No. 20-6889

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY BARTUNEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Gregory P. Bartunek

29948-047

Federal Correctional Institution

P.O. Box 9000

Seagoville, TX 75159

QUESTIONS PRESENTED

I. WHETHER THE FEDERAL RULES OF CRIMINAL PROCEDURE ARE UNCONSTITUTIONALLY OVERBROAD AND VAGUE

II. WHETHER WARRANTS BASED ON INTERNET PROTOCOL ADDRESSES SHOULD BE TREATED LIKE INFORMANT'S TIPS TO POLICE

LIST OF THE PARTIES

All parties appear in the caption of the cover page.

RELATED CASES

Gregory Bartunek v. United States of America
"Petition for Writ of Habeas Corpus"
D. Neb., 8:18CV440, Denied & Dismissed, Jan. 8, 2019
8th Circuit, 19-1248, Affirmed, Feb. 12, 2019
Supreme Court, 19-6880, Denied, Jan. 13, 2020

United States of America v. Gregory Bartunek
"Appeal of Detention Order"
D. Neb., 8:17CR28 #223, Motion Denied, Nov. 8, 2017
8th Circuit, 17-3593, Affirmed, Feb. 15, 2018
Supreme Court, 18-5617, Denied, Oct. 1, 2018

Gregory P. Bartunek v. Omaha Police, et al.
"Unconstitional Search Warrant"
D. Neb., 8:16CV568, Dismissed by Plaintiff, May 4, 2017

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Appendix

TABLE OF AUTHORITIES

Cases

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix [1] to the petition and is reported at United States v. Bartunek, 969 F.3d 860 (8th Cir. 2020).

The Order granting an extention of time to file a Petition for Rehearing appears at Appendix [2] to the petition and is unreported.

The Petition for Rehearing appears at Appendix [3] and is unreported.

The Order denying the Petition for Rehearing appears at Appendix [4] and is unreported.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on August 12, 2020. Bartunek sought an extention of time in which to file a Petition for Rehearing, and the Court granted the extention until October 20, 2020. The Petition was timely filed on September 29, 2020. The Petition was denied on October 20, 2020. This Petition has been timely filed. Jurisdiction is proper under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDANCES, AND REGULATIONS

Amendments I, IV, V, and VI of the U.S. Constitution

18 U.S.C. §2252 and § 2252A

Rules 102, 103, 104, 105, 401, 402, 403, 404, 414, and 802

STATEMENT OF THE CASE

Bartunek was convicted of Count I - 18 U.S.C. § 2252A(a)(2) Distribution, and Count II - 18 U.S.C. § 2252(a)(4)(B) Possession of child

pornography in the United States District Court for the District of Nebraska. Jurisdiction was proper under 18 U.S.C. § 3231. During the trial, the government introduced evidence both intrinsic and extrinsic to the crimes charged. The questions presented in this Petition are whether this evidence was improperly admitted in violation of Federal Rules of Criminal Procedure, United States Statutes, and Amendements to the U. S. Constitution, which affected Bartunek's substantial rights to such an extent that it affected the fairness, integrity and public reputation of the judicial proceedings.

A. The Search Warrant

On May 25, 2016 a Nebraska issued search warrant was executed on Bartunek's residence by the Omaha Police, et al. The warrant was based on a "bare bones" affidavit, lacking in probable cause to issue it. This can easily be shown by comparing the Bartunek Affidavit (Doc. 106-1) with the Manning Affidavit (United States v. Manning, Case No. 0:18CR102 (D. Min. 2018), Doc. 33-1). (See Appendices [15] and [16]). Below is a quick comparison table of the two affidavits:

No.	Item	Bartunek	Manning
1	Affidavit Length	4 pages	10 pages
2	Factual Grounds Length	1 page	6 pages
3	Affiant's Training and Experience	No	Yes @ p. 4
4	Role of NCMEC in Law Enforcement	No	Yes @ p. 4
5	Identified Omegle as an ESP	No	Yes @ p. 4
6	Described How Omegle Works	No	Yes @ p. 5
7	Determined Residence Ownership	No	Yes @ p. 6
8	Extensive Surveillance was Performed	No	Yes @ p. 7
9	Role of the Internet in Crimes	No	Yes @ p. 7
10	Computer as a Repository of Evidence	No	Yes @ p. 7-8
11	Justified Items to Search and Seize	No	Yes @ p. 8-9
12	Described Characteristics of Collectors	No	Yes @ p. 9

From the above table, it is quite easy to see how "bare bones" the Bartunek Affidavit was. It lacked the necessary factual details for the issuing judge to determine whether there was probable cause to believe child

pornography would be found. This issuing judge simply accepted the Affiant's assumptions, allegations, and conclusions without any factual basis for doing so.

The express purpose of the Fourth Amendment is to secure the "houses, papers and effects" of this nation's citizens from governmental intrusion, U.S. Const., Am. IV, and so its protective force is strongest at the private home's doorstep. Kyllo v. United States, 553 US 27, 31 (2001). Thus, any police official seeking to invade a private home must first obtain a valid search warrant upon showing probable cause to the satisfaction of a neutral magistrated. Groh v. Ramirez, 540 US 551, 559-60 (2004). "When a magistrate relies soley on an affidavit to issue the warrant, only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause." United States v. Farlee, 757 F.3d 810, 819 (8th Cir. 2014). Probable cause means that, given all the circumstances set forth in the affidavit, there exists sufficient information to conclude "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 US 213, 238 (1983). The warrant affidavit in this case failed to demonstrate the requisite probable-cause, and thus, its fruits must be suppressed.

The basis of issuing the warrant was from tripple hearsay evidence from an informant, Omegle.com. However, there was no information in the affidavit to determine the identity of the owner of that domain. Omegle.com was not identified as a person, business, ISP, ESP, or other entity. This is in stark contrast to the Manning Affidavit. "When probable cause is based on information supplied by an informant, the core question is whether the information is reliable." United States v. Buchanna, 574 F.3d 554, 561

(8th Cir. 2009). See also: United States v. Williams, 10 F.3d 590, 593 (8th Cir. 1993); Illinois v. Gates, 462 US 213, 238 (1983). In this case, there was no information in the affidavit showing the informant's identity, let alone its reliability, verasity, or basis of knowledge required to support probable cause to issue the warrant.

The only information provided to the police from the informant was that an image of apparant child pornography came across an IP address, two months before the warrant was issued. "That fact alone, without further corroboration, is analogous to an anonymous tip that alleges some criminal activity is occurring at someone's home but provides no further information to corroborate the claim." Unreliable Informants IP Addresses, Digital Tips and Police Raids (September 2016), by the Electronic Frontier Foundation at p. 15: https://www.eff.org/files/2016/09/22/2016.09.20_final_formated_ip_address_white_paper_0.pdf. (See Appendix [17]). "Courts and Police must apply the same skepticism of anonymous informants to IP addresses." (Id.).

Unlike the Manning Affidavit, no reason was given in the Bartunek Affidavit to believe that there was a fair probability that child pornography would be found in Bartunek's home. At the beginning of the Bartunek Affidavit, Affiant David Pecha stated that he believed that images and evidence of child pornography would be found in Bartunek's property, but failed to state why he believed this was true. His only conclusion was that child pornography was uploaded to Omegle.com from Bartunek's address. He failed to show why this single isolated event supported his initial claim. He did not state that his training and experience supported his claims, like the Manning Affidavit did. He did not include any facts about collectors of child pornography either, or that Bartunek was such a collector, or the

relevance of this towards finding probable cause. See United States v. Coreas, 419 F.3d 151, 156 (2n Cir. 2005).

Prior to the trial, Bartunek filed motions to suppress the seized evidence. (Docs. 47, 48, 70, 73, 80, 82, 85). The court overruled all the motions. (Doc. 208). The court assumed that the informant was reliable and that because the investigating officer provided a description of the image, this corroborated the informant's tip. However, the officer's conclusion about the image was not independent, but dependent directly on the informaiton supplied by the informant. This was not an independent investigation, and therefore not corroborating information. Furthermore, the equivocal description of the image was simply a conclusion of the officer, without any factual basis shown as to how he determined the age of the individual in the image or whether or not the image was real or a fake.

The Affidavit also mentioned a crimestoppers tip years earlier, but it is unclear how many years ago it occurred. See United States v. Palega, 556 F.3d 709, 715 (8th Cir. 2009) (holding that it is infufficient for probable cause to exist "as of sometime in the past."). Furthermore, neither the Omegle.com informant nor the crimestoppers informant were shown to be reliable. Indeed, the affiant later stated that the crimestoppers tip lacked sufficient evidence to issue a warrant. (Trial at 283:1-23). And since the only "evidence" of a crime was based soley on unreliable informants, eliminating this information from the warrant removed any probable cause for issuing the warrant, whatsoever.

