No. _____

In The
Supreme Court of the United States

JERRIS M. BLANKS,

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 A WRIT OF CERTIORARI

JONATHAN STERNBERG
Counsel of Record
JONATHAN STERNBERG, ATTORNEY, P.C.
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
Telephone: (816) 292-7020
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

Counsel for Petitioner

August 19, 2021

QUESTIONS PRESENTED

1. Whether, in direct conflict with decisions of other circuits, the Eighth Circuit correctly held that under Fed. R. Crim. P. 12(c), a defendant who knowingly and voluntarily withdraws a pretrial motion, even as a condition of accepting a plea offer the district court later rejects, cannot ever show good cause to refile it.

2. Whether, in direct conflict with decisions of other circuits, the Eighth Circuit correctly held that a district court has discretion to admit evidence over an objection under Fed. R. Evid. 403 that it is unduly prejudicial or needlessly cumulative, without first having viewed the evidence at issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION OF THE UNITED STATES:

STATUTORY PROVISIONS:

INTRODUCTION

Federal Rule of Criminal Procedure 12(c) provides that a district court may set a deadline for a pretrial motion, which it may extend or reset at any time before trial, and it may consider a motion outside such a deadline if the defendant "shows good cause." In this case, the Eighth Circuit held that whenever a defendant knowingly and voluntarily withdraws a pretrial motion, he *never* can show "good cause" for refiling it. It held this was even if, as here, the withdrawal was part of accepting a plea offer that the district court ultimately rejected. Instead, it stated a blanket rule that "a party cannot show good cause exists when he knowingly and voluntarily waived his right to file" pretrial motions (App., *infra*, 3a).

This Court should issue its writ of certiorari to review whether the Eighth Circuit's blanket rule is a correct statement of the law. The Eighth Circuit is the first and only federal appellate court to hold that a defendant who knowingly and voluntarily withdraws a pretrial motion cannot ever refile it, regardless of the circumstances.

And the Eighth Circuit's decision is directly contrary to other circuits, who without exception have held that even when there was a knowing, voluntary waiver of pretrial motions, good cause exists to file them out of time whenever the defendant shows a legitimate explanation for the waiver and that some new fact not of his own making changed that circumstance. In *United States v. Salahuddin*, 509 F.3d 858, 861-63 (7th Cir. 2007), contrary to the Eighth Circuit's decision here, the Sev-

enth Circuit held this was satisfied where, through no fault of the defendant's, a plea offer failed. Given that the pretrial motions requirement embodied in Rule 12 serves "an important social policy and not a narrow, finicky procedural requirement," *Jones v. United States*, 362 U.S. 257, 264 (1960), the Eighth Circuit's blanket rule jeopardizes that policy.

The Eighth Circuit also departed wholesale from uniform decisions on an important issue, warranting this Court's writ of certiorari, when it held that a district judge may deny a Fed. R. Evid. 403 motion to exclude evidence as unduly prejudicial or needlessly cumulative without even viewing the evidence at issue. Here, it allowed the Government to admit 42 repetitive images of child pornography blown up on a screen before the jury over the defendant's Rule 403 objection, and refused first to view the evidence for itself. The Eighth Circuit held that while viewing the evidence first might be a good practice, it was unnecessary (App, *infra*, 5a).

This, too, is without precedent and directly conflicts with decisions of other circuits. The Sixth, Seventh, and Ninth Circuits all have held that a district court denying a Rule 403 motion before even viewing the evidence at issue abuses its discretion as a matter of law, reversing convictions for this reason. *See United States v. Curtin*, 489 F.3d 935, 937 (9th Cir. 2007) (en banc); *United States v. Loughry*, 660 F.3d 965, 967-68 (7th Cir. 2011); *United States v. Cunningham*, 694 F.3d 372, 386-87 (6th Cir. 2012). Certiorari lies to clarify which approach is the law.

DECISIONS BELOW

The Eighth Circuit's decision (App., *infra*, 1a-8a) is reported at 985 F.3d 1070. The district court's judgment (App., *infra*, 11a-20a) is unreported.

STATEMENT OF JURISDICTION

The Eighth Circuit entered its judgment February 1, 2021 (App., *infra*, 1a). It denied Mr. Blanks' timely petition for rehearing and rehearing en banc on March 22, 2021 (App., *infra*, 21a). This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 12(c) provides:

> (c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.
>
> > 1. Setting the Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of the trial.
> >
> > 2. Extending or Resetting the Deadline. At any time before trial, the court may extend or reset the deadline for pretrial motions.
> >
> > 3. Consequences of Not Making a Timely Motion Under Rule 12(b)(3). If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

Federal Rule of Evidence 403 provides, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

STATEMENT OF THE CASE

A. Charges

The St. Louis County, Missouri Police Department said that in 2011, they found an address on the internet sharing child pornography files, which they linked to a computer at Jerris Blanks' grandmother's home. Mr. Blanks sometimes lived there, as did his cousin. Police seized the computer along with a box of CDs. They said they found 569 images and 14 videos of child pornography on the computer plus another 61 images on the CDs. A detective recorded Mr. Blanks admitting to the possession and said Mr. Blanks volunteered information to help in other investigations, which continued for the next few years. Mr. Blanks said he took the fall for his cousin, and thereafter became a police informant with regard to prostitution, signing a document to that end, and continued to assist police through to 2015.

