No. 21-5489

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

REPLY OF THE PETITIONER

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

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ARGUMENT

Jerris Blanks seeks this Court's writ of certiorari to review two questions the Eighth Circuit's opinion below raises. In his petition, he showed the Eighth Circuit's answer to both directly conflicts with other Circuits' conclusions, warranting this Court's clarification. The Government's brief in opposition does not refute this for either question. This Court should issue its writ of certiorari to review both.

A. The Court should review whether 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 P. 12(c) to refile pretrial motions out of time when he knowingly and voluntarily had withdrawn them is a correct statement of the law.

The first question Mr. Blanks' petition presents is whether the Eighth Circuit correctly held a defendant "cannot show good cause exists" to file pretrial motions out of time "when he knowingly and voluntarily waived his right to file" them. Or, as other circuits have held, does good cause exist to file pretrial motions out of time after a waiver whenever the defendant shows a legitimate explanation for the waiver and that some new fact not of his own making changed that circumstance?

In its brief in opposition, the Government reframes this question as whether it is an abuse of discretion to deny "leave to file untimely pretrial motions" after a waiver when the defendant was "informed that the waiver would apply in the circumstance in which [he] sought to avoid it" (Brief in Opp. i). It points to the fact that the magistrate judge advised Mr. Blanks that the district judge could reject the Government's plea offer, and that he would be unable to refile pretrial motions he was withdrawing as a condition of accepting the plea offer (Brief in Opp. 8-9).

The Government makes two errors that defeat its argument. First, the Eighth Circuit's decision did not turn on this distinction. Instead, it stated what Mr. Blanks called in his petition a blanket rule – what the Government calls a "categorical rule" (Brief in Opp. 8) – that "a party **cannot** show good cause exists when he knowingly and voluntarily waived his right to file" pretrial motions (Pet. App. 3a) (emphasis added). So, "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" (Pet. App. 3a).

The Government disagrees, calling this a "mistaken premise" (Brief in Opp. 10). It says that what Mr. Blanks complains about is merely a parenthetical and would not bind a later Court of Appeals (Brief in Opp. 10). It points to the Eighth Circuit's discussion of the question the magistrate judge asked Mr. Blanks and her statement to him that "that the district court might reject the plea agreement and that, in those circumstances, [he] would not be permitted to re-file his pretrial motions" (Brief in Opp. 8) (quoting Pet. App. 4a). It says this is what the Eighth Circuit's opinion turned on, and there is no suggestion of a categorical rule.

That is untrue. The Eighth Circuit expressly "reject[ed] [Mr.] Blanks's argument that 'good cause exists whenever the defendant's failure to file the motion on time or [his] withdrawal of the timely-filed motion was due to some circumstance beyond his control and the Government would not be prejudiced'" (Pet. App. 5a). This, itself, directly conflicts with other circuits. *See, e.g.*, *United States v. Walden*,

625 F.3d 961, 965 (6th Cir. 2010) ("Good cause is a flexible standard"); *United States v. Salahuddin*, 509 F.3d 858, 861-63 (7th Cir. 2007) (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).

The Eighth Circuit allowed no exceptions to its rule that a knowing and voluntary waiver "cannot" result in good cause to file pretrial motions late (Pet. App. 3a-4a). It gave no signal there is any way a defendant *can* "show good cause exists when he knowingly and voluntarily waived his right to file" pretrial motions (Pet. App. 3a). It allowed no room for a district court to "abuse its discretion in denying [a] motion for leave to file post-deadline pretrial motions" when the defendant "knowingly and voluntary[ily] waiv[ed] his right to do so" (Pet. App. 3a). Rather, it announced and applied a categorical rule, both in its parenthetical and the body of its decision, that a party cannot show good cause exists when he knowingly and voluntarily waived his right to file pretrial motions.

Second, the magistrate judge's statement to Mr. Blanks on which the Government relies in changing Mr. Blanks' question presented – that "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" (Pet. App. 4a) – itself just begs Mr. Blanks' first question presented in his petition. Is the magistrate judge's statement of the law correct that a defendant who waives his pretrial

motions in order to accept a plea offer cannot establish good cause to refile his pre-trial motions if a plea offer is rejected or otherwise fails?