Both the issuing judge and the court assumed that Omegle.com was a corporate ISP or ESP, that was required by law to report such information to NCMEC, and therefor, a presumption of reliability existed. They missed the point. There was absolutely no information in the affidavit showing

that Omegle.com was even a business, let alone a corporation, ISP, or ESP, or that it was required to report to the NCMEC. Nothing in the four corners of the affidavit supported the court's conclusion. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of bare bones conclusions of others." Illinois v. Gates, 462 US 213, 239 (1983). "The NCMEC neither investigates nor vouches for the accuracty of the information reported to itself ..." It is simply a "clearinghouse". United States v. Lapsins, 570 F.3d 758, 762 (6th Cir. 2009). (See Appendix [24]). The issuing judge and the court also erroneously assumed that the information from COX was credible and accurate. However, COX made it very clear that it "cannot guarantee that they [thier records] necessarily represent information linking the identified customer to your [Police's] investigation." (See Appendix [25]).

The affiant's failure to fully discose these technology limitations are grounds for voiding a warrant, because the Fourth Amendment requires candor "to allow the [issuing judge] to make an independent evaluation of the matter." Franks v. Delaware, 438 US 154, 165 (1978). Faced with these flaws, the court may conclude that the results of the illegal search could still be admissible pursuant to the Leon Good-Faith exception. United States v. Leon, 468 US 897, 919-20 (1984). However, well-established precedent precludes reliance on a warrant based on a "bare bones" affidavit such as this one. Id. Comparing the Bartunek Affidavit with the Manning Affidavit makes it clear that the Bartunek Affidavit was so "bare bones" and so lacking in probable cause that it was objectively unreasonable, and thus suppression is mandated.

Suppression of the doll and underwear evidence was also required

because their seizure did not fall under the "plain site" exception. They were not listed in the items to be searched or seized. They were not in the proximity of other items seized. During the search, Officer Stigge took the pictures, and when asked why, he stated, "Just -- there was a bit of unusualness to it, so I wanted to document it in the best we could." (Trial at 218:16-17). Although the dolls and underwear were in plain site, there was no probable cause to believe that they were associated with any criminal activity. Coolidge v. New Hampshire, 403 US 443, 465-471 (1971).

During the search, the police moved the dolls, undressed them, and posed them to take thier pictures. Officer Stigge stated that, "We did alter that one just a bit." referring to one of the dolls. (Trial at 213:4). And agin he said, "We -- they were moved." (Id. at 215:4). Officer Pecha confirmed this stating, "I believe at the time they [dolls] were placed on the bed." (06/22/2017 Hearing at 52:12). Clearly, these actions constituted an illegal search. Arizona v. Hicks, 480 US 312 (1987) (where moving a piece of stereo equipment constituted an illegal search).

B. The Government's Extrinsic Evidence

On April 28, 2017 the government filed a Notice of Intent to offer Rule 404(b) and 414 evidence at trial: 1) allegations by S.P. that Bartunek sexually assaulted him and showed him child pornography; 2) Crimestoppers Tip alleging possession of child pornography in 2013; and 3) a sexual contact allegation by K.H. in 2015. (Doc. 77). Bartunek was charged with sexually assaulting S.P., but the charges were dismissed. (See Appendix [26]). The government also intended to introduce evidence that Bartunek showed child pornography to S.P., but Bartunek was never charged with this offense. Furthermore, a search was performed at the time, but no child pornography was found. (02/28/2017 Hearing at 7:2-16). And, all items seized were

returned to Bartunek. (See Appendicies [27], [28]). In addition, S.P. was at least 14 years old at the time, barring admission under Rule 414. The Crimestoppers Tip was hearsay evidence from an anonymous informant, barring admission under Rule 802 and the confrontation clause under the Sixth Amendment of the United States Constitution. Both the Crimstoppers Tip and the K.H. allegation lacked probable cause to even issue a warrant. Furthermore, the K.H. incident was not sexual assault, barring admission under Rule 414. Even so, the government didn't use the K.H. evidence at trial.

On October 24, 2018 the government filed its Trial Brief. (Doc. 336). Over half of the brief was devoded to evidence extrinsic to the crimes charged. In addition to the evidence included in its previous notice, the government intended to introduce additional Rule 404(b) evidence: 4) dolls and underwear; 5) child erotica; and 6) file names with titles consistent with child pornography. As previously discussed, this evidence was the result of an illegal search and seizure and should have been suppressed. Never-the-less, it was admitted at trial. According to the government, the purpose of introducing the doll and underwear evidence, as well as the child erotica and file names, was to show that Bartunek had a "sexual interest in prepubescent children", to show his "intent." (Doc. 336 at p. 7). And it intended to use the other three prior incidents pursuant to Rules 404(b) and 414 for the same purpose, to show intent. (Doc. 336 at p. 9).

C. Motions in Linime

Bartunek filed several pro se motions in limine. (Docs. 70, 71, 72, 73, 80, 82, 291, 292, 293, 294, 295). These were all denied by Judge Rossiter. (Docs. 208, 301). Andrew Wilson, CJA Panel Attorney for Bartunek, filed a Motion in Limine on October 26, 2018. (Doc. 340). It was not ruled upon until the day of the trial. In his motion, he asked the court to prohibit

testimony from S.P. and K.H. and prohibit the offering of evidence of the dolls. However, he failed to include the underwear, child erotica, or file names in his motion. He argued that admission of the doll evidence and testimony was not allowed under any Rule of Evidence, because the only purpose was to prove a person's character, and its prejudicial value outweighed its probative value.

It is quite clear that the government intended to use this extrinsic evidence to show that Bartunek was a disturbed sexual preditor. (Doc. 24 at p. 8-9). The government previously used this same evidence as the sole reason to deny Bartunek bail. During the bail hearings, Government Prosecutor Michael Norris' entire argument on why Bartunek should be denied bail was based on the extrinsic evidence, not the crimes Bartunek was charged with. (02/23/2017 Hearing at 11:8-18:14; 02/28/2017 Hearing at 5:1-8:15). Other individuals with the same charges, even with a criminal history, were regularly released in the past. (02/23/2017 Hearing at 5:24-6:8). Even so, Judge Rossiter denied Bartunek bail. (Doc. 28). In particular, Norris used the doll and underwear evidence to shock and confuse the jury as he did with the judges. As Magistrate Susan Bazis said, "Now Exhibit C [the dolls] is -- is probably more concerning ..." (02/23/3017 Hearing at17:8-12). And Norris stated "I think the court can also look at how those dolls are dressed -- in Exhibit 2C and the fact they are in the bedroom..." (Id. at 17:16-21). To which Judge Bazis replied, "No question. It's wierd ..." (Id. at 17:22). The dolls had a similar affect on Judge Rossiter, who stated, "I am also concerned about Exhibit -- at least at this point by Exhibit 2C and what it depicts -- I believe it depicts with the life-sized dolls. (02/28/2017 Hearing at 13:21-23).

D. Hearing on Motion in Limine

On October 29, 2018, the first day of trial, a hearing was held before Judge Rossiter on Wilson's Motion in Limine. Wilson's brief argument was only one-half of a page long in the trial transcript, and only addressed the S.P. allegations. (Trial at 3:19-4:6). Wilson added, "But I'll let -- the others speak for themselves." (Id. at 4:4). Judge Rossiter made a tentative ruling to overrule the motion at that time. (Id. at 4:9-19). However, the court failed to identify the Rule 404(b) or 414 components that formed the basis of the rulings. (See United States v. Brown, 923 F.2d 109, 111 (8th Cir. 1991). Judge Rossiter also failed to do so when the evidence was additted in the trial. He did express uncertainty about admitting the S.P. evidence because of his age. (Trial at 4:9-19). He stated that he needed to balance against 403, but failed to do so. (Id.).

> "Reversal is appropriate only if the trial court failed to engate in the required balancing process or where it is impossible to determine from the record whether it did or not." United States v. Riepe, 858 F.3d 552, 56-61 (8th Cir. 2017); United States v. Horn, 523 F.3d 882, 888 (8th Cir. 2008).

When Judge Rossiter asked Norris if he wished to be heard, Norris said he did, and that, "I especially want to be heard on the dolls ... and underwear." (Trial at 4:20-23). Norris' argument was almost five pages long. (Id. at 5:1-9:12). Then Norris talked the judge into believing that the doll and the underwear evidence should come in under Rule 401, not 403, claiming that it was inextrincably intertwined. (Id. at 20:25-11:23).