St. Louis Police said that in 2015, Mr. Blanks' telephone number came up in a child pornography investigation. He voluntarily gave his cell phone to his detective contact. The detective also obtained a warrant for Mr. Blanks' Google and Google Gmail accounts. Police said the phone contained 476 images of child pornography, and the Google account contained a further 14 images.

In 2016, a grand jury in the Eastern District of Missouri indicted Mr. Blanks on one count of receiving child pornography in 2015, in violation of 18 U.S.C. § 2252A(a)(5)(B), to which a superseding indictment in 2017 added two counts of possessing child pornography in 2011, in violation of 18 U.S.C. § 2252A(a)(2).

B. Pretrial motions

Mr. Blanks retained private counsel, and in response to the 2017 superseding indictment timely filed three pretrial motions. First, he moved to dismiss the first two counts of the superseding indictment, possession of child pornography in 2011. He argued: (1) he had acted as a confidential informant for the Government for years, resulting in transactional immunity for any charges from the 2011 search, (2) that the pre-accusation delay of charging him for possession in 2011 violated due process, and (3) the new charges were the result of prosecutorial vindictiveness.

Second, Mr. Blanks moved to suppress anything seized from his online accounts. He argued Google and the National Center for Missing and Exploited Children had acted as agents of law enforcement in violating his right to privacy in his email accounts and giving information from those accounts to law enforcement, which law enforcement in turn viewed without a warrant, violating the Fourth Amendment.

Finally, Mr. Blanks moved to suppress anything seized from the Google warrant. He argued this was because the warrant was outside the St. Louis County, Missouri judge's authority to issue it, and no good faith exception applied.

The Government filed oppositions to all of these motions. Mr. Blanks replied to the Government's responses and filed a supplemental memorandum, to which the Government also responded. With the pretrial motions fully briefed, an evidentiary hearing was set for April 18, 2018, before a magistrate judge.

C. Plea agreement and withdrawal of pretrial motions

Shortly before the April 18 evidentiary hearing, Mr. "Blanks and the Government reached a pre-ruling non-binding plea agreement, which required that [Mr.] Blanks withdraw all previously filed motions and waive his right to file any further pretrial motions" (App., *infra*, 2a).

So, at the April 18 hearing before the magistrate judge, Mr. Blanks requested leave to withdraw all previously filed pretrial motions, waive the evidentiary hearing, and waive filing pretrial motions. As the Eighth Circuit quotes in its opinion, the magistrate judge asked Mr. Blanks,

> "And do you understand that if I accept your withdrawal of motions and waiver of motions that you will not have another opportunity to bring up pretrial motions in this case?" … [Mr.] Blanks responded, "I wasn't quite sure about that because … if the next judge was to for some reason deny our [plea] agreement, then where would that put us?" The following dialogue ensued:
>
> > THE COURT: Well, if you waive your right to have pretrial motions and I accept your waiver of pretrial motions, your case will be going before a district judge for a change of plea or a trial. That would be the next step in the proceedings. …
> >
> > [THE GOVERNMENT]: I just want to make sure the record is clear is [sic] that we had negotiations—our negotiations are a non-binding plea agreement, and so the judge is free to either accept the recommendation or reject it.
> >
> > THE COURT: Okay. So that's the situation. So if you are going forward to the district judge, … I'm not involved in that part of the case. What I would be involved in is whether or not you wish to file pretrial motions or have an evidentiary hearing on those motions. But if I'm accepting your withdrawal of motions and waiver of motions

> then you would not be able to come back before this court and bring up pretrial motions again. Do you understand that?
>
> [BLANKS]: Yes.
>
> THE COURT: Is that something that you wish to do?
>
> ***
>
> [BLANKS]: Yes.

(App., *infra*, 3a-4a).

The magistrate judge then accepted Mr. Blanks' withdrawal of pretrial motions and waiver of pretrial motions, finding he made this knowingly and voluntarily. She then entered an order formally granting the request to withdraw the pretrial motions and waive pretrial motions (App., *infra*, 9a-10a).

D. Rejection of plea agreement, refusal to refile pretrial motions

A change-of-plea hearing then was scheduled before the district court. A chambers conference occurred beforehand, at which Mr. Blanks was not present. Both the Government and Mr. Blanks' counsel later stated on the record that the district court advised the parties at the conference that the plea agreement was unacceptable, and it would refuse to accept the agreement.

Mr. Blanks then moved the district court under Fed. R. Crim. P. 12(c) to allow him to refile his pretrial motions, arguing that the rejection of the plea offer was good cause for him to refile them despite his withdrawal of the previous motions. The Government opposed this, arguing that per the magistrate judge's questioning, Mr. Blanks' withdrawal and waiver was made knowingly, voluntarily, and intelli-

gently, and he knew that even if the district court rejected the plea agreement, the motions could not be refiled.