The magistrate judge's statement itself conflicts with the Seventh Circuit's decision in *Salahuddin*, which allowed that if a plea agreement fails through no fault of the defendant's – as the Government says, there, a "mutual mistake of law" (Brief in Opp. 11) – that "once [the defendant] was permitted to withdraw his plea and go to trial, it made sense to permit him to litigate the suppression motion." 509 F.3d at 862. That in holding otherwise, the Eighth Circuit relied on the magistrate judge's mistaken view of the law does not itself support the Eighth Circuit's decision adopting that view or render it any less conflicting with *Salahuddin* and the other decisions Mr. Blanks cited.

The Government's attempt to distinguish *Salahuddin* is just as unavailing as the Eighth Circuit's, which Mr. Blanks addressed in his petition (Pet. 19-20). The defendant's waiver of the pretrial motions in *Salahuddin* was not the *result* of a mutual mistake of law, as the Government suggests (Brief in Opp. 12), but instead was the result, just as here, of his entering into a plea offer that required him to waive them first. 509 F.3d at 861. Rather, the mutual mistake is what led to the plea offer being *withdrawn*. *Id.* That was no fault of the defendant's.

Here, too, the district court's rejection of the Government's plea offer to Mr. Blanks was no fault of Mr. Blanks'. Outside the magistrate judge's misstatement of the law to Mr. Blanks that he automatically would not be allowed to refile his pre-

trial motions, when Fed. R. Crim. P. 12(e) allowed him to do so for "good cause," the Government offers no reason why the defendant had good cause in *Salahuddin* but Mr. Blanks does not. Just as the defendant in *Salahuddin*, it makes sense that having required Mr. Blanks to go to trial, the district court had to allow him to litigate his fully briefed, hearing-ready pretrial motions.

Finally, the Government suggests Mr. Blanks is relying on an intra-circuit conflict because he distinguished several Eighth Circuit decisions in his petition (Brief in Opp. 12). Obviously, an intra-circuit conflict would not warrant this Court's review. But Mr. Blanks' point was not that the Eighth Circuit disagreed with itself, only that the sweeping conclusion the Eighth Circuit drew in its decision in this case – that that a defendant cannot establish good cause to refile pretrial motions waived to accept a plea offer after the district court's rejected that offer (Pet. App. 3a-4a), did not have support even in its own decisions it cited in its decision, which did not involve this circumstance.

Tellingly, the Government does not cite even a single decision in which a defendant who withdrew pretrial motions to accept a plea offer was disallowed from refiling them when the plea offer failed through no fault of his own, and an appellate court affirmed. This is because none exists. The only other time this has ever occurred, in *Salahuddin*, the Seventh Circuit held it was an abuse of discretion. This Court should grant its writ of certiorari to clarify which approach is proper under Rule 12(e).

B. The Court should review whether the Eighth Circuit's conclusion 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 is a correct statement of the law.

The second question Mr. Blanks' petition presents is whether the Eighth Circuit correct held 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 after refusing to view the evidence at issue. Or, as the Third, Seventh, and Ninth Circuits have held, does a district court abuse its discretion as a matter of law when it denies a Rule 403 motion without first viewing the evidence at issue?

The Government suggests the evidence to which Mr. Blanks objected would not fit Rule 403, because it was "only 'a small representative sample' of the child pornography recovered from [Mr. Blanks]: 42 of the more than 1000 images and none of the 14 videos" (Brief in Opp. 13) (quoting Pet. App. 6a, 8a). It says Mr. Blanks "objects not to the substance of the district court's decision to admit the images, but to the procedure that the court followed" (Brief in Opp. 14). It says he "does not identify any image that the district court would have excluded if it had reviewed the image before trial" (Brief in Opp. 17).

The Government's suggestion is in error. Below, Mr. Blanks' counsel argued that the evidence at issue – 42 images of graphic child pornography, many of which were repetitive, blown up on a screen – was needlessly cumulative, and showing them to the jury was unduly prejudicial. The images shown plainly were repetitive. For example, a detective described the seven images being shown he said were

found on Mr. Blanks' computer as this, which he stated along with showing each image to the jury:

- Exhibit P-31: "prepubescent female displaying her genitals" (Trial Tr. 68);
- Exhibit P-32: "another prepubescent female with her genitals displayed" (Trial Tr. 69);
- Exhibit P-33: "picture of a prepubescent female with her genitals displayed" (Trial Tr. 70);
- Exhibit P-34: "prepubescent female with her genitals displayed" (Trial Tr. 70);
- Exhibit P-35: "picture of a prepubescent female with her genitals displayed" (Trial Tr. 72);
- Exhibit P-36: "prepubescent female with her genitals displayed" (Trial Tr. 72-73); and
- Exhibit P-37: "prepubescent female with her genitals displayed" (Trial Tr. 73).