> Res gestae, or intrinsice evidence "includes both evidence that is inextricably entertwined with the crime charged, as well as evidence that merely complets the story or provides context to the charged crime." United States v. Cunningham, 702 Fed. Appx. 489, 492) (8th Cir. 2017).
>
> However, res gestae is a "mind-numbing and elastic term" which "pretends much but means little." United States v. Green, 617 F.3d 233, 244 n. 9 (3rd Cir. 2010).

Norris intentially did this in order to confuse and mislead the judge and later the jury, and to prevent the court from giving an limiting instruction. (Trial at 11:11-22).

> The designation of evidence as "inectricably intertwined" unduly deprives the defendant of the right to a limiting instruction. United States v. Bowie, 232 F.3d 923, 927-28 (D.C. Cir. 2000).
>
> "The presence of a limiting instruction diminishes the danger of any unfair prejudice arising from the admission of other acts." United States v. Lindsey, 702 f.3d 1092, 1099 (8th Cir. 1997).

E. The Trial

The "prior acts" evidence constituted significantnportions of the trial, including the government's opening and closing statements, as wel as from testimony of four of the government's nine witnesses. During the opening statement, the government discussed the doll and underwear evidence (Trial at 113:17-23), the child erotica (Id. at 112:9-15), and the file names (Id. at 115:11-14).

The first four government witnesses simply layed the foundation to admit the Omegle.com evidence. (Trial at 118:9-202:9). At the end of Mark Dishaw's testimony, he testified that the reason the case was assigned to David Pecha was because of a Crimstopper's Tip in 2013. (Id. at 199:4-202:9). Wilson objected based on relevance and Rule 404. (Id.) Judge Rossiter was uncertain if it was relevant but overruled the objections anyway. (id.). However, he failed to address the 404 objection or perform a 403 analysis, or to give a limiting instruction. (Id.). As with the doll evidence, Norris convinced Judge Rossiter that this was also "res gestae" evidence to again mislead and confuse bothe the judge and the jury. Without limiting instructions, the jury was free to consider the evidence for any purpose whatsoever, including character and propensity evidence.

"We hold that whenever evidence is admitted for a limited purpose, it is plain error, in absence of a manifest waiver, to omit an immediate cautionary instruction." United States v. McClain, 440 f.2d 241, 246 (D.C. Cir. 1970).

"The danger of prejudicial effect from such evidence is so great that only an immediate and contemporaneious instruction can be considered sufficient to protect defendants." (Id.).

"As long as we have rules of evidence which admit testimony for some purpose, but not for others, we must guard against misuse by the jury." (Id.).

The fifth witness, Brandon Stigge, talked about the search and seizure of Bartunek's residence, and their interrogation of Bartunek on the day of the search. (Trial at 202:11-250:23). When Stigge introduced the doll evidence, Wilson objected based on Rule 404. (Id. at 211:12-212:13). Judge Rossiter said, "I think it's a 401 issue and not a 404 --", and overrulled the objection on that basis. (Id.). Once again, Judge Rossiter failed to address the 404 objection or perform a 403 analysis or to give a limiting instruction. Stigge's testimony about the dolls continued. (Id. at 212:4-219:23). Stigge then introduced the underwear evidence. (Id. at 212:24-220:10). This time, Wilson failed to object, and no 404 v. 403 balancing was done, nor was a limiting instruction given. Judge Rossiter later tried to clarify that the doll evidence was relevant under Rule 401 as circumstantial evidence, not 404(b). (Id. at 221:7--222:15). The next day, Judge Rossiter indicated that he performed a 403 evaluation on the doll evidence, but failed to indicate the 404(b)(2) purpose for its admission. (Id. at 226:4-12). Stigge continued to elaborate on the doll and underwear evidence over Wilson's objections. (Id. at 227:8-230:12, 232:20-233:3). And later he testified about interrogating Bartunek about the dolls. (Id. at 241:23-243:21). Again, Wilson objected based on relevance and his motion in limine, but the judge overruled his motions without a 404 v. 403 balancing, or giving a limiting instruction.

The sixth witness was S.P. (Trial at 256:18-277:10). Wilson objected to his testimony, but Judge Rossiter admitted it under 404(b), and indicated that he weighed it under 403 and found it proper. (Id. at 257:9-14). He also gave a limiting instruction. (Id. at 257:21-258:20). During S.P.'s testimony, he indicated that he was arrested. (Id. at 264:5). Then during cross-examination, S.P. stated that he was arrested for sexually assaulting another individual. (Id. at 267:23-268:5). When Wilson asked him when it happened, S.P. replied, "In 2002. Which it was Greg's victim too." (Id). Wilson failed to object to the testomony at that time, but did later during Norris' redirect of S.P. (Id. at 269:1-270:8). A lengthly sidebar discussion commenced, based on Wilson's motion in limine and an argument insued on whether Wilson "opened the door" to Bartunek's alleged sexual assault. (Id. at 270:9-275:7). However, Wilson's motions were overruled. (Id. at 275:9). Over Wilson's objections, S.P. was allowed to testify further about his crime and the other individual and his relationship with Bartunek. Because this additional testimony went beyond its limited purpose, Judge Rossiter should have immediately given a new limiting instruction, but did not. (Rule 105). Furthermore, neither the alleged assault of S.P., nor the other individual, should have been allowed. This was character evidence, and both S.P. and the other individual were at least 14 years old at the time. (See Appendix [3] at p. 8-9). Therefore, its admission was barred by rules 403, 404, and 414. Most importantly, all this information was known to the prosecutors and the courts in 2002, when Bartunek was charged with assaulting S.P., and yet he was not charged with possession of child pornography, or the alleged assault of the other individual. Two different courts dismissed the charges and wouldn't even pursue a misdemeanor charge. (See Appendix [20]). In order for this past act evidence to be

admissible, "proff must be introduced sufficient to support a finding that the fact does exist." (Rule 104(b)). In other words, the court must find that the S.P. alleged acts were "supported by sufficient evidence to support a finding by a jury that the defendant committed the prior act[s]." United States v. Johnson, 439 F.3d 947, 952 (8th Cir. 2006). S.P.'s uncorroborated and inconsistent testimony alone was simply not enough to show this, in light of the fact that two prosecutors, knowing all the facts at the time, failed to bring Bartunek to trial in 2002 on any charges, whatsoever.

Pecha was the next witness to testify. (Trial at 278:8-382:9). Immediately after establishing Pecha's experience and duties with the Omaha Police Department, testimony was solicited regarding the 2013 Crimestoppers Tip. (Id. at 279:17-290:23). Wilson objected to this testimony based on Rule 403. (Id. at 279:24-280:9). Judge Rossiter again overruled his objection, without providing the 404(b) purpose of the testimony, or performing a 403 analysis, or giving any limiting instructions. (Id. at 280:10-11). Norris later asked Pecha about what the Crimestoppers Tipster told him. (Id. at 282:1-283:5). Wilson objected based on "hearsay" and "relevance". (Id. at 282:18). Norris interruped saying, "Context as to what happens." (Id. at 282:19). Judge Rossiter immediately overruled the objection without taking any further action. (Id. at 282:20). Pecha went on to testify about the details of his "Knock and Talk" investigation with Bartunek resulting from the Crimestoppers Tip. (Id. at 283:4-286:17). Included was testimony about a traffic cone found on Bartunek's vehicle with the word "CHIMO" (CHIld MOlester) writtent on it. (Id. at 284:9-16). At the conclusion, Wilson objected and moved to strike the entire testimony based on Rules 401, 403, and 404. (Id. at 286:20-22). At sidebar was held. (Id. 287:1-290:12). Norris made it very clear that Bartunek's behavior

during the Knock and Talk showed that he was "evasive." (Id. at 287:4-14). Clearly, this was character evidence, forbidden by rule 404. Not only was this forbidden by that rule but also Rules 104, 105, 401, 403, and 802. Wilson then moved for a mistrial based on this testimony and the fact that Pecha stated that the tip was for child pornography. (Id. at 288:4-10). Wilson's objections and motions were overruled. (Id. at 290:8-14). Judge Rossiter made it clear that he believed the testimony was res gestae evidence, as he gave a limiting instruction stating that it was offered for "background and context." (Id. at 290:13-22).

> "Allowing agents to narriate the course of their investigation, and thus spread before jurors daming information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the [S]ixth [A]mendment and hearsay rule." United States v. Silva, 380 F.3d 1010, 1020 (7th Cir. 2004).