At a hearing, the district court denied Mr. Blanks' motion, stating:

> From what I've heard, this motion is going to be denied. I don't -- you know, we are now playing with words. Everything is really clear. [The magistrate judge] made this as clear as anyone could ever make it, and so the motion is going to be denied and the case is on for December for trial.

E. Motion to limit number of child pornography images

The case then proceeded to a three-day jury trial.

Before trial, Mr. Blanks moved the district court to curtail the number of child pornography images the Government could show to the jury, arguing that he would stipulate the images in question were child pornography, alleviating the Government from any need to prove that, and that the danger of unfair prejudice from the images far outweighed their probative value. The Government opposed this.

At a hearing before the first day of trial, Mr. Blanks' counsel argued that if the Government is "going to be allowed to" show any images to the jury, "how many images, I am concerned what's really necessary for the jury to understand particularly where [Mr. Blanks] is acknowledging that that's what they are. I would think at least the Court maybe can curtail the number of images because I think there are quite a few." Counsel for the Government responded that "there are approximately 750 filed images that we discovered," and the Government "intend[ed] to show 42 images" to the jury, which was "approximately 5 percent of the images that were

found on the defendant's devices" and came from "six different sources." He said the Government would show the images as slides.

Counsel for the Government then proffered to the court the images it wished to show. The court refused, stating, "No, just show [defense] counsel."

The district court then commented that in most of these sorts of cases it had heard, the Government showed the jury the videos, "[s]o it is a substantial withdrawal" for the Government not to do so here. Mr. Blanks' counsel argued, "If there are six different locations and they need to prove each one, we would say six pictures should be sufficient to do that." The court disagreed, saying, "In these cases ordinarily all the images are -- all the videos are shown. I think that's -- I'm really surprised that the United States is only going to show that number of -- so, yeah, overruled." It made no further analysis, and did not view any of the images. As the Eighth Circuit put it, "the district court failed to view the images before deciding to admit them" (App., *infra*, 6a).

At trial, the Government then displayed all 42 images it had discussed on a large screen (App, *infra*, 3a), each of which the witness introducing it described. At the outset, Mr. Blanks' counsel renewed his objection to showing any of the images to the jury, or if images were shown, to limit them to six, and sought a lasting objection. The district court overruled the objection but granted a lasting objection.

The jury found Mr. Blanks guilty on all three counts (App., *infra*, 1a, 11a). The district court then sentenced him to 130 months in prison (App., *infra*, 12a).

F. Eighth Circuit's decision

Mr. Blanks then timely appealed to the U.S. Court of Appeals for the Eighth Circuit.

Mr. Blanks first argued that the district court had abused its discretion in refusing to allow him to refile his pretrial motions after it rejected the plea agreement, as this was "good cause" under Fed. R. Crim. P. 12(c) to allow him to do so out of time, for he only had withdrawn his pretrial motions so as to accept the Government's plea offer, and the district court's rejection of the offer was of no fault of his own. He cited decisions from other circuits reversing similar denials of requests to refile pretrial motions when a defendant shows a legitimate explanation for his waiver but some new fact not of his own making changed that circumstance, including *United States v. Salahuddin*, 509 F.3d 858, 861-63 (7th Cir. 2007) (where plea withdrawn on Government's mistake); *United States v. Chavez*, 902 F.2d 259, 263-64 (4th Cir. 1990); and *United States v. Jones*, 619 F.2d 494, 497 (5th Cir. 1980).

The Eighth Circuit affirmed, holding "that the district court did not abuse its discretion in denying [Mr.] Blanks's motion for leave to file post-deadline pretrial motions in light of his knowing and voluntary waiver of his right to do so" (App., *infra*, 3a). It held that without exception, "a party cannot show good cause exists when he knowingly and voluntarily waived his right to file" pretrial motions (App., *infra*, 3a). It rejected that a legitimate explanation for the waiver and a change of circumstances beyond the defendant's control could be "good cause" (App., *infra*, 5a).

Mr. Blanks also argued that the district court had abused its discretion in denying his Rule 403 motion in limine without first having viewed the images in question. He cited decisions from other circuits holding that a district court denying a Rule 403 motion to exclude evidence as unduly prejudicial or needlessly cumulative before even viewing the evidence at issue abuses its discretion as a matter of law, reversing convictions for this reason. *See United States v. Curtin*, 489 F.3d 935, 937 (9th Cir. 2007) (en banc); *United States v. Loughry*, 660 F.3d 965, 967-68 (7th Cir. 2011); *United States v. Cunningham*, 694 F.3d 372, 386-87 (6th Cir. 2012).

The Eighth Circuit affirmed the district court's admission of the images at issue without having viewed them first, stating, "Although it might well have been a better practice to examine the images in question, the district court did not abuse its discretion by making its Rule 403 decision without having done so" (App., *infra*, 6a). It held this was because allowing some images to be shown to the jury generally was not an abuse of discretion (App., *infra*, 6a-7a).

REASONS FOR GRANTING THE PETITION

Two of the Eighth Circuit's holdings in this case depart from the existing law of the United States, warranting this Court's review and clarification.

