This evidence supports a reasonable inference that Davenport and the filmer agreed to, and intended to, produce child pornography." App. B at 8a-9a.

The Ninth Circuit's decision is wrong and essentially equates solicitation or inducement—asking another person to commit an offense—with conspiracy. If Martin's testimony is believed, Mr. Davenport asked her to commit a crime by

making a particular type of child pornography and gave her a suggestion about how *she* could commit the crime. Martin did not testify that Mr. Davenport did anything to assist in the production of the child pornography. The conduct Martin described differs from conspiracy, which has long been recognized as a "confederacy of two or more persons to accomplish some unlawful purpose." *Ocasio v. United States*, __ U.S. __, 136 S. Ct. 1423, 1429 (2016) (quoting 2 J. Bishop, Commentaries on the Criminal Law § 175, p. 100 (rev. 7th ed. 1882)). While Mr. Davenport would not have to agree to facilitate every element of an offense to be guilty as a co-conspirator, he would have to at least agree to support commission of the substantive offense in some way. *Ocasio*, 136 S. Ct. at 1432 (defendant could conspire to commit Hobbs Act extortion by agreeing to a plan in which all co-conspirators would actively help support at least some part of the offense conduct).

According to Martin's testimony, Mr. Davenport did not agree to support Martin's act of producing the child pornography video in any way. He did not agree to provide a place to produce the video; Martin would produce the video in the home in which she worked as a babysitter, a home that was thousands of miles away from Mr. Davenport. Mr. Davenport did not agree to supply equipment to produce the video; Martin would use her own cell phone camera to produce the video. Mr. Davenport did not agree to introduce Martin to a minor she could

abuse; she would abuse a toddler she had known since birth and regularly cared for, a child Mr. Davenport did not know at all. Mr. Davenport did not agree to act as a lookout; Martin alone was familiar with the house where the toddler lived and she would choose to make the video in the one room in the home that did not have a security camera. In short, Mr. Davenport and Martin did not agree that Mr. Davenport would take part in any part of the offense of producing the child pornography video.[8]

As this Court has held, conspiracy, by its nature, requires the government to prove that at least two persons had an agreement to commit the underlying offense. *Ocasio*, 136 S. Ct. at 1429. The fact that one individual breaks the law by supplying contraband to a second person does not make the second person a co-conspirator. *United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994). Thus, "merely associating with known criminal conspirators or purchasing drugs for personal use is insufficient to prove participation in a conspiracy." *United States v.*

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[8] The district judge may have misunderstood Mr. Davenport's lack of participation in the offense of producing child pornography. The district judge suggested he believed Mr. Davenport had somehow remotely operated the cell phone that Angela Martin used to produce the child pornography video, stating he rejected Mr. Davenport's claim that he did not make the video:

> Yes, he did. And in today's world of technology, you don't have to physically be present at the location and actually operate the equipment to say that you are not responsible for what is going on with that equipment.

D. Ct. Doc. 311 at 62. There was absolutely no evidence that Mr. Davenport exercised any type of remote control over the cell phone Martin used to record the child pornography video.

Pickel, 863 F.3d 1240, 1252 (10th Cir. 2017). Similarly, where one party sells contraband to a second party, and the second party subsequently resells the contraband to others, the two parties are not co-conspirators because, although they know of and in some way are necessary to the other's criminal activity, they do not jointly undertake a unified criminal act. *United States v. Loveland*, 825 F.3d 555, 561 (9th Cir. 2016).

Here, at most, the evidence at trial shows that Mr. Davenport asked Martin to make the video and enjoyed watching the video after he received it. The knowing receipt and possession of child pornography is, of course, its own offense that is different from production of child pornography. There is no evidence that Mr. Davenport and Martin ever agreed that they would both participate in the offense of sexually exploiting Jenny Doe and producing the video. Evidence showing Mr. Davenport wanted Martin to commit the offense is not sufficient to demonstrate he was a co-conspirator in the offense. *See Lennick*, 18 F.3d at 818-19 (where evidence showed defendant sold or gave marijuana to others, and the others simply consumed it, the evidence was insufficient to support conviction for conspiracy to manufacture, distribute, or possess with intent to distribute).

This Court should grant the petition for a writ of *certiorari* on this issue because the implications of the Ninth Circuit's holding amount to a stunning expansion of potential liability for a criminal conspiracy. There are many people who seek to

obtain and possess contraband, be it illegal drugs or child pornography. Traditionally, federal criminal statutes have distinguished between the offenses of producing/distributing contraband and obtaining/possessing contraband, with the latter being punished less severely. For example, in the context of child pornography, production of child pornography carries at least a statutory sentencing range of 15-to-30 years (18 U.S.C. § 2251(e)), whereas soliciting child pornography carries at least a statutory sentencing range of 5-to-20 years (18 U.S.C. § 2252A(a)(3)(B), (b)). If a person who asks another to produce and supply them with contraband is liable as a co-conspirator in the production of that contraband, without any evidence that the two people agreed they would in any way act together in producing the child pornography, the distinction between the offenses is erased. This Court should overrule the Ninth Circuit's dramatic expansion of criminal conspiracy liability.

VI. Conclusion

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*.

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Respectfully submitted,

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