Moreover, a Government investigator admitted that at least one of the images, Exhibit P-83, actually was repeated: "This file is one that we've seen previously. It is two minor children. They look to be performing oral sex. There is another person placing a silver chain over the back of one of the children" (Trial Tr. 162). So, in at least one instance, the *same* image even was shown to the jury *twice*.

Therefore, the district court would have been well within its discretion to hold that the Government's presentation was unduly prejudicial and needlessly cumulative. As the Sixth Circuit held in *United States v. Cunningham* regarding videos, "the more [images] were shown, the more it became a needless presentation of unfairly prejudicial and cumulative evidence." 694 F.3d 372, 391 (6th Cir. 2012). "Given the other available evidence, the Government did not need to show" the same image or sort of image repeatedly to the jury "to prove that [the defendant] knowingly possessed [and] received child pornography." *Id.*

But the district court here did not fulfill this gatekeeper function, because it did not view the evidence to which Mr. Blanks objected at all. Instead, it denied his Rule 403 objection without having viewed the evidence for itself to determine whether it indeed was or was not unduly prejudicial or needlessly cumulative.

In his petition, Mr. Blanks pointed to the only three decisions ever analyzing whether a district judge has the discretion to deny a Rule 403 objection without first viewing the evidence objected to, all of which held, contrary to the Eighth Circuit's decision in this case, that doing so was an error as a matter of law. *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); *Cunningham*, 694 F.3d at 386-87.

In response, the Government counters first that "Rule 403 … includes no requirement to examine evidence before ruling on its admissibility" (Brief in Opp. 14). But the Ninth, Seventh, and Sixth Circuits disagreed, holding that Rule 403 implic-

itly required this, because "[o]ne cannot evaluate in a Rule 403 context what one has not seen or read." *Curtin*, 489 F.3d at 957. "Without looking at the [challenged evidence] for itself, the [district] court could not have fully assessed the potential prejudice to [the defendant] and weighed it against the evidence's probative value." *Loughry*, 660 F.3d at 972. "[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.'" *Cunningham*, 694 F.3d at 386 (quoting *Curtin*, 489 F.3d at 957).

Next, the Government argues *Curtin*, *Loughry*, and *Cunningham* do not conflict with the Eighth Circuit's decision in this case, because in those cases, "the objection to the evidence turned on the inflammatory content of the evidence, and the court of appeals determined that the district court should have resolved the objection only after examining the evidence in question," and none established a categorical rule requiring a district court to examine evidence objected to under Rule 403 before ruling on the objection (Brief in Opp. 15). This is untrue.

First, Mr. Blanks' objection was to the inflammatory nature of showing the jury 42 repetitive blown-up images of graphic child pornography, some of which were the same image repeated more than once. His counsel stated in his motion in limine, "When viewed against Rule 403, there is absolutely no probative value from displaying these pictures. … In comparison, there is an overwhelming likelihood

that said pictures will inflame and prejudice the jury so severely that they will not be able to put their opinions aside to give the Defendant a fair trial" (ECF Doc. 215).

Second, the Government's focus on selected language from each of *Curtin*, *Loughry*, and *Cunningham* about their respective facts ignores that each one plainly held it is implicit in Rule 403 that the district court *must* view the challenged evidence before denying a Rule 403 objection. "[W]e hold 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." *Curtin*, 489 F.3d at 957. "[A] district court, in exercising its discretion under Rule 403, must carefully analyze and assess the prejudicial effect of challenged evidence." *Loughry*, 660 F.3d at 970. "[W]e find both *Curtin* and *Loughry* persuasive. We agree 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.'" *Cunningham*, 694 F.3d at 386 (quoting *Curtin*, 489 F.3d at 957).

The Eighth Circuit's decision in this case is the only one to depart from this otherwise uniform, well-reasoned rule. Instead, citing no authority and with hardly any discussion, it held 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" (Pet. App. 6a). 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