First, the Eighth Circuit's adoption of a blanket rule that a defendant cannot ever show good cause under Fed. R. Crim. P. 12(c) to refile pretrial motions out of time when he knowingly and voluntarily had withdrawn them directly conflicts with decisions of other circuits, and is the only circuit to have adopted such a rule. Rather, other circuits without exception have held that even when there was a knowing, voluntary waiver, good cause existed whenever the defendant showed a legitimate explanation for the waiver and that some new fact not of his own making changed that circumstance, and reversed a district court's conclusion otherwise as an abuse of discretion. *See United States v. Salahuddin*, 509 F.3d 858, 861-63 (7th Cir. 2007); *United States v. Chavez*, 902 F.2d 259, 263-64 (4th Cir. 1990); and *United States v. Jones*, 619 F.2d 494, 497 (5th Cir. 1980). In *Salahuddin*, with which the Eighth Circuit's decision here directly conflicts, the good cause was that the defendant had withdrawn his pretrial motions in order to accept a plea offer, but the plea later failed through no fault of his own. This Court should issue its writ of certiorari to clarify which approach is proper under Rule 12(c).

Second, the Eighth Circuit's holding that a district judge may deny a Fed. R. Evid. 403 motion to exclude evidence as unduly prejudicial or needlessly cumulative without first even viewing the evidence at issue also directly conflicts with decisions

of other circuits, and is the only circuit to have held so. To the contrary, the Sixth, Seventh, and Ninth Circuits have held that a district court denying a Rule 403 motion before even viewing the evidence at issue abuses its discretion as a matter of law, reversing convictions after trials. *See United States v. Curtin*, 489 F.3d 935, 937 (9th Cir. 2007) (en banc); *United States v. Loughry*, 660 F.3d 965, 967-68 (7th Cir. 2011); *United States v. Cunningham*, 694 F.3d 372, 386-87 (6th Cir. 2012). This Court also should grant its writ of certiorari to clarify which approach is proper under Rule 403.

A. The Eighth Circuit's blanket rule that a defendant cannot ever show good cause under Fed. R. Crim. P. 12(c) to refile pretrial motions out of time when he knowingly and voluntarily had withdrawn them is in direct conflict with decisions of the Fourth, Fifth, and Seventh Circuits that when a defendant shows a legitimate explanation for the waiver and that some new fact not of his own making changed that circumstance, it is good cause to file pretrial motions out of time, including that a plea offer failed through no fault of the defendant's.

The Eighth Circuit holds "the district court did not abuse its discretion in denying [Mr.] Blanks's motion for leave to file post-deadline pretrial motions in light of his knowing and voluntary waiver of his right to do so" (App., *infra*, 3a). It holds this is because, under Fed. R. Crim. P. 12(c), as a rule, "a party **cannot** show good cause exists when he knowingly and voluntarily waived his right to file" pretrial motions (App., *infra*, 3a) (emphasis added). It offers no further analysis, holding "[t]he fact that the district court's rejection of the plea agreement was beyond

[Mr.] Blanks's control does not alone create good cause in light of his acceptance of that risk at the time of the waiver" (App., *infra*, 5a).

The Eighth Circuit's rule that there "cannot" be good cause to re-file pretrial motions if the defendant made a "knowing and voluntary waiver," even if the circumstances leading to it have changed due to something beyond his control, is without precedent anywhere in the United States, even in the Eighth Circuit. It is also directly contrary to decisions of other circuits holding that there "can" be good cause in this circumstance, even reversing convictions to allow defendants to refile pretrial motions in similar situations.

1. The Eighth Circuit's rule is unsupported by its own prior decisions.

In its decision, the Eighth Circuit suggested that its prior decision in *United States v. Bloate*, 534 F.3d 893, 901 (8th Cir. 2008), supported its blanket rule that "a party cannot show good cause exists when he knowingly and voluntarily waived his right to file" pretrial motions, regardless of the circumstances (App., *infra*, 3a).

Bloate did not involve this situation and does not support this rule. There, the defendant never filed any pretrial motions and then waived filing any so he could enter into a plea agreement and plead guilty. *Id.* at 896, 900-01. Only at the change-of-plea hearing did the defendant, *himself*, elect not to plead guilty. *Id.* at 896. He then sought to file pretrial motions out of time, the district court refused, and the Eighth Circuit affirmed. *Id.* at 900-01. There was nothing out of the de-

fendant's control, but instead he withdrew his own offer to plead guilty, despite having been fully informed of the consequences. *Id.*

Unlike in *Bloate*, here Mr. Blanks *did* file pretrial motions. The Government even fully responded to them. And most crucially, unlike in *Bloate*, where the failure to go through with the guilty plea was the defendant's own choice, here the district court itself rejected the plea agreement, which was something Mr. Blanks could not control.

The Eighth Circuit also cites its prior decision in *United States v. Garrido*, 995 F.2d 808, 815 (8th Cir. 1993) (App., *infra*, 5a). *Garrido* also did not involve this situation and does not support the Eighth Circuit's rule here.