Pecha went on to describe the search and seizure of Bartunek's residence on May 25, 2016, and the interrogation of Bartunek immediately after. (Trial at 291:4-316:25). Wilson objected to the introduction of the evidence from the search and seisure based on a previous suppression motion, but his motion was overruled. (Id. at 293:2-6). During the interrogation, Pecha discussed the dolls with Bartunek. (Id. at 315:2-316:20). Wilson again objected based on a previous suppression motion, and again was overruled. (Id. at 314:8-15). However he failed to object to any of the siezed evidence or testimony based on 401, 403, 404, or 414.

The remainder of Pecha's testimony was about Pecha's forensice investigation of the items seized from Bartunek's residence. (Id. at 317:1-359:21). The first item discussed was a thumb drive, Ex. 34, which Pecha claimed contained 357 items of child pornography or child erotica. (Id. at 323:8-335:4). However, according to the Trial Brief, it only contained child erotica. (Doc. 336 at p. 4). Wilson failed to object to this 404

evidence, and no 403 analysis was performed, nor was a limiting instruction given. Although Pecha claimed that three of the images were child pornography, they were not. They were: 1) an image of adult pornography with a banner from a legal gay website, Ex. 34.1; 2) an image of a nude, Ex. 34.2; and 3) an image of a child fooling around in his underwear, Ex. 34.2. It is clear that Norris was trying to convince the judge and the jury that the images of child erotica were intermingled with other images of child pornography and get the evidence admiited as res gestae evidence, avaiding any 403 balancing test or limiting instructions. However this evidence was inadmissable. (See United States v. Fechner, 952 F.3d 954, 961 (8th Cir. 2020) (where child erotica found on an SD card with child pornography was not intrinsice to the charge of transporting and receiving child pornography, and inadmissable.) (See also United States v. Heidebur, 122 F.3d 577, 580 (8th Cir. 1997). Furthermore, no evidence was presented to show that Pecha had any training or that he was an expert in child pronography, erotica, or human sexuality, to allow him to classify images that he selected from the thumb drive as either child pornography or erotica.

> "[A] lay witness, unqualified as an expert in human sexuality, cannot characterize an item as "erotica" because the witness cannot properly offer an opinion that the defendant gained sexual gratification from the admittedly (non-pornographic) item." United States v. Caldwell, 1999 U.S. App. LEXIS 7417 *14 (6th Cir. 1999).

The next witness briefly discussed technical information about the modem, wireless (Wi-Fi) router, and its IP address, found during the search of Bartunek's residence. (Trial at 383:1-391:17).

The last witness to testify was Jordan Warnock. He testified about his forensic analysis of the hard drive from the computer tower, Ex. 36. (Trial at 392:5-457:25). During his analysis, he was able to find file names with titles that were indicative of child pornography. (Id. at

420:8-427:3, Exs. 40-48). However, none of these files existed. (Id. at 448:12-20). Wilson objected to the admittance of these exhibits based on a previous suppression motion, but failed to object to the testimony or exhibits based on rules 401, 403, or 404. Again, no 404 v. 403 analysuis was done, nor was a limiting instruction given. This testimony and evidence should never have been admitted. (See United States v. Chase, 367 Fed. Appx. 979 (11th Cir. 2010)) (where titles of video files that suggested that they may contain child pornography were not admissible).

Finally in closing, Norris included the same "prior act" evidence as he did in his opening statements. (Trial at 482:18-495:4, 503:15-509:24). These included 1) doll and underwear evidence (Id. at 492:20-494:4, 504:10-20, 506:5-8); 2) child erotica (Id. at 483:22-484:5, 494:5-14, 504:10-20, 506:9-11); and 3) file names of non-existent files (Id. at 508:11-509:15). Although the government did not bring up the S.P. evidence, Wilson did:

> "I would just simply suggest to you that if the government's case was so strong against Mr. Bartunek, why bring in somebody to raise allegations from 2000, 1999-2000, 18 years later? And remember, you heard it from [S.P.], that even though charges were filed against Mr. Bartunek, they were dismissed. That would suggest to you that the veracity of these claims by [S.P.] is suspect at best and -- wrong, false, in his position, at worst." (Trial at 497:17-498:1).

The government made it clear that this prior act evidence was meant to show that Bartunek was a bad person deserving punishment, which heavily influenced the jury. Norris told the jury:

> "He [Bartunek] has a desire. He has an urge ... As a matter of fact, if anybody brought a child to visit a place [Bartunek's residence] like that, they would have to be seriously looked at as far as once they entered and saw what the officers observed on the day [of the search]." (Trial at 493:15-494:4).

This "other act" evidence was emphasized throughout the entire trial. The government used it in it opening statment, and by soliciting testimony and evidence of these acts by four witnesses, and again in its closing statements.

Unlike the evidence intrinsic to the charged crimes, attention was drawn to this "other act" evidence over and over again by the sidebar discussions, leaving jurors to speculate on what other horrible things were being hidden from them. And, without immediate limiting instructions, or none at all, jurors had pleanty of time to from a false belief that Bartunek was a bad person deserving to be punished. There is little doubt that this "other act" evidence greatly affected the jurors, and was used improperly as character and propensity evidence, and was unfairly prejudical.

> Testimony of Bartunek's prior "bad acts constituted significant portions of these witness' testimony and was front-and-center in the trial. We cannot say that the jury was not substantially swayed by the inadmissable evidence, and that it limited its inquiry only to the evidence relevant to the case." United States v. Heidebur, 122 F.3d 577, 581 (8th Cir. 1997).

F. The Court of Appeals Ruling

The Court of Appeals ("COA") ruled only on three of the "other act" evidence: 1) admission of photographs of the dolls; 2) admission of testimony from S.P.; and 3) the courts denial of Wilson's motion for a mistrial based on Pecha's testimony of the 2013 Crimestoppers Tip.

It is very clear that the doll evidence was admitted as res gestae evidence, not 404(b) evidence. (Trial at 10:25-11:23, 211:12-212:13). However, the COA ruled on its own accord, that it was not res gestae evidence, but rather 404(b) evidenc showing motive. The COA stated that Bartunek derived "gratification from replicas of young children", and thus, he was more inclined or more likely to derive gratification from child pornography. (See Appendix [1|| at p. 4]). However, this is clearly the definition of propensity evidene, forbidden by Rule 404.

> Propensity is defined as a "disposition or inclination to some action, course of action, habit, etc." (The Oxford English Dictionary 637 (2nd Ed. 1989).

> Propensity is also defined as the "likelyhood that one will engage in [a particular] act." Thomassan v. Perry, 80 F.3d 915, 939-40 (4th Cir. 1995).

In addition to this, if one accepts the COA's reasoning, this presents the jury with a logical circular paridox like the "chicken and the egg" -- which came first -- confusing the jury, which is forbiddent by Rule 403.

The COA did acknowledge that the court erred in not giving a limiting instruction. (See Appendix [1] at p. 4-5). However they ruled that it was harmless. (Id. at p. 5). In light of the fact that this evidence was flaunted over and over before the jury (Trial at 113:17-23, 211:12-219:23, 221:6-222:11, 227:8-230:12, 232:10-233:14, 241:23-243:21, 315:2-316:22, 324:17-19, 376:15-16, 492:22-494:4, 504:10-20, 506:5-8), and considering the affect of the dolls on the minds of seasoned judges, as evidenced by the detention hearings (02/23/2017 Hearing at 17:22-25; 02/28/2017 Hearing at 13:21-23), it can hardly be said that this evidence didn't seriously invoke a highly emotional response to punish Bartunek for having such "wierd" and "concerning" thoughts. (Id.).

The most distrubing thing about both the district court's and the COA's decisions was not that court rules were violated, but rather that both courts acted as mind readers. There was no evidence presented to show Bartunek's "state of mind" regarding the dolls. Even if there was, and regardless of the reason why he had the dolls, the government had no business admitting this evidence. The courts violated Bartunek's First and Fourth Amendment rights in doin so. The people have the right to be safe and secure in their own homes (Amendment IV of the U.S. Constitution), and the government "has no business telling a man, sitting alone in his own house, what books he may read, or what films he may watch", or what toys or clothes or any legal objects he may possess. Stanley v. Georgia,

394 US 557, 565-66 (1969). "Our whole constitutional heritage rebels at the though of giving government the power to control men's minds. (Id.). (See also Amendment I of the U.S. Constitution).

