

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2021

ELIJAH VINES,

Petitioner,
vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI
AND APPENDIX TO PETITION

Counsel of Record:

Rosen and Holzman
ATTN: Mark S. Rosen
400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188
(262) 544-5804
Email: roseholz@sbcglobal.net

QUESTIONS PRESENTED

This Petition presents two separate Issues that each meet the requirements for Supreme Court Review.

I. The Seventh Circuit has recently indicated, in its Decision in this present matter, that Defendant's girlfriend who had possessed Defendant's Iphone had actual and apparent authority to turn that IPhone over to law enforcement for analysis. This, when Defendant had specifically denied her password access to that phone. The evidence had been uncontroverted that Defendant had refused her the password to utilize the phone. He had been in custody at the time of the seizure. During this custody, there had been jail phone calls between the Defendant and the girlfriend, that law enforcement had been aware of, in which he had specifically indicated that he would not provide her with the password. The girlfriend had told law enforcement at the time of the seizure that she did not have the password, and that if she had entered the wrong password two or more times, then the phone would be wiped out of all of its data.

Nevertheless, the Seventh Circuit had cited a Seventh Circuit case, U.S. vs. James, 571 F.3d 707 (7th Cir. 2009) that had indicated that the mother of James had apparent and actual authority to seize his safe. The Court had indicated that James had not provided any limits on his mother's access to that safe. The Court had relied exclusively on this case to conclude that Defendant's girlfriend in the present matter had consent to turn

Defendant's Iphone over to the police. However, in James, unlike here, James' mother had the combination to that safe.

Furthermore, this present Seventh Circuit Decision is in conflict with case law from other Circuits that, under essentially the same circumstances as presented here, the third party possessor of a computer does not have apparent or actual authority over the item. This, when that third party possessor has been denied access to the password to utilize that computer. These other Circuits are the Fourth and Tenth Circuits. Both of those other Circuits had concluded that, in such situations, that third party does not have consent to either the search, or the seizure, of that computer. Both of these Circuits had compared the situation to that of a locked footlocker/suitcase/briefcase. The Fourth Circuit had indicated that, by using a password, owners affirmatively intend to exclude others from their personal files. Those owners also, because they conceal their passwords from others, cannot be said to assume the risk that third parties would permit others to seize/search those files. Those owners have a legitimate expectation of privacy in password protected files. Further, computers are repositories for private information that the computer's owner does not intend to share with others. A password is identical to a lock on a footlocker/briefcase/suitcase. Such a physically locked item conveys a subjective expectation of privacy. Third party consent in such items must be examined in the officers' knowledge about password protection as an indication of whether a computer is "locked" in the way that a footlocker would be.

Here, there is no reason why Defendant's password protected Iphone must have any different analysis with respect to third party consent than computers. Clearly, based upon law enforcement's need to obtain Defendant's Iphone, Iphones are the repository of private information. Iphones, such as Defendant's IPhone, are often password protected. Generally, such cell phones provide the owner with such password protection capability. Accordingly, this present situation should be treated identically to that of a password protected computer. Hence, in the present situation, the Circuits are in conflict concerning this standard of third party consent as to password protected phones. Clearly, the Seventh Circuit's ruling in its Decision in this matter conflicts with that of both the Fourth and Tenth Circuits. This raises a question of law which has never been considered by the United States Supreme Court.

As indicated, the Seventh Circuit had concluded that Defendant's girlfriend had third party consent to turn Defendant's Iphone over to the police. This, even when she did not have access to the password, Defendant had refused her such access, and law enforcement had known about such refusal at the time of seizure. However, as discussed, other Circuits are aligned contrarily with, and opposite to, the Seventh Circuit.

Accordingly, the question presented for review is:

WHETHER A THIRD PARTY POSSESSES AUTHORITY TO CONSENT TO THE SEIZURE OF ANOTHER'S CELL PHONE WHEN THAT PHONE IS PASSWORD PROTECTED, THE OWNER OF THAT PHONE HAS DENIED THE PASSWORD INFORMATION TO THAT THIRD PARTY, AND LAW ENFORCEMENT KNOWS OF THAT DENIAL AT THE TIME OF THE SEIZURE.

II. The Seventh Circuit has indicated in its recent Decision in this matter that an expert on sex trafficking, Special Agent James Hardie, would testify that victims of such trafficking often initially lie to law enforcement. The Seventh Circuit had indicated that this expert could testify as to the credibility of victims of sex trafficking. The Seventh Circuit had indicated that his testimony that victims would often be unwilling to disclose all details from the start. True, the Seventh Circuit had indicated that the trial court had not allowed Hardie to testify as to the specific victim involved in this matter. However, contrary to the Circuit, there had only been one sex trafficking victim involved in this case. Hence, Hardie's testimony had clearly been provided to materially bolster her testimony and to inform the jury that it should disregard her history of lying and solely believe her in court testimony.