In *Garrido*, the defendant filed pretrial motions, but before the Government responded he agreed to waive them so as to enter into a plea agreement that would require him to give truthful information to the Government, and a magistrate judge informed him of the consequences of doing so. 995 F.2d at 813. But then, he "lied several times at debriefing," which caused the Government to withdraw the plea agreement. *Id.* He then sought to refile his pretrial motions, the district court refused, and this Court affirmed. *Id.* at 813-14. "[T]he failure to implement an agreement was the direct result of [the defendant's] lying; the failure was not due to any action or fault of" the Government or anyone else, such as the district court. *Id.*

Again, this case is nothing like *Garrido*. Mr. Blanks filed pretrial motions to which the Government responded. He did everything he was supposed to do in or-

der to obtain the benefit of the agreement into which he and the Government had entered. Only the district court's rejection of the agreement forced him to have to go to trial.

The Eighth Circuit's blanket rule in this case that under Rule 12(c), "a party cannot show good cause exists when he knowingly and voluntarily waived his right to file" pretrial motions, regardless of the circumstances (App., *infra*, 3a), is without precedent even in the Eighth Circuit. It is a new rule created in this case.

2. The Eighth Circuit's rule directly conflicts with decisions of the Fourth, Fifth, and Seventh Circuits, which far more fit the purposes of Rule 12 than a blanket rule disallowing good cause in all cases of knowing and voluntary waivers.

The Eighth Circuit's blanket rule in this case also is without precedent in any other circuit. No other circuit has held that as a rule, under Rule 12(c) a party cannot ever show good cause exists to file pretrial motions out of time when he knowingly and voluntarily waived his right to file them, regardless of the circumstances.

Instead, other circuits have rejected the Eighth Circuit's rule and held instead that "good cause" under Rule 12(c) is an accommodating standard. "Good cause is a flexible standard heavily dependent on the facts of the particular case as found and weighed by the district court in its equitable discretion. At a minimum, it requires the party seeking a waiver to articulate some legitimate explanation for the failure to timely file." *United States v. Walden*, 625 F.3d 961, 965 (6th Cir. 2010).

So, even when there was a knowing, voluntary waiver, other circuits have held good cause existed whenever the defendant showed a legitimate explanation for the waiver and that some new fact not of his own making changed that circumstance, and reversed a district court's conclusion otherwise as an abuse of discretion.

In *United States v. Salahuddin*, 509 F.3d 858, 861-63 (7th Cir. 2007), the Seventh Circuit held the failure to allow a defendant to proceed on a suppression motion after a plea was withdrawn on the Government's mistake of law was an abuse of discretion, regardless of the fact that he knowingly and voluntarily had waived his pretrial motions on the record, as here, so as to accept the Government's plea offer. 509 F.3d at 861-63. The Eighth Circuit's decision in this case directly conflicts with the Seventh Circuit's in *Salahuddin*.

In *Salahuddin*, after the defendant pleaded guilty and the district court accepted the plea, the parties were confused about whether certain juvenile convictions made the Armed Career Criminal Act apply. *Id.* at 861. Ultimately, after the Government contended the Act did apply, the district court allowed the defendant to withdraw his plea. *Id.* But then a magistrate judge refused to allow the defendant to move to suppress evidence out of time, holding that like Mr. Blanks here, he knowingly and voluntarily had withdrawn his pretrial motion. *Id.* The Seventh Circuit held this was an abuse of discretion:

> It seems incongruous to permit a defendant to withdraw a guilty plea and go to trial while not permitting him to litigate the admissibility of

> significant evidence. It is true that the considerations governing such a motion are different in every case and rarely all favor one side. … Certainly, once [the defendant] was permitted to withdraw his plea and go to trial, it made sense to permit him to litigate the suppression motion. …
>
> Moreover, it is not clear that, under these circumstances, permitting the defendant an opportunity to test whether the key evidence against him is admissible, after he withdrew a guilty plea, controverts the purpose of Rule 12(e). Here, neither the speed and efficiency of the judicial process nor fairness to the Government appears to be at stake. The pretrial motions requirement embodied in Rule 12 serves "an important social policy and not a narrow, finicky procedural requirement," *Jones v. United States*, 362 U.S. 257, 264 (1960), and these goals would not be jeopardized by granting a hearing on the motion to suppress in these unique circumstances.

Id. at 862-63 (internal citation shortened).

Other circuits have come to similar conclusions when the defendant showed a legitimate explanation for a prior knowing and voluntary waiver but that some circumstance beyond his control had changed that.

In *United States v. Chavez*, 902 F.2d 259, 263-64 (4th Cir. 1990), the defendant knowingly had not filed any prior pretrial motions, but the Fourth Circuit reversed the district court's decision refusing to allow him to file a motion to suppress an informant's testimony eleven days before trial as an abuse of discretion. The Government had not turned over the grand jury transcript containing the basis of the informant's knowledge until only one day before that, and the Government could not show prejudice, especially as it had filed a detailed response. *Id.* This result is also directly contrary to the Eighth Circuit's rule here that "a party cannot show good cause exists when he knowingly and voluntarily waived his right to file"

pretrial motions (App., *infra*, 3a). If that were so, the Fourth Circuit's conclusion would be wrong.

Finally, in *United States v. Jones*, 619 F.2d 494, 497 (5th Cir. 1980), the defendant knowingly did not file a motion to suppress on time, but the Fifth Circuit reversed the refusal to allow him to file a motion to suppress 41 days late as an abuse of discretion. The discovery leading to the motion had taken place after the deadline. *Id.* Again, under the Eighth Circuit's blanket rule here, the Fifth Circuit's conclusion also would be wrong.