The COA ruled that the S.P. testimony was admissable under Rules 404(b) and 414, and not subject to the exclusion under 403. However, as stated previously, the S.P. alleged acts were not supported by sufficient evidence to be admitted under any rule of evidence. According to the COA, the testimony was admissible under Rule 414 because it involved child pornography. However the olther alleged "bad acts", I.e. that the defendant gave S.P. alcohol, cigarettes, marijuany, and "other gifts", were not allowd under 414. This evidence only served to show that Bartunek was using these as grooming tools for the alleged sexual assaults. One could argue they were res gestae evidence. The problem with that analysis is that while they may have been res gestae evidence for the alleged assaults, there were not for the child pornography. And since S.P. was at least 14 years old at the time, this was forbidden propensity evidence, inadmissible under either Rule 404 or 414.

The COA then stated that it was not an error in declining sua sponte to strike evidence that Bartunek had an underage "victim." However, the COA ignored the fact that Wilson did object a second time under Norris' redirect, but was overruled after a lengthly sidebar. (Trial at 269:1-275:10). Furthermore, like S.P., the "victim" was also 14 years or older at the time, making this evidence inadmissible under Rules 404 and 414. (See Appendix [3] at p. 9-10). There was no 403 analysis done regarding this evidence, nor was a limiting instruction given. The COA also ruled that the S.P. evidence was not unfairly prejudicial because it was 414 evidence. However, the alleged sexual assaults were not 414 evidence,

and were extremely unfairly prejudicial. Furthermore, the "other victim" evidence came as a surprise to Wilson, as he asked S.P. to repeat his allegation. (Trial at 268:3-5). Wilson abruptly ended his cross-examination, and failed to challenge S.P.'s verasity or present available eviednce which contradicted S.P.'s claims. (Id. at 267:23-268:23).

> "If, for example, the "bad act" proffered came as a suprose to the defense, surely Rule 403 would preclude admission, absent unusual circumstances." United States v. Ameri, 297 F. Supp. 2d 1168, 1169 (8th Cir. 2004).

Allowing this evidence was not only a violation of court rules, but also of Bartunek's due process rights and the confrontation clause of Amendment VI of the U.S. Constitution.

> Raping is more serious-and thus more prejudicial- offense than child pornography and thus "inflamed the jury" and ran "the risk of confusing the issues" in the trial and "waisted valuable time" which it did. United States v. Johnson, 238 F.3d 138, 156 (3rd Cir. 2002).

The 2013 Crimestoppers Tip was offered as res gestae evidence as background and context. The alleged purpose of Pecha's testimony was to explain why Pecha was assigned to the case. (Trial at 199:4-201:15). However this was totally irrelevant under Rules 401 and 402 in proving the crimes Bartunek was charged with. The COA ruled that the 2013 Crimestoppers Tip testimony was allowable in its entirety, and that denying Wilson's motion for mistrial was not in error. However, as previously stated, this testimony was based on an anonymous tip that was not supported by evidence required for it to be admitted under any rule of evidence. The ruling was based soley on the objection to the traffic cone with CHIMO ("CHIld MOlester) written on it. But this was not the reason that Wilson gave for his motion. His objection and motion was because Pecha brought up that the tip was for child pornography. (ID. at 281:8-10, 287:25-288:24). This was hearsay evidence not allowed under Rule 802, and was admitted in violation

of the confrontation clause of Amendment VI of the U.S. Constitution. The COA also stated that the testimony was relevant to "evasiveness." However, this is character evidence, inadmissable under Rule 404, and not admissable under Rule 414. The COA did rule that the CHIMO evidence was inadmissable hearsay evidence, but because Wilson failed to object at the time, his objection was untimely, and the error was forgivable.

The COA ruled that any errors made were "harmless errors" because they did not result in unfair prejudice, and they affirmed the judgment of the district court. The COA also ruled that there was no abuse of discretion in denying a mistrial in light of the "extensive" evidence of child pornography and other evidence. However, they ignored the fact that when these errors were committed, several of Barutnek's constitutional rights were violated.

REASONS FOR GRANTING THE PETITION

I. Whether the Federal Rules of Criminal Procedure are Unconstitutionally Overbroad and Vague

This question includes several subsidary questions relevant in answering this broad question. Some of these questions have been answered in part by various circuits, however, their answers were inconsistent. It is important that the Supreme Court clear up these inconsistencies in the law in order to make sure that justice is equally applied throughout the entire United States. The subsidary questions follow:

A. Whether Rule 404 is unconstitutionally overbroad and vague, as it allows evidence to be admitted that is: 1) obtained from an illegal search and seizure; 2) from irrelevant legal items such as stories, pictures, dolls, toys, clothing, objects of a sexual nature, etc., that were not used in a crime or other bad act; 3) admitted under Rule 404(b)(2) as non-

propensity or non-character evidence, but actually used as forbidden propensity or character evidence; 4) not relevant to an actual issue in dispute or an element of the crime; or 5) admitted without a limiting instruction.

B. When evidence is admitted for a limited purpose, is it plain error, in abscence of manifest waiver, to omit an immediate cautionary instruction?

C. Was the res gestae evidence used to circumvent Rules 403 and 404 to allow the goverment to used the evidence of other acts as propensity and/or character evidence, and thus avoid any limiting instructions?

D. Whether "other act" evidence admitted under the wrong rule of evidence is a reversable error.

E. When evidence is admitted under Rule 404 and/or 414, but in doing so, allows inadmissible evidence as propensity and/or character evidence, not allowed under Rule 414, results in a reversable error.

F. Whether it is reversable error to admit other act evidence when the 403 balancing was not done, or done improperly.

G. Whether this extrinsic "other act" evidence, and other inadmissable evidence, and only this evidence, taken as a whole, "inflamed the passions of the jury" and led them to believe that Bartunek was a "bad person" who deserved to be punished, causing the jury to render an unfair verdict.

H. If the Federal Rules of Criminal Procedure are not overly broad or vague, why are they so often violated by the courts?

This case demonstrates how easily the justice system can be manipulated by an overzealous prosecutor, together with ineffective counsel, and a biased judge, to not only violate Federal Rules of Criminal Procedure,

but also violate a defendant's constitutional rights and his right to a fair trial. And, because these Rules are so overbroad and vague, virtually anything and everything can be admitted in a trial in violation of these rules. And, once a defendant has been convicted based on this inadmissable evidence, it can take years to correct this miscarriage of justice, if it happens at all.

The only recourse available to the defendant is through the Courts of Appeals. But they too struggle to apply these Rules with consistency and fairness. According to Rule 102:

> "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." (Rule 102).

However, if these rules are broken, no one but the defendant pays the price. In most cases, as this one, the errors are simply dismissed and labeled as "harmless errors". The court's reasoning is that the defendant still would have been found guilty, if the inadmissible evidence is ignored. An error could hardly be called harmless which resulted in Bartunek being imprisoned for 17.5 years, based on this evidence. If this evidence was truely "harmless" this implies that the evidence was "irrelevant" to the defendant's guilt or innocense, and thus, also violated Rules 401 and 402.

> "Evidence is relevent if: a) it has a tendency to make a fact more or less probable than it would be without the evidence, and b) the fact is of consequence in derermining the action. (Rule 401).

> "Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a Federal Statute, these rules, or other rules presented by the Supreme Court. Irrelevant evidence is not admissible. (Rule 402).

And, these harmless errors also imply that the evidence causing them had little or no probative value, waisted time, and introduced undue delay of the trial, violating Rule 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, waisting time, or needlessly presenting cumulative evicence." (Rule 403).

These Rules contain several ambiguous words such as tendency, more, less, consequence, may, substantially, unfair, undue, needlessly, etc. This lack of specificity has led to an ever increasing amount of inconsistent rulings regarding the admissablility of evidence. And even when the rules are broken, the courts can ignore them by simply labeling the errors as "simple", and thus escape any accountability.

> "In a trial by jury in a federal court, the judge is not merely a moderator, but is governor of the trial, for the purpose of assuring proper conduct and determining questions of law." Ballenbach v. United States, 326 US 607, 612 (1945).

It appears that our courts have taken the approach that the "ends justify the means" in administering justice, excusing their violations of these Rules, in order to get a conviction, no matter the cost to individuals or society in general.

A. Rule 404 Irregularities

1. Several items seized from Bartunek's residence were admitted in the trial as both intrinsic and extrinsic evidence. However, they were seized illegally pursuant to an unconstitutional search warrant. The legality of this warrant was previously discussed.