Here, contrary to the Seventh Circuit, the Eighth Circuit has specifically indicated that credibility determinations are uniquely within the province of the trier of fact, and that one witness cannot comment as to the credibility of another witness. One such Eighth Circuit case has ruled that, even under the guise of "expertise," an expert on child sex abuse cannot testify as to the credibility of an alleged sex abuse victim. The Government in that case had argued that this expert could help in assessing the credibility of a child witness. This, due to the expert's expertise in children, and in particular how sexually abused children think and act. However, the Eighth Circuit had rejected this argument,

calling such testimony as putting "...an impressively qualified expert's stamp of truthfulness on a witness's story." This Eighth Circuit case had cited case law from other Circuits, such as the Ninth, Tenth, and Third. Accordingly, in the present situation, the Circuits are in conflict concerning this standard of an expert witness testifying as to the credibility of other witnesses. Clearly, the Seventh Circuit's ruling in its Decision in this matter conflicts with that of the previously cited other Circuits. This raises a question of law, which has never been considered by the United States Supreme Court.

Accordingly, the question presented for review is:

WHETHER AN EXPERT MIGHT TESTIFY AS TO THE CREDIBILITY OF A CHILD SEX TRAFFICKING WITNESS, EVEN UNDER THE GUISE OF "GENERAL EXPERTISE TESTIMONY," WHEN THAT TESTIMONY CLEARLY RELATES TO THE TESTIMONY OF THAT CHILD WITNESS.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	1
TABLE AUTHORITIES.....	7
OPINION BELOW.....	9
JURISDICTION.....	9
STATEMENT OF THE CASE.....	9
REASONS FOR GRANTING THE PETITION.....	21
 I. CONFLICTS REGARDING THE APPROPRIATE STANDARD FOR DETERMINING A THIRD PARTY'S APPARENT AUTHORITY TO CONSENT TO THE SEIZURE OF ANOTHER'S PASSWORD PROTECTED CELL PHONE, WHEN THE OWNER OF THAT PHONE HAS AFFIRMATIVELY DENIED THAT PASSWORD INFORMATION TO THAT THIRD PARTY, AND LAW ENFORCEMENT ARE AWARE OF THIS DENIAL AT THE TIME OF SEIZURE, ARE TO BE RESOLVED BY THIS SUPREME COURT.....	21
 The Seventh Circuit's Decision in this Present Case is in Conflict with Holdings of Other Circuits...	21
 II. CONFLICTS FOR DETERMINING WHEN AN EXPERT CAN TESTIFY AS TO THE CREDIBILITY OF A CLEARLY DETERMINED AND IDENTIFIED SEX TRAFFICKING/ABUSE VICTIM WITNESS, ARE TO BE DETERMINED BY THIS SUPREME COURT.....	25
 The Seventh Circuit's Decision in this Present Case is in Conflict with Holdings of Other Circuits...	25
 CONCLUSION.....	14

Index to Appendix

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases Cited</u>	
<u>Trulock vs. Freeh</u> , 275 F.3d 391 (4 th Cir. 2001).....	23-24
<u>U.S. vs. Andrus</u> , 483 F.3d 711 (10 th Cir. 2007).....	23-24
<u>U.S. vs. Awkard</u> , 597 F.2d 667, 671 (9 th Cir. 1979), cert. den., 444 U.S. 885, 62 L.Ed.2d 116, 100 S.Ct. 179 and 444 U.S. 969, 100 S.Ct. 460, 62 L.Ed.2d 383 (1979).....	27
<u>U.S. vs. Azure</u> , 801 F.2d 336 (8 th Cir. 1986).....	27-28
<u>U.S. vs. Barnard</u> , 490 F.2d 907 (9 th Cir. 1973), cert. den. 416 U.S. 959, 40 L.Ed.2d 310, 94 S.Ct. 1976 (1974)...	27
<u>U.S. vs. Buckner</u> , 473 F.3d 551 (4 th Cir. 2007).....	23-24
<u>U.S. vs. Geddes</u> , 844 F.3d 983 (8 th Cir. 2017).....	27-28
<u>U.S. vs. James</u> , 571 F.3d 707 (7 th Cir. 2009).....	22
<u>U.S. vs. Samara</u> , 643 F.2d 701 (10 th Cir. 1981), cert. den. 454 U.S. 829, 70 L.Ed.2d 104, 102 S.Ct. 122 (1981).....	27-28
<u>U.S. vs. Ward</u> , 169 F.2d 460 (3 rd Cir. 1948).....	27-28

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2021

ELIJAH VINES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

The Petitioner, Elijah Vines, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit rendered August 13, 2021.