Mr. Blanks cited all these decisions before the Eighth Circuit, but the Eighth Circuit's decision only mentions *Salahuddin*, and only then briefly in a footnote (App., *infra*, 5a-6a n.3). The Eighth Circuit says *Salahuddin* "lend[s Mr. Blanks] no aid," as there, the "district court clearly erred when it denied review of a pretrial motion that was untimely filed as a result of the parties' mutual mistake of law regarding the applicability of a prior offense" (App., *infra*, 6a n.3).

That is a distinction without a difference. The question is whether a knowing, voluntary withdrawal and waiver of a pretrial motion means, as the Eighth Circuit holds here, that in all circumstances the defendant "cannot show good cause exists" (App., *infra*, 3a). In *Salahuddin*, as here, there was a knowing, voluntary withdrawal of the pretrial motions as a condition of pursuing a plea agreement, and it was only because, due to a circumstance beyond the defendant's control (the mutual mistake), that circumstance was changed: the plea agreement was withdrawn.

Therefore, good cause existed, *despite* the knowing and voluntary waiver. Under the Eighth Circuit's rule that "a party cannot show good cause exists when he knowingly and voluntarily waived his right to file" pretrial motions (App., *infra*, 3a), the Seventh Circuit's conclusion also would be wrong.

Like the defendant in *Salahuddin*, the Government and Mr. Blanks' attorney both were mistaken that the district court would accept the plea agreement. Instead, through no fault of their own, this required a trial. But as with the withdrawal of the plea due to mutual mistake in *Salahuddin*, "It seems incongruous to [reject a plea offer and require a] trial while not permitting [Mr. Blanks] to litigate the admissibility of significant evidence" or the constitutional propriety of the indictment. 509 F.3d at 862. "Certainly, once" a trial was required, "it made sense to permit [Mr. Blanks] to litigate the suppression motion" and motion to dismiss. *Id.* And at the same time, as in *Salahuddin*, allowing this would fit Rule 12's goals and purposes.

Moreover, as in *Salahuddin*, the Government would not have been prejudiced by allowing Mr. Blanks' motions out of time. This is because the Government already had responded to them. *See also Chavez*, 902 F.2d at 263-64 ("the government would have suffered no prejudice had the court granted the defendant a suppression hearing before trial, especially since the government prepared a lengthy response to [the] motion").

Moreover, realistically, what else was Mr. Blanks to do? His counsel reached a plea agreement with the Government that he was prepared to accept, avoiding a trial. All he had to do was withdraw his pretrial motions and waive filing any others. So, he did exactly that. But then the district court *rejected* the plea agreement. Mr. Blanks had no control over what the district court would or would not do. But is this necessarily to mean that his important constitutional rights he sought to protect in his pretrial motions – his right to due process in the motion to dismiss, and his Fourth Amendment rights in his motions to suppress – now receive no consideration? Is it to mean that he can be found guilty of unlawful charges? Is it to mean the Government can introduce unlawfully obtained evidence?

The risks to the public from concluding that in these singular circumstances, like in *Salahuddin*, Mr. Blanks did not show good cause to refile his pretrial motions are manifest. Otherwise, nothing would stop the Government from dangling plea agreements that it knows likely are far too lenient for a district court to accept, sandbagging a scared defendant and inexperienced counsel into waiving pretrial motions in order to pursue that agreement, and then avoiding any suppression or dismissal as a result when the agreement inevitably is rejected.

The Constitution demands more. Rule 12 demands more. As in *Salahuddin* and the other decisions cited above, they demand that when a defendant withdraws pretrial motions to pursue a plea agreement, but the district court rejects the agreement through no fault of the defendant's and outside his control, he has good

cause to refile the pretrial motions. Holding otherwise unnecessarily puts procedural technicalities above the Constitution.

The Eighth Circuit's blanket rule that a defendant cannot ever show good cause under Fed. R. Crim. P. 12(c) to file pretrial motions out of time when he knowingly and voluntarily had withdrawn them is in direct conflict with decisions of these other circuits holding that when a defendant shows a legitimate explanation for the waiver and that some new fact not of his own making changed that circumstance, it is good cause to file pretrial motions out of time. This Court should issue its writ of certiorari to clarify which approach is proper under Rule 12(c).

B. The Eighth Circuit's decision that a district court may deny a Fed. R. Evid. 403 motion to exclude evidence as unduly prejudicial or needlessly cumulative without even viewing the evidence at issue directly conflicts with decisions of the Sixth, Seventh, and Ninth Circuits holding that a district court denying a Rule 403 motion before even viewing the evidence at issue abuses its discretion as a matter of law.

The Eighth Circuit's holding that a district court properly exercises its discretion to deny a Fed. R. Evid. 403 motion to exclude evidence as unduly prejudicial or needlessly cumulative when it fails first to view the evidence at issue also warrants this Court's review. The Eighth Circuit cites no authority for this holding. It is without precedent anywhere and is directly contrary to the decisions of three other circuits who hold that as a matter of law, a district court abuses its discretion when it denies a Rule 403 motion without first viewing the evidence at issue.