2. Many of the items seized were obtained illegally, regardless of the validity of the search warrant. These included the doll and underwear evidence, adult pornography, and alleged child erotica. None of these items were listed in the warrant, nor were they used in a crime or bad act or of a criminal nature. Courts routinely use these kinds of objects that are legal to own and possess as evidence of a crime. While some courts allow

thier admission, others do not. And when they are ommited in error, some courts rule that the error(s) were harmless, and others do not. Cases like Bartunek's case, which show these inconsistencies can be found in both state and federal courts:

> See, e.g., Jenkins v. Commonwealth of Kentucky, 275 S.W.3d 226 (Ky.App. 2008) (A new trial was granted when the trial court erred in admitting evidence of pornography and sex toys from defendant's house.); State v. Adamo, 2018-NMCA-013, 409 P.3d 1002(N-M Ct. App. 2017) (Sex toys and male enhancement products were irrelevant to receipt and possession of child pornography.); Warr v. State, 418 S.W.3d 617 (Tex. App. 2009) (Sex toys were erronously admitted which constituted plain error); United States v. Christie, 624 F.3d 558 (3rd Cir. 2010) (Children's toys were admitted in error because they were extremely prejudicial.); Guam v. Shymanovitz, 157 F.3d 1154 (9th Cir. 1997) (Reversal was mandated because condoms, a box of surgical gloves, tube of K-Y jelly, children's underwear, a calendar, and legal sex magazines were not "bad acts."); United States v. Hinkel, 837 F.3d 111 (1st Cir. 2016) (Photos of Hinkel wearing woman's underwear and a child's tutu were of no probative value.); United States v. Schneider, 817 F. Supp. 2d 586 (3rd Cir. 2011) (A faun figurine was admitted under a bizzar theory, and a legal film called Nijinsky was highly prejudicial.); United States v. Evans, 802 F. 3d 942 (8th Cir. 2015) (Stories of adult men engaged in sexual acts with minors were admitted in error.); United States v. Langley, 549 F.3d 726 (8th Cir. 2008) (Photographs of a partially nude to nude girl were admitted in error.); United States v. Hentzen, 638 Fed. Appx. 427 (6th Cir. 2015) (Child erotica was not probative of any material issue.).

3. "Admissability is keyed to the issue for which the evidence is offered." United States v. Gomez, 763 F.3d 845, 858 (7th Cir. 2014). But, as in this case, an overzealous prosecutor can easily convince an already biased judge to admit character propensity evidence disguised as 404 or res gestae evidence. "During trial, counsel fairly bears the heavy burden of guarding against misuse of evidence." United States v. Lewis, 693 f.2d 189, 197 n. 35 (D.C. Cir. 1982). However, Wilson failed to do so.

> This allowed the government to "parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantial innuendo." Huddleston v. United States, 485 US 681, 689 (1988).

According to the government, the doll and underwear evidence, the 2013

Crimestoppers Tip testimony, and the S.P. testimony were introduced as 404 evidence to show intent. "Intent is perhaps the one most likely to be tangled up with improper propensity uses." Gomez at 858. Clearly, the adult pornography, alleged child erotica, and the file names of non-existent files were also 404 evidenc, although Wilson failed to object to this evidence on that basis. Unduly prejudicial evidence might be introduced under Rule 404(b). Michelson v. United States, 335 US 469, 476 (1948). Based soley on this extrinsic evadence, and ignoring the intrinsic child pornography evidence, it is a certain as it was in Bartunek's bail hearing, that this evidnece was not used as non-propensity evidence, but as unfairly prejudicial propensity evidence to show that Bartunek was a "bad man" and needed to be punished for these other "bad acts", reguardless of the truth of this or any other evidence.

> "Even when 404(b) evidence is admitted properly, but is then used improperly to show propensity, we have found the error to be harmful." Gomez at 866.

Rule 404 has two parts, (a) and (b). Rule 404(a)(1) states:

> "Prohibited Uses: Evidence of a person's character or character trait is not admissable to prove that on a particular occasion that the person acted in accordance with the character or trait." (Id.)

This is called propensity evidence. Clearly, this part of the rule is absolute. Like 404(a)(1), 404(b)(1) absolutely prohibits crimes, wrongs, or other acts to prove propensity. However, Rule 404(b)(2) states in part:

> "Permitted Uses: ...This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident ..." (Id.).

This is called non-propensity evidence. The problem with this Rule is two-fold. Clearly, the plain language of the Rule absolutely prohibits propensity evidence. On the other hand, it "may" or may not allow

non-propensity evidence. When it may and when it may not be used is unclear. Another problem is that a "wrong" and "other act" are so vague that the Rule allows the government to introduce evidence based on fabricated and bizzar theories, including a person's fantasies.

> "A person's inclinations and fantasies ... are his own and beyond the reach of government..." Jacobson v. United States, 503 US 540, 551-552 (1991).

Evidentiary problems arrise when evidence can be used as both propensity and non-propensity evidence. Rule 404(b)(2) seems to allow this kind of evidence to be admissable.

> "But if subsection (b)(2) of the rule allows the admission of other acts whenever they can be connected to the defendant's knowledge, intent, or identity (or some other plausible non-propensity purpose), then the bar against propensity evidence would be virtually meaningless." Gomez at 855.

Looking at the 2013 Crimestoppers Tip, it was introduced as res gestae evidence as "background and context." And yet Pecha was allowed to present unproven hearsay evidence that Bartunek possessed child pornography and was a CHIMO (CHIld MOlester). The unproven S.P. allegations did more than accuse Bartunek of possessing child pornography. S.P. was allowed to testify that Bartunek corrupted his morals by allowing him to have alcohol, cigarettes, and marijuana, as well as watch child pornography. (Trial at 262:4-264:5). Clearly this is prohibited propensity evidnece under Rule 404(a)(1) & (b)(1). But that was not the end of the prohibited propensity evidence. S.P claimed he was "tramatized" by the child pornography, implying this cause him to assault other boys. (Id. at 265:21-25). Then he went even further, claiming that Bartunek sexually assaulted another individual that he also assaulted. (Id. at 268:1-5). It takes very little imagination to jump to the conclusion that S.P. was assaulted by Bartunek. However, was not on trial for corrupting the morals of a youth or for sexual assault.

And yet, if the jury believed S.P., there is little doubt that they would let Bartunek go unpunished for these prior acts this time. (The charges were dismissed.).

> "When one looks beyond the purposes for which the evidence is being offered and considers what inferences the jury is being asked to draw from that evidence, and by what chain of logic, it will sometimes become clear .... that despite the label, the jury is essentially being asked to rely on the evidence as proof of the defendant's propensity to commit the charged offense." United States v. Lee, 724 F.3d 968, 978 (7th Cir. 2013).

4. According to the government, the 404(b) and 414 evidence was admitted to prove intent. The COA ruled that the doll evidence was admitted to prove motive. However, neither intent nor motive were at issue because Bartunek plead not guilty to the crimes, and he denied any possession of child pornography. (Trial at 17:16-2). Wilson presented no defense, simply resting his case. (Id. at 476:4-9). In closing, Wilson simply relied on the "presumption of innocense." (Id. at 496:7-23).

> "Intent is not at issue, however when the defendant specifically denies only the criminal act...Rule 404(b) evidence on the issue of intent is not admissible." United States v. Sumner, 119 F.3d 658, 660 (8th Cir. 1997).

> "Where motive is not an element of [the crime], proof of motive is not relevant and thus not admissible." Shannon v. Koehler, 2011 U.S. Dist. LEXIS 157049 (N.D. Iowa,)ct. 19, 2011).

In one case, the supreme Court ruled that a fact need not be in dispute to be admissible, relying on Rule 403 reasons to determine admissiblily. Old Chief v. United States, 519 US 172, 179 (1997). However, Bartunek's case is distinguished from Old chief because the evidence in that case was from a proven past crime,not unproven other acts, and it was used as direct evidence to prove an element of the crime. In Bartunek's case, intent and motive were only formal issues, so that proof of the charged crime, itself, gives rise to an inference of intent and motive. Gomez at 858.

The courts would dismiss an error in admitting this "other act" evidence as a simple error. But this implies that the issue in dispute did not affect the jury's decision, and thus was immaterial and irrelevant, violating Rule 401(b). And it would have not probative value, but was unfairly prejudicial, melead the jury, introduced undue dely, wasted time, and needlessly presented cumulative evidence, also violating Rule 403.