OPINION BELOW

The Decision and Order of the United States Court of Appeals for the Seventh Circuit has not been published. It is printed in the Appendix. (A 1-20).

The relevant portions of the record, to consist of the District Court's oral and written Decisions before the United States District Court for the Southern District of Indiana, are printed in the Appendix (A 21-36).

JURISDICTION

Petitioner seeks review of a Decision and Order of the United States Court of Appeals for the Seventh Circuit entered August 13, 2021. That Decision and Order affirmed the final Judgment of Conviction imposed and entered by the United States District Court for the Southern District of Indiana on July 3, 2019.

Jurisdiction of the United States Supreme Court to review the decision and Order of the Seventh Circuit is derived from 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Defendant Elijah Vines was originally charged in a six Count Indictment dated August 9, 2017. Defendant was charged along with codefendants Kevin Baker and Shaquan Meeks. The Indictment charged Defendant with the first four of the six Counts: Count One, beginning on or about August 20, 2016 and on or about October 6, 2016, within the Southern District of Indiana and elsewhere, in and

affecting interstate commerce, knowingly recruited, enticed, harbored, transported, provided, obtained, advertised, maintained, patronized, and solicited, by any means, Minor Victim 1, knowing and in reckless disregard of the fact that Minor Victim 1 had not attained the age of 18 years and that Minor Victim 1 would be caused to engage in a commercial sex act and Defendant had a reasonable opportunity to observe Minor Victim 1 in violation of Title 18, U.S.C. 1591(a)(1) and (b)(2) and c; Count Two, beginning on or about August 30, 2016 and October 6, 2016, within the Southern District of Indiana and elsewhere, did knowingly benefit, financially and by receiving anything of value, from participation in a venture which, in or affecting interstate commerce, knowingly recruited enticed, harbored, transported, provided, obtained, advertised, maintained, patronized, and solicited, by any means, Minor Victim 1, knowing and in reckless disregard of the fact that Minor Victim 1 had not attained the age of 18 years and that Minor Victim 1 would be caused to engage in a commercial sex act in violation of Title 18, U.S.C. 1591(a)(2) and (b)(2); Count Three, on or about September 10, 2016 and on or about September 22, 2016, did knowingly transport Minor Victim 1, and individual who had not attained the age of 18 years in interstate or foreign commerce, with the intent that Minor Victim 1 engage in prostitution, and in any sexual activity for which any person can be charged with a criminal offense, in violation of Title 18, U.S.C. 2423(a); Count Four, beginning on or about August 31, 2016 and continuing until or about July 15, 2017, in Indianapolis, in the Southern District of

Indiana and elsewhere, Defendant did use and cause the use of any facility in interstate or foreign commerce, with the intent to promote, carry on, manage and establish and facilitate the promotion, management, establishment, and carrying on an unlawful activity, specifically promoting prostitution and thereafter, did knowingly perform or attempt to perform an act constituting Promoting Prostitution, by receiving money or other property from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution, and having control over the use of a place, knowingly permitted another person to use the place for prostitution, and did knowingly offer or agree to procure a person for another person for the purpose of prostitution, in violation of Title 18, U.S.C. 1952(a)(3).

On September 11, 2018, the Government had obtained a Superseding Indictment. This was an eight Count Indictment. As to Defendant Vines, Counts One and Two had remained the same. However, a new Count Three had charged Conspiracy to Commit Sex Trafficking of a Minor, that between September 10, 2016 and on or about October 6, 2016, within the Southern District of Indiana and elsewhere, Defendant did conspire with another person to violate 18 U.S.C 1591, that is, the Defendant did agree with at least one other person to, in and affecting interstate commerce, knowingly recruit entice, harbor, transport, provide obtain, advertise, maintain, patronize, and solicit, by any means, Minor Victim 1, knowing and in reckless disregard of the fact that Minor Victim 1 had not attained the age of 18 years and that Minor Victim 1 would be

caused to engage in a commercial sex act, in violation of 18 U.S.C. 1594c and 1591; the original Counts Three and Four now became Counts Four and Five; and added Count Eight, Tampering with a Witness, in that on or about July 16, 2017, the Defendant did attempt to corruptly alter, destroy, mutilate and conceal a record, document, or other object, with the intent to impair the object's integrity or availability for use in an official proceeding, that is the Defendant did direct an individual to access his cell phone and to delete information from that cell phone, after the Defendant had been arrested for the offense of Sex Trafficking of a Minor, in furtherance of that attempt, the Defendant took one or more substantial steps, in violation of 18 U.S.C. 1512c(1).