When the Government sought to introduce 42 images of child pornography to the jury at trial, Mr. Blanks moved under Rule 403 to curtail their number to six,

arguing that what the Government sought to show the jury was needlessly cumulative and unduly prejudicial. Counsel for the Government then proffered to the court the images it wished to show. The court refused, stating, "No, just show [defense] counsel." Despite this, not having viewed the images at all,[1] many of which were repetitive, several even the same image more than once, it denied Mr. Blanks' motion, stating only, "In these cases ordinarily all the images are -- all the videos are shown. I think that's -- I'm really surprised that the United States is only going to show that number of -- so, yeah, overruled."

In its decision, the Eighth Circuit acknowledges "the district court failed to view the images before deciding to admit them" (App., *infra*, 6a). Nonetheless, citing no authority, it holds that while "it might well have been a better practice to examine the images in question, the district court did not abuse its discretion by making its Rule 403 decision without having done so" (App., *infra*, 6a).

The Eighth Circuit's decision that a district court may deny a Rule 403 objection without first viewing the evidence at issue is without precedent. The decision cites no authority for this holding (App., *infra*, 6a). In the paragraph containing this holding, it only cites *United States v. Worthey*, 716 F.3d 1107, 1114 (8th Cir.

---

[1] 42 separate images is more than in any other reported decision in the Eighth Circuit involving showing a jury child pornography. *See United States v. Evans*, 802 F.3d 942, 945-46 (8th Cir. 2015) (spending five minutes showing 14 images and 22 short video clips); *United States v. Robertson*, 560 F. App'x. 626, 629-30 (8th Cir. 2014) (17 three-and-a-half-inch photographs); *United States v. McCourt*, 468 F.3d 1088, 1092-93 (8th Cir. 2006) (seven videos); *United States v. Becht*, 267 F.3d 767, 768 (8th Cir. 2001) (39 images).

2013) (App., *infra*, 6a-7a). But *Worthey* did not involve this issue, and instead merely held allowing the Government to show the jury several videos was not improper. *Id.*

To the contrary, the only other circuits that have heard this issue uniformly have held that a district court *must* view all evidence objected to under Rule 403 before ruling on the objection, and otherwise abuses its discretion as a matter of law.

In *United States v. Curtin*, 489 F.3d 935, 957-58 (9th Cir. 2007), the Ninth Circuit en banc held that as a matter of law, a district court abuses its discretion in denying a motion to exclude evidence under Rule 403 without first having viewed the evidence at issue, and reversed the defendant's conviction for this reason.

The defendant in *Curtin* sought to exclude under Rule 403 sexual stories he allegedly wrote, but district court did not read them before denying his objection and allowing the Government to admit them, based purely on what the Government's counsel reported they were. *Id.* at 957. The Ninth Circuit noted:

> This troubling circumstance raises a question primarily of procedure or process rather than substance: Was the trial court in this case required to have read every word of these stories when exercising its balancing discretion pursuant to Rule 403 to determine whether their potential for undue prejudice substantially outweighed their probative value? Our answer here is in the affirmative. The inflammatory nature and reprehensible nature of these abhorrent stories, although generally relevant, is such that a district court making a Rule 403 decision must know precisely what is in the stories in order for its weighing discretion to be properly exercised and entitled to deference on appeal. We see no other way for a court to make this important decision involving prejudice and redundancy, especially when the stories are such that a

> court finds itself unable to read all of them. In this context, reliance on an offer of proof simply is not enough.

Id.

Therefore, the Ninth Circuit held "**as a matter of law** that a court does not properly exercise its balancing discretion under Rule 403 when it fails to place on the scales and personally examine and evaluate all that it must weigh," and "[r]elying only on the descriptions of adversary counsel is insufficient to ensure that a defendant receives the due process and fair trial to which he is entitled under our Constitution, as this case demonstrates. **One cannot evaluate in a Rule 403 context what one has not seen or read.**" (Emphasis added). It reversed the defendant's conviction and ordered a new trial. *Id.*

In *United States v. Loughry*, 660 F.3d 965, 970-71 (7th Cir. 2011), relying on and following *Curtin*, the Seventh Circuit held the same for child pornography photographs and videos to which the defendant objected under Rule 403 but which the district court did not view before denying the objection. As with the stories in *Curtin*, "instead of examining the photographs and videos for itself, the [district] court relied on the government's description of the contested evidence in making its decision under Rule 403." *Id.* at 970.

Noting that the Ninth Circuit had held in *Curtin* that "a district court's failure to review challenged evidence when considering whether such evidence should be excluded under Rule 403 is error as a matter of law," the Seventh Circuit agreed. *Id.* at 970-72. It held, "a district court, in exercising its discretion under Rule 403,

must carefully analyze and assess the prejudicial effect of challenged evidence." *Id.* at 971. So, while it is possible for a district court to *exclude* evidence as unduly prejudicial without viewing it – "[t]here may be cases where the probative value of the evidence is so minimal that it will be obvious to the court that the potential prejudice to the defendant substantially outweighs any probative value the evidence might have" – this is not so to *admit* that evidence, as "[t]he safest course, however, is for the court to review the contested evidence for itself." *Id.*

The Seventh Circuit agreed with the Ninth Circuit that

> relying on the parties' descriptions was insufficient. Few, if any, details were provided to the court when it was deciding whether to admit the evidence. The government's only description of the various challenged exhibits was that some of them depicted pornography that was similar to that on the Cache and that others depicted "hard core" pornography. Based on that vague description, the court could not have properly weighed the prejudicial impact of the challenged evidence against whatever probative value the court believed the evidence had.