Therefore, it follows that "If an issue is not in dispute and not a direct element of a crime, other acts evidence is inadmissible as the government's case-in-chief." Some circuits have adopted this rule, and others have not. Still others, while they have decliend to adopt this rule, per se, they have looked at the degree to which the non-propensity issue is actually contested in admissability. Gomez at 859-860. For a collection of such cases, see the Adendum in United States v. Crowden, 141 F.3d 1202, 1210 (D.C. Cir. 1998); United States v. Jenkins, 7 f.3d 803 (8th Cir. 1993).

B. Ommission of Limiting Instructions

The only evidence for which a limiting instruction was given prior to its admission was the S.P. testimony. Although a limiting instruction was given at the end of the 2013 Crimestoppers Tip, over Wilson's objection, Judge Rossiter allowed this entire testimony to be given.

> "We hold that whenever evidence is admitted for a limited purpose, it is plain error, in the absence of a manifest waiver, to omit an immediate cautionary instruction." United States v. McClain, 440 F.2d 241, 246 (D.C. Cir. 1971).

No limiting instructions were given for the doll and underwear evidence, or after the S.P. assault allegation was made, or when the hearsay child pornography allegation and CHIMO evidence was admitted, or for the adult pornography, the alleged child erotica, or the file names of non-existent files. In this case, not only did the court fail make sure the Rules were followed, but Bartunek's own defense counsel didn't either.

> "It is a defense counsel's job to alert the court to the potentially prejudicial evidence, and to find ways to mitigate that prejudice." United States v. Lewis, 693 F.2d 189, 197 n. 35 (D. C. Cir. 1982).

Judge Rossiter discussed giving a limiting instruction for the doll evidence, but he didn't because Norris convinced him it was res gestae evidence. . . .

> "If the court admits evidence that is admissable against a party or for a purpose--but not against another party or for another purpose--the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly." (Rule 105).

However, this rule is of little value if the government convinces the judge that the scope must not be limited or that no limiting instruction is needed, or if the defense counsel was ineffective, as was in this case and failed to make timely requests, or any requests at all.

There were three individuals, the judge, the prosecutor, and the defense counsel, who were suppossedly "experts" at law, who share the responsibility of following the Rules. And yet, the need for timely limiting instructions was deliberately or inadvertaintly ignored by all three of them; not once, not twice, but at least seven times. Once again the "Rules" failed to protect Bartunek's rights to a fair trial.

> "The danger of prejudicial effect from such [Rule 404] evidence is so great that only an immediate and contemporaneious instruction can be sufficient to protect defendants." United States v. De Carlo, 458 F.2d 358, 374 (3rd Cir. 1972).

C. The Res Gestae Evidence Circumvented the Rules of Evidence

It is quite clear from the record that the government deliberately introduced inadmissible propensity evicence, forbidden by Rule 404, under the guise of res gestae, to bypass relevancy under Rule 102, limiting instructions under Rule 105, and balancing under Rule 403. In particular, this was done with the doll and underwear evidence, and the 2013 Crimestoppers Tip evidence. Several circuits have criticized the res gestae doctrine, and some have disapproved it.

See, e.g., United States v. Conner, 853 F.3d 1011, 1018-21 (7th Cir. 2009) (crediting several critisims of the inextricably entertwined test and holding that the district cort abused its discretion by admitting evidence pursuant to this doctrine.); United States v. Cunningham, 702 Fed. Appx. 489, 492 (8th Cir. 2017) ("Rule 404(b) does not apply to intrinsic [inextrinsicably intertwined] evidence."); United States v. Ameri, 297 F. Supp. 2d 1168, 1169 (8th Cir. 2004) ("Inextricably intertwined exception to Rule 404(b) would essentially nullify the 404(b) restrictions on "bad act" evidence."); United States v. Green, 617 F.3d 233, 248 (3rd Cir. 2010) (The "inextricably intertwined" doctrine was disapproved.); United States v. Gorman, 613 F.3d 711, 718-19 (7th Cir. 2010) (same).

D. Other Act Evidence Admitted Under the Wrong Rule of Evidence

The COA ruled in this case that it didn't matter what basis or what Rule was used to admit evidence, as long as they could find some reson to justify its admission. (See Appendix at p. 2-5). But the fact is that all of the "other act" evidence was admitted under the wrong basis or Rule. The COA erred for two reasons. First, admitting evidence under the wrong basis or Rule allowed the district court to ignore other rules prohibiting its admittance, and avoid limiting instructions. (See C. above). Second, allowing the Court of Appeals to "second guess" the trial judge violated Bartunek's due process rights, and sent a clear message to the district courts that the "Rules of Evidence don't matter!"

> "[T]he district court erred in admitting the evidence on the other Rule 404(b) bases it listed." United States v. Sumner, 119 F.3d 658, 661 (8th Cir. 1997). And, "it was up to the district court [not the Court of Appeals] to admit the evidence under the proper rule of evidence, so it could "conduct the Rule 403 balancing test in the first instance."" Id. at 662.

E. Evidence Admitted Under Rule 404 and 414 Allows Inadmissible Propensity Evidence

Rules 404 and 414 are so overbroad and vague that they allow evidence to be admitted where admissible and inadmissilbe evidence are intermingled, violating these and other Rules, and unfairly prejudicing defendants. In this case, this was done in admtting both the S.P. and Crimestoppers Tip

testimony. (See A.3. and C. above).

> "Even when 404(b) evidence is admitted properly but is then used improperly to show propensity, we have found the error to be harmful. Gomez at 866.

F. Rule 403 Balancing Was Not Done or Done Improperly

The Rules of Evidence are so vague, as is Rule 403, that judges often fail to apply it when they should, or when they do, apply it in error. According to Rule 403, the balancing test should be done whenever any extrinsic or res gestae evidence is introduced. However, the Rule 403 balancing was not done in admitting the doll or underwear evidence, the 2013 Crimestoppers Tip Testimony, the S.P. testimony regarding the alleged "grooming" and assault, the alleged child erotica, or the file names of non-existent files.

> "Reversal is appropriate only if the trial court failed to engage in the required balancing process or where it is impossible to determine from the record whether it did or not." United States v. Riepe, 858 F.3d 552, 560-61 (8th Cir. 2008).

Not only is it important that judges do a Rule 403 balancing, but in doing so, it is vital that they examin all the evidence before its admission. "One cannot evaluate in a Rule 403 context what one has not seen or read" or heard. United States v. Curtin, 489 F.3d 935, 958 (9th Cir. 2007). In this case, Judge Rossiter failed to do so with the S.P. testimony or the alleged child erotica. He took the word of the government what S.P.'s testimony would be, without knowing all the facts of that previous "other act", which allowed the admittance of unfairly prejudicial evidence. And, he also allowed testimony solicited by the government from Officer Pecha about 357 images of alleged child erotica, without viewing all of them, simply accepting the government's assertion.

> "A court does not properly exercise its balancing discretion under Rule 403 where it fails to place on the scales and personally examine and evaluate all that it must weigh." Id.

G. "other Act" Evidence Should Be Independently Evaluated

In this case, the COA ruled that no matter what errors were committed or by whom or how many there were, they were harmless in light of the extensive evidence supporting the verdict. However, every one of the evendtiary errors affected Bartunek's due process rights to a fair trial. To say otherwise would be to say that the Rules are meaningless. For if the government's case was so strong, it logically follows that all of the extrinsic and res gestae evidence had no probative value, and thus violated Rule 403 reasons for excluding it.

> "The inquiry cannot be merely whether there was enough to support the result apart from the phase affected by the error. It is rather, even so, whether the error itself had a substantial influence." United States v. Sheldon, 628 F.2d 54, 57-58 (D.C. Cir. 1980).

Clearly, the "other act" evidence wrongly used by the government in an effort to convince them that Bartunek previously commited a crime.

> "Improper admission of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes plain error impinging on the fundamental fairness of the trial itself." United States v. Biswell, 700 F.3d 1210, 1319 (10th Cir. 1983).

While Bartunek never commited a prior crime of was convicted of any prior crime, the inferences drawn from the "other act" evidence was just as unfair. These errors cannot be looked at in isolation. When evaluating the effect of extrinsic and res gestae evidence on the minds of the jury, judges need to look at all this evidence (admitted in error or not), taken as a whole, independent of other intrinsic evidence, to determine if the trial is fair.

> "The disctrict court failed to 'balance the alleged errors against the record as a whole and evaluate the fairness of the trial' to determine whether a mistrial or new trial was appropriate." United States v. McBride, 862 F.2d 1316, 1319 (8th Cir. 1988). See also: United States v. Green, 648 F.2d 587 (9th Cir. 1981) (where evedentiary erros, when considered [cumulatively], required reversal).