Defendant had filed a Pretrial Motion to Suppress all Evidence Obtained from his Iphone, with attachments. By this Suppression Motion, he sought, an eventual ruling that law enforcement had violated his Fourth Amendment rights against unreasonable searches and seizures. He had indicated that law enforcement had illegally obtained his cell phone from his girlfriend, SS, who did not have either actual or apparent authority to provide the phone. He had moved for the suppression of evidence derived from this illegal search. This suppression included the subsequent search of his telephone, notwithstanding a subsequent search warrant to search this phone. The Motion had contained the Search Warrant with respect to the telephone, and a proposed Order.

Defendant had indicated in the Motion to Suppress his Iphone Evidence that he had been taken into custody July 14, 2017 while at

a state court hearing. After that hearing, a law enforcement officer had met SS at an elevator, and had provided her with Vines' phone, watch, and wallet. On August 12, 2017, Special Agent Bartelson and FBI Task Officer Cuevas had called SS and had requested to meet and interview her. The officers had wanted to meet that day, but SS had indicated that she had wanted to meet next week. They scheduled a meeting for the following week at a downtown location. Despite the appointment, the officers, without calling SS back, arrived at her apartment that day. They had showed their badges and then asked to come in. After about forty five minutes of questioning, the officers had asked her if she still had Vines' cell phone and if she would provide it to them. The officers then advised that if she did not provide the phone, they would return with a search warrant. She provided the phone. At that time, the phone was off, she had not been using the phone, and she did not know the password to access the phone. From the conversation, the police knew that this was Vines' phone. The officers never contacted Vines or his counsel for permission to seize the phone. The officers did not obtain a search warrant to seize the phone. Later, law enforcement obtained a search warrant for the phone. They did not disclose that when they seized the phone from SS that the phone was password protected and that she did not know the password.

Further, as Defendant had indicated in his Reply to the State's Response to the Iphone Suppression Motion, SS had told law enforcement that, not only did she not have the password to the

Iphone, but that, if she entered the wrong password two more times, that the phone would be wiped out of all of its data. Law enforcement did not put this information into its Search Warrant.

The trial court conducted a status conference on October 30, 2018. At that conference, the parties and the trial court discussed discussed the Motion to Suppress Iphone Evidence. Defendant had argued that because the initial seizure had been illegal, then the resulting search warrant of the phone had also been illegal as fruit of the poisonous tree. Defendant had indicated that the seizure of the phone had been illegal. This, because SS did not have the passcode to access the phone. The pass code is what should be the measure of authority to access the phone, and that is the authority to provide the authority to be able to seize it. Defendant had indicated that, without providing the pass code information so as to access the phone, the phone is essentially a paper weight. This, due to resulting technology.

Defendant had also indicated to the court on October 30, 2018 that, with respect to the search warrant for the Iphone, the affidavit did not indicate that SS, who provided the phone, did not have access to the phone because she did not have the passcode. This information being omitted was crucial to a determination of whether or not the phone had been seized legally, and if so, whether the phone had been validly obtained. Defendant had his phone password protected, he did not want SS to access the phone. There had been multiple jail calls where she's asking for the passcode because she wants to go through his phone. He was saying

no. This information was present in the Government's mind. However, on October 31, 2018, the District Court issued an Order denying this Defendant's Suppression Motion. (A 21-25).

Subsequently, on December 21, 2018, Defendant submitted a Motion in Limine. By this Motion, he had sought that the proposed testimony of Agent James Hardie be limited. The Government had sought admission of this testimony. Defendant indicated that the Agents should not be allowed to testify regarding witness credibility, slang that is within jury's knowledge, and any other area to which they are not more familiar with the topics than others. The Motion in Limine had indicated that these witnesses would be expected to testify that "...victims of sex trafficking may not be completely forthcoming when questioned by law enforcement or medical personnel." Defendant had indicated that such testimony would relate to one witness would then be testifying as to the credibility of another witness, which is illegal. Defendant had indicated that the credibility of the alleged victim, GMC, would be a central element in his trial. Defendant had indicated that Agents Hardie or Bartelson may not testify as to why a trafficking victim or other individual may not be truthful. Such testimony is illegal and unduly influences the jury. Defendant had provided supporting case law that witnesses could not testify as to the credibility of other witnesses.