Id. Rather,

> [g]iven the inflammatory nature of the evidence, the district court needed to know what was in the photographs and videos in order for it to properly exercise its discretion under Rule 403. Without looking at the videos for itself, the court could not have fully assessed the potential prejudice to Loughry and weighed it against the evidence's probative value. *See Curtin,* 489 F.3d at 958 ("One cannot evaluate in a Rule 403 context what one has not seen or read."). We therefore hold that, in light of the evidence in this case, the district court abused its discretion under Rule 403 when it failed to review the challenged videos before they were admitted in evidence.

Id. at 972. The Seventh Circuit reversed the defendant's conviction. *Id.* at 975.

Finally, in *United States v. Cunningham*, 694 F.3d 372, 386-87 (6th Cir. 2012), the Sixth Circuit joined the Ninth and Seventh Circuits in holding that a district court abuses its discretion as a matter of law when it admits evidence over a Rule 403 objection without first having viewed the evidence. There, the Government sought to introduce several videos of child pornography, which the district court "failed to view … before ruling on their admissibility." *Id.* at 383.

The Sixth Circuit found "guidance in" the Ninth Circuit's decision in *Curtin* and the Seventh Circuit's in *Loughry*. *Id.* at 383-84. It noted that "the *Loughry* court, like the *Curtin* court, did not make a distinction between extrinsic and intrinsic evidence. Rather, the *Loughry* court focused on the inflammatory character of the evidence and concluded that 'the district court needed to know what was in the photographs and videos in order for it to properly exercise its discretion under Rule 403.'" *Id.* at 386 (quoting *Loughry*, 660 F.3d at 972). It also found "both *Curtin* and *Loughry* persuasive," agreeing "that a district court should know what the challenged evidence actually is – as opposed to what one side or the other says it is – 'in order for [the court's] weighing discretion to be properly exercised and entitled to deference on appeal.'" *Id.* at 386 (quoting *Curtin*, 489 F.3d at 957).

The Sixth Circuit also agreed with the Seventh Circuit that in limited circumstances, evidence can be *excluded* under Rule 403 without being viewed first, but cannot be *admitted* over a Rule 403 objection without the district court first knowing what it is:

> Thus, we conclude that, speaking generally, a district court should personally examine challenged evidence before deciding to admit it under Rule 403. However, as *Loughry* reflects, while that is the best course, *see* 660 F.3d at 971 ("The safest course, however, is for the court to review the contested evidence for itself."), it may be that, when a court has been provided with a sufficiently detailed description of the challenged evidence and decides to reject the evidence, it need not undertake that further review. In other words, if, after reviewing a detailed description of the evidence, it is obvious to the court that the probative value of the evidence is so minimal that it is substantially outweighed by the danger of unfair prejudice, a court need not personally examine it. *See id.*

Id. at 386-87. But what the district court could not do was refuse to view the evidence at issue "to assess their prejudicial impact and instead, over objection, rely only on written descriptions prior to admitting them," as this "was 'arbitrary ... [and] unreasonable.'" *Id.* at 387 (citation omitted).

Mr. Blanks addressed all of these decisions before the Eighth Circuit, but its decision does not mention any of them at all, let alone seek to distinguish them. Instead, the Eighth Circuit says the district court here did not abuse its discretion because the 42 images ultimately were admissible (App., *infra*, 6a-7a).

That the district court might after viewing the evidence at issue and engaging in a proper Rule 403 analysis have admitted them anyway is not a distinction from these other decisions. As the Ninth, Seven, and Sixth Circuits all held, it remains the district court's decision whether evidence is too prejudicial, and without viewing the evidence first, "the court could not have properly weighed the prejudicial impact of the challenged evidence against whatever probative value the court believed the evidence had." *Loughry*, 660 F.3d at 972. So, "a district court's failure

to review challenged evidence when considering whether such evidence should be excluded under Rule 403 is error as a matter of law ...." *Id.* at 970 (citing *Curtin*, 489 F.3d at 958.

The Eighth Circuit's holding that a district judge may deny a Fed. R. Evid. 403 motion to exclude evidence as unduly prejudicial or needlessly cumulative without even viewing the evidence at issue is a lone outlier among the circuits and directly conflicts with decisions of the Sixth, Seventh, and Ninth Circuits that failing to view the evidence at issue before admitting it over a Rule 403 objection is error as a matter of law. This Court should grant its writ of certiorari to clarify which approach is proper under Rule 403.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN STERNBERG
Counsel of Record
JONATHAN STERNBERG, ATTORNEY, P.C.
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
Telephone: (816) 292-7020
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

Counsel for Petitioner