H. Why Are The Federal Rules Of Evidence So Often Violated?

To ask this question is to answer it. The problem is that these

Rules are so overbroad and vague that it is virtually impossible for them to be followed. And if they are broken, who suffers--the defendant. There is no accountability in our justice system. Judges are appointed for life. Attorneys always have more fish to fry. Our government (which included prosecutors, public defenders, and judges) has abandoned our Constitution, and have decided that the only thing that matters is that they "win the game", rather than "how the game is played."

> "An accused is entitled to a fair trial that is one properly emplying the rules of evidence." United States v. Langley, 549 F.3d 726, 731 (8th Cir. 2008).

The only way to fix the problem is to 1) clarify the Rules of Evidence; and 2) abandon the notion that an error can actually be "harmless". Our justice system must treat all evidentiary errors seriously, and must follow the Rules, treating them as if someone's freedom, or even their life, depends on them--because it does.

II. Whether Warrants Based On Internet Protocol Addresses Should Be Treated Like Informant's Tips To Police

The Fourth Amendment clearly states that "the people [have the right] to be secure in the persons, houses, papers, and effects against unreasonable searches ..." Id. When this admendment was passed, there was no computers, cell phones, electronic data, artificial intellegence, or the Internet. Papers, i.e., information or "data", was kept secure in people's homes, businesses and other secure places. What people did, read, looked at, or said in the privacy of their own homes was their own business, was free from the prying eyes of the government. However, this personal data has moved out of our homes and into the "cloud" on the Internet, store on multiple servers, both in the United States and foreign countries such as the Philippines or China.

> "However, the mere act of accessing [the Internet] does not in itself extinguish privacy expectations." United States v. Heckenkamp, 482 F.3d 1142, 1146 (9th Cir. 2006).

Never-the-less, recent computer apps such as Facebook, Zoom, Tick-Tock, and Omegle have made it possible to expose the most intimate details of our private lives; first to the businesses that control these apps and our data, and then to the government, without sufficient safeguards in place to preserve our freedoms guarateed by our Constitution.

When this personal data travels over the Internet, it is tagged with an Internet Protocol ("IP") address, which is an electronic destinaiton on the Internet. These IP addresses identify particular devices or groups of devices, not a person or an exact physical location. A single IP address can be assigned to thousands of devices, seperated over a wide geographical area, encompasing multiple locations in multiple cities. And with wireless technology, a phone, computer, or other electronic device can share this single IP address to access the Internet, untied to a physical location.

In recent years, law enforcement has relied on electronic evidence such as IP addresses to help track and identify us when investigating crimes. However, both the Police and the Courts are overestimating the ability of IP address information, without additional corroboration, to identify a particular location or individual, bringing harm to numerous innocent people. (See Appendix [23]).

> See, e.g., Arnold v. MaxMind, Inc., 216 F. Supp. 3d 1275 (10th Cir. 2016) (where law enforcement misuses of unreliable IP address information subjected innocent residents of a farm in Kansas to repeated unreasonable searches based on allegations of child pornography and a host of other crimes.); United States v. Stanley, 753 F.3d 114 (3rd Cir. 2014) (the government searched an innocent persons home and computers, looking for child pornography, when a neighbor was actually using his wireless connection to share the illega content.); Police Go On Fishing Expedition, Search the Home Of Seattle Privacy Activists Who Maintain Tor Network, by Ansel Herz, "The Stranger" (Mar. 30, 2106) (where Seattle Police raided

an appartment of two innocent people whose IP address was being used by someone else to distribute a child pornography video.).

This unreliability of this IP address to identify a particular place or person should be addressed under the law. Courts and Police must apply the same skeptism to tips received from informants based on IP addresses as they do to other tips from informants, such as they do with mail, phone, or Crimestoppers Tips, where the tipster may or may not be anonymous. When Police rely on information form an informant based on an IP address, they need to include details in their warrant applications demonstrating: 1) the informant's reliability; 2) corroboration that the Police have obtained; and 3) the technical limitations of this evidence.

> See: Illinois v. Gates, 462 US 213) (An informant's "verasity", "reliability", and "basis of knowledge" are needed in determining whether probable cause exists for issuing of a search warrant. An independent corroboration of an informant's tip is also needed.); Franks v. Delaware, 438 US 154 (1978) (A search warrant affidavit must not contain factual misrepresentations or ommissions relevant to the probable cause determination.).

In this case, the tip actually came from an unknown computer, via a probram whose reliability was unknown.(It is well known that computer programs have errors ("bugs") in them, and are subject to viruses and other malware, making them act in unreliable ways.). There was no information included in the warrant's affidavit regarding the reliability of the IP address information, or its limitations. In fact, the information returned from a subpoena from COX stated that there was uncertainty of the IP address information, was excluded from the affidavit.

The Government has been able to convince the Courts that information from a business is implicitly reliable; that computers make no mistakes; that information received from NCMEC is reliable; and that IP addresses are reliable in identifying the scene of a crime or the criminal commiting it.

However, the courts have been mislead: a corporation's reliability is dependent on the correctness of their policies and that the people follow them; computer information is dependent on people who program them, and that the information is not compromised; coercing businesses or individuals to be informants for the government can lead to constitutional violations; reporting tips through NCMEC doesn't add relibility to the information reported; and IP addressing information is not implictly reliable.

Because of this, the courts lack the knowledge and experience ("Common Sense") needed when evaluating the limitations of our current technologies, and many individuals have had their Fourth Amendment rights violated, causeing undue harm. This is wrong--and a Fourt Amendment violation--to search an individual's house based on uncorroborated assertions that some crime was committed using an IP address associated with a location or a person.

III. Considerations For Granting Review

Bartunek's case presents two related important federal questions regarding the ability of the "Government" to follow the laws/rules governing evidence. The first question deals with laws inside the courtroom and the due process right to a fair trial pursuant to Amendment V of the U.S. Constitution. And, the second question deals with laws outside the courtroom and the right to privacy pursuant to Amendment IV of the U.S. Constitution. The underlying question is actually whether or not our "Government" is above the law.

> "In a just society, those who govern, as well as those who are governed, must obey the law." Leon at 980.

The first question may be too far reaching for the Supreme Court to tackle. But the flip-side is that it is too far reacing not to tackle it. The Fifth Amendment of the U.S. Consitution states in part that:

"No person shall [] be deprived of life, liberty, or property, without due process of law." Id.

However, in this case, the Court failed to follow the rules, depriving Bartunek of this right. As previously discussed, there is much confusion and inconsistency in applying the Rules of Evidence regarding the admissibility of "other act" and res gestae evidence. Whether this Court considers the entire question posed, or one of the subsidary questions, these matters touch on several fundamental rights embedded in our constitutional law--the right to free speech, the right to privacy, the right to confront witnesses, and the due process right to a fair trial. (See Amendments I, IV, V, and VI of the U.S. Constitution.).

The second question is much more limited in scope, however, it addresses one of our most deeply held rights--the right to be secure in our own homes. The time is right for the Court to take up this question, and Bartunek's case is an ideal vehicle for resolving the question presented. We are on the verge of a technological revolution that will put every aspect of our private lives in the hands of large corporate giants like Amazon, Google, Facebook, Microsoft, Tick-Tock, Zoom, etc., and without proper safeguards in place, within the hand of the government, or even worse, a foreign government. Both this Court as well as other state and federal courts have started to look at these kinds of privacy issues with these new technologies, and more needs to be done.

> See, e.g., Carpenter v. United States, 201 LED2D 507, __US__ (2018) (where warrantless access of cell phone records fell short of probable cause; State v. Reid, 194 N.J. 386, 945 A.2d 26, 28 (N.J. 2008) ("We now hold that citizents have a reasonable expectation of privacy [] in the subscriber [IP Address] information they provide to Internet service providers ... ", like COX.; United States v. Stanley, 753 F.3d 114 (3rd Cir. 2014) ("Even a person show subscribes to a lawful, legitimate Internet connection necessarily transmits her signal to a modem and/or servers owned by third parties. This signal carries with it an abundance of detailed, private information about the user's Internet Activity. A holding that an Internet

user discloses her "signal" every time it is routed through third-party equipment could, without adequate qualification, unintentionally provide the government unfettered access to this mass of private information without requiring its agent to obtain a warrant.").

This Court's answer to the questions presented herein will be outcome determinative in this case, and its impact will be widespread. This Court should therefore accept this opportunity to decide these important Constitutional issues. If the Court feels that the two primary questions are too broad or vague, then Petitioner asks the Court to consider a subset of the primary/subsidiary questions, as the court deems appropriate.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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12/17/2020

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