A Final Pretrial conference occurred on January 4, 2019. At that time, the District Court and the parties discussed Defendant's Motion in Limine Concerning Agents Hardie and Bartelson. Defendant

had indicated that it was inappropriate credibility boosting by the Government to have these expert witnesses say "they lied and here is why." The expert testimony would give undue weight to GMC's testimony as to why she had lied. Defendant argued that a Government provided case had even indicated that such testimony was questionable and has the potential to be prejudicial and displace the testimony of the victims. According to this case, such expert testimony should be limited only to issues of recruitment and control. (DN 303 at 46-47). Defendant indicated that the experts should not be allowed to testify and speculate on why victims lie. (DN 303 at 48). Defendant had indicated that the case law had ruled that an expert witness may not comment on another witness's credibility. Such a field is for the jury's determination. Hardie was a blind expert who had never interviewed GMC. This testimony would be just speculative general based behavior. The Government had indicated that Hardie would testify as to alleged reasons why people who have experienced sex trafficking may withhold information from law enforcement, or might have difficulty remembering things. (DN 303 at 50-51). At that time, Defendant had indicated that for such experts to testify as to whey victims lie, even without saying that is why Minor Victim 1 lied, would be inappropriate for the expert, and the jury would put too much weight on it.

On January 4, 2019, the District court denied Defendant's Motion in Limine concerning the admission of Hardie's and Bartelson's testimony. (A 26-36).

Jury trial testimony commenced on January 23, 2019. At that time, GMC had testified for the Government. Defendant had cross-examined her extensively about her prior lies and inconsistent statements. Such lies included her age. She had lied about her identification of the Defendant as having been Deacon. This, due to her material lies and inconsistencies about the descriptions. Further, she had also identified someone else as Deacon. Also, there had been thorough and length cross-examination about disclosure issues. This, in order to attack her credibility.

On January 24, 2019, Jennifer Barnes had testified for the Government. She testified as an expert on digital media forensics. She had testified that she had conducted an extraction of an Iphone, brought to her by Gabe Cuevas. She had uncovered inculpatory information on that phone, to include various images. One was a screen capture image entitled "Hey, E, it Gabby." This had been part of a stream of text messages. Gabby is the first name of GMC. Barnes also discussed the Apple account associated with the phone. The emails related to this account's email address had dated back as far as September, 2014. The phone also been used to access the website backpage.com. A backpage account had actually been accessed. The Apple account had also been used to manage this backpage account. There had been wifi logins associated with motels. This was Defendant's Iphone.

On January 24, 2019, Agent James Hardie testified for the Government. He testified that he had joined the FBI in 2001. He had also testified that he had obtained a master's of science degree in

criminal justice with an emphasis on forensic psychology in 2017. He began working on sex trafficking cases in 2008. At that time, he had been selected to be the coordinator of the Initiative that focused on domestic minor sex trafficking. He was responsible for that task force. He directed the investigations, coordinated the sting operations, and served as the primary investigator for a lot of the investigated cases, and served as case agent for the cases that had proceeded to trial. He interviewed hundreds of individuals who had been involved in some aspect of prostitution. He trained numerous law enforcement officials. He had been qualified multiple times as an expert in sex trafficking in various courts. As an expert, he had been permitted to express opinions on the targeting, recruitment, grooming, and controlling of sex trafficking victims. He had studied child victims of sex trafficking since 2008. The Government offered him as an expert in sex trafficking matters. Defendant again entered his Objection to this witness testifying as to whether or not victims are forthcoming and to tell the truth. In response, the District Court indicated that Hardie could not testify as to the credibility of any one witness, but generally. (A37). This, even though, by his own testimony, he had never been permitted to testify as to credibility of sex trafficking victims, even generally. His prior testimony had never included such credibility testimony.

Agent Hardie testified that victims commonly lie about their age to law enforcement, to other girls in the stable, and during the trafficking itself. Hardie also testified that victims often

experience confusion about the details that they were providing. When it comes to disclosures, one would not expect to get the truth, the whole truth, and nothing but the truth during the first, second or even the third interview. An interviewer will get minimization. They sometimes lie to the police about whether or not they keep the money that they earn. More often, they do not report their traffickers to the police.

AD testified for the Government. She testified that she prostituted along with GMC. AD testified that GMC told her that she was twenty one. AD knew her as Monique. GMC never told AD that her real name was Gabby and not Monique.

Agent Michelle Bartelson testified for the Government. She testified that she served a search warrant on Apple for Defendant's Icloud account. There were images recovered from that account. There was a backpage email sent to Defendant's Icloud account. There were prostitution backpage post ids. There were some for AD. There were emails referencing a backpage ad involving GMC, with her picture. She also discussed images of women that had appeared in Defendant's Facebook account. There had been other Facebook exhibits from Defendant's account. In a nutshell, Bartelson had testified extensively about material and evidence obtained from Defendant's Iphone.

During his defense case, Defendant presented the testimony of Maxine Hall. She was GMC's foster mother during 2016. She testified as to factual reasons why she had believed that GMC was not truthful. GMC would lie about possessing other foster kids' cell

phones. She would stick with a lie. She was not a truthful person generally.

The jury eventually reached verdicts of guilty as to Counts One through Five of the Superseding Indictment. However, the jury reached a verdict of Not Guilty as to Count Eight.

The sentencing hearing occurred on June 27, 2019. The District Court sentenced Defendant to forty years on each of Counts One through Four, to be served concurrently, and sixty months on Count Five, also to be served concurrently. The Court imposed a supervised period upon release of life for Counts One through Four, concurrently, and three years on Count Five, also concurrent.

Defendant filed his Notice of Appeal on July 11, 2019.

In a panel decision dated August 13, 2021, the Seventh Circuit affirmed the District Court's Judgment of Conviction.

REASONS FOR GRANTING THE PETITION

I. CONFLICTS REGARDING THE APPROPRIATE STANDARD FOR DETERMINING A THIRD PARTY'S APPARENT AUTHORITY TO CONSENT TO THE SEIZURE OF ANOTHER'S PASSWORD PROTECTED CELL PHONE, WHEN THE OWNER OF THAT PHONE HAS AFFIRMATIVELY DENIED THAT PASSWORD INFORMATION TO THAT THIRD PARTY, AND LAW ENFORCEMENT ARE AWARE OF THIS DENIAL AT THE TIME OF SEIZURE, ARE TO BE RESOLVED BY THIS SUPREME COURT.

The Seventh Circuit's Decision in this Present Case is in Conflict with Holdings of Other Circuits.

Here, the Seventh Circuit Decision had indicated that Defendant had not limited SS's access to his Iphone in any way. The

Seventh Circuit had cited U.S. vs. James, 571 F.3d 707 (7th Cir. 2009) for this ruling. The Panel had discussed this case, and had then indicated that Defendant had not limited SS's access to his Iphone in any way. However, contrary to the Seventh Circuit and its Decision, had not even considered that Defendant had password protected his Iphone, and had adamantly denied SS this password information. He had denied her this information on multiple occasions, such as on inmate jail calls that law enforcement had been aware of. Here, SS did not have either actual or apparent authority to allow the police to seize Defendant's Iphone. The Iphone had been password protected. She did not have that password. So, as Defendant had indicated to the District Court, that Iphone had been essentially a paper weight with respect to her authority over it. Further, she had attempted to obtain the password from the Defendant while he was in custody. However, he had refused to give it to her. Further, even after this refusal, she knew that if she had even tried to enter a guess password into the Iphone, the phone would delete all material after two failed tries. Clearly, she did not have the authority to consent to any search/seizure of that Iphone. Also, law enforcement had known, at the time of the seizure, that Defendant had not provided SS any authority to consent to that seizure. Vines had maintained his legitimate expectation of privacy with respect to that Iphone.

Here, the Seventh Circuit had relied upon James. However, two other Circuits have discussed the relevance of password protection, and the refusal to reveal the password information to third

parties, with respect to computers. The Fourth and Tenth Circuits have concluded that, in such situations, an individual does not have consent to either the search, or the seizure, of that computer. The Tenth Circuit case is U.S. vs. Andrus, 483 F.3d 711 (10th Cir. 2007). The Fourth Circuit cases are Trulock vs. Freeh, 275 F.3d 391 (4th Cir. 2001) and U.S. vs. Buckner, 473 F.3d 551 (4th Cir. 2007). Both of these Circuits had compared the situation to that of a locked footlocker/suitcase/briefcase. Andrus had discussed this matter in terms of a locked footlocker. Buckner and Trulock had discussed this matter in terms of locked suitcase/briefcase. The rule of authority to consent has to be one of reason that assesses the critical circumstances indicating the presence or absence of a discrete expectation of privacy with respect to the particular object. These Circuits had indicated that, by using a password, individuals affirmatively intend to exclude others from their personal files. Those individuals also, because they conceal their passwords from others, cannot be said to assume the risk that third parties would permit others to seize/search those files. Those individuals have a legitimate expectation of privacy in password protected files. Further, computers are repositories for private information that the computer's owner does not intend to share with others. A password is identical to a lock on a footlocker/briefcase/suitcase. A physically locked footlocker conveys a subjective expectation of privacy. Third party consent in such items must be examined in the officers' knowledge about password protection as an indication of

whether a computer is "locked" in the way that a footlocker would be. U.S. vs. Andrus, 483 F.3d 711 at 718; U.S. vs. Buckner, 473 F.3d 551 at 554; Trulock vs. Freeh, 275 F.3d 391 at 403.

Based upon the foregoing, there is a clear conflict among the Circuits as to the appropriate standard for password protected items. Here, there is no reason why Defendant's password protected Iphone must have any different analysis with respect to third party consent than computers. Clearly, Iphones, and cell phones in general, are the repository of private information. Such phones, such as Vines' IPhone, are often password protected. Such phones allow the owners of those phones to input passwords, such as in computers. Clearly, such passwords are designed to limit access to the information on the phones. This, to either the owner of the phone, or to some third party that the owner has determined should have such access. Accordingly, this present situation should be treated identically to that of a password protected computer. Hence, in the present situation, the Circuits are in material conflict concerning this standard of third party consent as to password protected phones. Clearly, the Seventh Circuit ruling in its Decision in this matter conflicts with that of both the Fourth and Tenth Circuits. Hence, multiple Circuits disagree with the Seventy Circuit's Decision. The Seventh Circuit is in dispute with the Fourth and Tenth Circuits.

Based upon the clear conflict among the Circuits as to the appropriate standard for a finding of third party authority to consent to seizure of a password protected phone when the owner of

that phone has clearly refused to provide that password information to that third party, Petitioner respectfully requests that the United States Supreme Court resolve this conflict by determining what is the appropriate standard for such a situation.

II. CONFLICTS FOR DETERMINING WHEN AN EXPERT CAN TESTIFY AS TO THE CREDIBILITY OF A CLEARLY DETERMINED AND IDENTIFIED SEX TRAFFICKING/ABUSE VICTIM WITNESS, ARE TO BE DETERMINED BY THIS SUPREME COURT.

The Seventh Circuit's Decision in this Present Case is in Conflict with Holdings of Other Circuits.

Here, Special Agent James Hardie had essentially told the jury that GMC's lies should not be part of its credibility determination and that the jury should believe her testimony anyway. Hardie told the jury that it should believe her trial story. Legally and factually, he had negated her massive credibility issues. However, her testimony had shown that she was a liar. She had provided multiple stories at various times. Her various statements to the police had involved multiple inconsistencies and lies. She had lied to the police on multiple occasions, to include her arrest in Ohio. She had lied to others, such as AD and GMC's foster mother. Her testimony had been attacked by the Defendant, and had been open to serious question.

The Seventh Circuit has indicated in its recent Decision in this matter that this expert on sex trafficking, Hardie, could testify that victims of such trafficking often lie to law enforcement. The Seventh Circuit had indicated that this expert

could testify as to the credibility of victims of sex trafficking. The Seventh Circuit had found admissible that his testimony that victims would often be unwilling to disclose all details from the start. True, the Seventh Circuit had indicated that the trial court had not allowed Hardie to testify as to the specific victim involved in this matter. However, contrary to the Seventh Circuit, as discussed, there had only been one sex trafficking victim involved in this case. Hardie's testimony, contrary to the Decision, had clearly referred to her. Any reasonable jury would so conclude. There is no reasonable inference to the contrary. Hence, Hardie's testimony had clearly been provided to materially bolster her testimony and to inform the jury that it should disregard her history of lying and solely believe her in court testimony.

Here, GMC's credibility had been crucial to the Government's case. She was the named victim in the Counts. Her credibility had been the central element at the trial. This, as to what the Defendant had done to her. Further, Hardie's testimony had also negated the testimony of Maxine Hall. Hardie's testimony had simply told the jury to disbelieve GMC's lies, Hall's testimony, and solely believe GMC's testimony and statements that had been inculpatory. Hardie had told the jury to believe the inculpatory portions of GMC's testimony and statements and disbelieve exculpatory portions. Contrary to the Seventh Circuit's Decision, such testimony by Hardie had been illegal and impermissible.

Here, contrary to the Seventh Circuit, the Eighth Circuit has specifically indicated that credibility determinations are uniquely

within the province of the trier of fact, and that one witness cannot comment as to the credibility of another witness. One such Eighth Circuit case had indicated that, even under the guise of "expertise," an expert on child sex abuse could not testify as to the credibility of an alleged sex abuse victim. The Government in that case had argued that this expert could help in assessing the credibility of a child witness. This, due to the expert's expertise in children, and in particular sexually abused children, think and act. However, the Eighth Circuit had rejected this argument, calling such testimony as putting "...an impressively qualified expert's stamp of truthfulness on a witness's story." As indicated by the Eighth Circuit, putting an impressively expert's stamp of truthfulness on a witness's story goes too far legally. This Eighth Circuit case had cited case law from other Circuits, such as the Ninth, Tenth, and Third. U.S. vs. Azure, 801 F.2d 336 (8th Cir. 1986). See also, U.S. vs. Barnard, 490 F.2d 907 (9th Cir. 1973), cert. den. 416 U.S. 959, 40 L.Ed.2d 310, 94 S.Ct. 1976 (1974). In U.S. vs. Awkard, the Ninth Circuit had indicated that under the Federal Rules of Evidence, opinion testimony on credibility is limited to character; all other opinions on credibility are for the jurors themselves to form. U.S. vs. Awkard, 597 F.2d 667, 671 (9th Cir. 1979), cert. den., 444 U.S. 885, 62 L.Ed.2d 116, 100 S.Ct. 179 and 444 U.S. 969, 100 S.Ct. 460, 62 L.Ed.2d 383 (1979). An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility. U.S. vs. Samara, 643 F.2d 701 (10th Cir. 1981), cert. den. 454 U.S. 829, 70 L.Ed.2d 104,

102 S.Ct. 122 (1981); U.S. vs. Ward, 169 F.2d 460 (3rd Cir. 1948).

See also U.S. vs. Geddes, 844 F.3d 983 (8th Cir. 2017).

Here, contrary to the Seventh Circuit's Decision, Hardie's testimony had illegally crossed the line between simple expert testimony concerning general modus operandi, and testifying as to the credibility of the Government's critical witness under the guise of expertise. As the Eighth Circuit had indicated in Azure, putting an impressively qualified expert's stamp of truthfulness on a witness's story goes too far legally. As discussed, GMC, the victim, was the Government's key witness, and her credibility had been critically important. Because her testimony had been likely bolstered by Hardie's erroneously admitted "expert" believability opinion, the error was not harmless. Further, because the error had substantial influence upon the credibility of the key witness, and the importance of that witness to the Government's case, the error was not harmless. U.S. vs. Azure, 801 F.2d 336 at 341.

Further, contrary to the Panel, Hardie should not have been allowed to testify as to GMC's credibility, even in a "general sense." Each witness must be evaluated individually. There had not been any indication that GMC had the same traits and characteristics of "other sex trafficking victims." Her testimony should have been evaluated on its own. This, exclusive of Hardie telling the jury that, due to her status as a sex trafficking victim, her prior history of lying should not have any bearing on her credibility. As indicated in the cited case law, a jury can evaluate her credibility.

Accordingly, in the present situation, the Circuits are in conflict concerning the standard of an expert witness testifying as to the credibility of other witnesses. This, even in the context of alleged "general" testimony. As argued herein, any discussion by the Seventh Circuit that Hardie's testimony had been "general," and not specific, had been a sham. Hardie's testimony had discussed the credibility of sex trafficking victims. Here, there had only been one such victim. Hence, and clearly, the Seventh Circuit ruling in its Decision in this matter conflicts with that of the other cited other Circuits. Hence, multiple other Circuits disagree, and are in conflict, with the Decision.

Based upon the clear conflict among the Circuits as to the appropriate standard for an expert to testify as to the credibility of a child sex trafficking victim, even under the guise of "general testimony" when such testimony clearly refers to another specific witness, Petitioner respectfully requests that the United States Supreme Court resolve this conflict by determining what is the appropriate standard for such a situation.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision and opinion of the Court of Appeals for the Seventh Circuit.

RESPECTFULLY SUBMITTED, at Waukesha, Wisconsin, this _____
day of September, 2021.

Attorney for Elijah Vines
Mark S. Rosen
Wis. State Bar No. 1019297

Rosen and Holzman
400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188
ATTN: Mark S. Rosen
(262) 544-5804
email:roseholz@sbcglobal.net

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2021

ELIJAH VINES,
Petitioner,

vs.

UNITED STATES,
Respondent.

CERTIFICATION FOR THE PETITION FOR WRIT OF CERTIORARI
FOR THE PETITIONER ELIJAH VINES

The attached Petition for Writ of Certiorari complies with all page and Petition requirements of Federal Rules of Supreme Court Procedure Rules 13, 14, 33, and 34.

Mark S. Rosen
Attorney for Petitioner

TABLE OF CONTENTS TO APPENDIX

	<u>Page</u>
1. Decision and Order of Seventh Circuit.....	A 1-20
2. District Court's Written Decision Denying Defendant's Motion to Suppress Evidence Obtained from his Iphone.....	A 21-25
3. District Court's Oral Decision Denying Defendant's Motion in Limine Pertaining to the Testimony of Hardie.....	A 26-36
4. January 24, 2019 Oral Ruling as to Admissibility of Hardie's Testimony as to Credibility.....	A 37