No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TREMAIN LAMAR BRAXTON, TIMOTHY ROY MASON, and DARRELL LEE-LAMONT SUMMERS II

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Sarah Riley Howard
Counsel of Record
Pinsky, Smith, Fayette & Kennedy, LLP
146 Monroe Center St. NW, Suite 418
Grand Rapids, MI 49503
(616) 451-8496
showard@psfklaw.com

Counsel for Petitioner Tremain Lamar Braxton

Parker Douglas
Counsel of Record
Assistant Federal Public Defender
Western District of Michigan
50 Louis St. NW, Suite 300
Grand Rapids, MI 49503
parker_douglas@fd.org

Counsel for Petitioner Timothy Roy Mason

Brian P. Lennon
Counsel of Record
Charles R. Quigg
Warner Norcross + Judd LLP
150 Ottawa Ave. NW, Suite 1500
Grand Rapids, MI 49503
(616) 752-2089
blennon@wnj.com

Counsel for Petitioner Darrell Lee-Lamont Summers II

QUESTION PRESENTED

Petitioners were indicted on drug distribution conspiracy charges. Pretrial, the Government discovered child pornography created by its star witness—the charged conspiracy's leader—on the witness's smartphone. The evidence also showed the witness committing criminal sexual conduct against the underage girl. Petitioners sought to cross-examine the witness regarding the child pornography and criminal sexual conduct to show that the witness had an additional incentive to favor the Government in his cooperation and testimony—beyond the deal he received in the drug conspiracy case. The district court barred any references to the child pornography and criminal sexual assault on cross-examination at trial, and the jury convicted Petitioners.

The question presented is:

Whether a defendant's Sixth Amendment confrontation rights are violated when a trial court bars all cross-examination about events that concededly took place and may have provided the witness an incentive to shade or fabricate his testimony in the Government's favor.

PARTIES TO THE PROCEEDING

Petitioners are Tremain Lamar Braxton, Timothy Roy Mason, and Darrell Lee-Lamont Summers, II.

Respondent is the United States of America.

RELATED PROCEEDINGS

United States Court of Appeals (6th Cir.):

United States v. *Daryl Kevin Cannon*, Docket No. 20-1515

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii
PARTIES TO THE PROCEEDING iii
TABLE OF AUTHORITIES vi
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISION INVOLVED 1
INTRODUCTION 2
STATEMENT 2
REASONS FOR GRANTING THE PETITION 5
CONCLUSION 10
APPENDIX A - Opinion of the Sixth Circuit Court of Appeals 1a
APPENDIX B - Excerpts from 10/23/2019 Transcript 18a

TABLE OF AUTHORITIES

Page(s)

Cases

Alford v. United States,
282 U.S. 687 (1931) 6

Davis v. Alaska,
415 U.S. 308 (1974) 6, 7

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 6, 7

McGee v. McFadden,
139 S. Ct. 2608 (2019) 10

Pointer v. Texas,
380 U.S. 400 (1965) 6

United States v. Bagley,
473 U.S. 667 (1985) 9

United States v. Giovanetti,
No. 07-CR-295, 2008 WL 2095370 (M.D. Fla. May 16, 2008) 10

United States v. Kohring,
637 F.3d 895 (9th Cir. 2011) 9

Statutes

28 U.S.C. § 1254(1) 1

Other Authorities

U.S. Const., amend. VI 1, 6

PETITION FOR A WRIT OF CERTIORARI

Tremain Lamar Braxton, Timothy Roy Mason, and Darrell Lee-Lamont Summers II respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit's opinion, App. 1a–17a, is unpublished but available at 2022 U.S. App. LEXIS 8590 (6th Cir. Mar. 29, 2022). Judge Donald's dissenting opinion on the Question Presented is available at pages *19-22. App. 14a–17a. The district court's opinion was given from the bench at a pre-trial hearing on October 23, 2019. App. 22a–27a.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2022. On June 21, 2022, Justice Kavanaugh extended the time to file a certiorari petition until August 26, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI.

INTRODUCTION

This Petition presents a unique and discrete legal issue on a direct appeal under the Confrontation Clause to the Sixth Amendment. The trial court denied Petitioners any meaningful ability to cross-examine the Government's star witness in a drug conspiracy case on a significant issue of potential bias—whether he had an incentive to shade or fabricate his testimony in the Government's favor because he knew that the Government knew that he created child pornography and engaged in criminal sexual conduct. The trial court held that because the Government made no express promise to withhold prosecution of the witness, and because Petitioners had other fertile grounds for cross-examination, Petitioners could be denied the opportunity to ask any questions about the child pornography and criminal sexual conduct. A divided panel of the U.S. Court of Appeals for the Sixth Circuit affirmed.

Accordingly, Petitioners ask this Court to hold that the Sixth Amendment guarantees criminal defendants at least some opportunity to cross-examine a witness about events that concededly took place and could have provided the witness an incentive for shade or fabricate his testimony in the Government's favor. This Court's review is needed to explore the contours of the Confrontation Clause and explain the limits of a trial court's discretion to bar cross-examination on a classic theory of bias.

STATEMENT

The Government obtained an Indictment of Petitioners on November 14, 2018, which charged them with conspiracy and possession with intent to distribute methamphetamine. The Government filed a superseding indictment in April 2019. In

November 2019, a jury convicted Petitioners. Petitioners Braxton and Mason were each sentenced to 15 years in prison, and Petitioner Summers was sentenced to 20 years.

Before trial, the parties filed motions in limine to seek a ruling on whether Petitioners could cross-examine Raymond Stovall, the Government's star witness and confessed leader of the drug conspiracy, regarding evidence of child pornographic material located on his phone. Government agents located four videos on Stovall's smartphone of Stovall engaged in a sex act with a minor. The Government disclosed to Petitioners' counsel that Stovall claimed that he believed the individual to be of legal age, indicating that Government investigators questioned Stovall about the video. Neither the state nor federal government charged Stovall with child pornography crimes nor any criminal sexual conduct ("CSC") crimes arising out of this video evidence. Stovall's plea agreement in the drug conspiracy case in the district court is silent about this issue.

Petitioners argued they had a constitutional right to cross-examine Stovall and confront him with the evidence of the child pornography on his phone because it would show an additional, significant incentive for Stovall to shade or fabricate his testimony in the Government's favor. They argued that they had a right to cross-examine Government witnesses about all benefits they receive in exchange for their cooperation and that, even without an explicit promise in Stovall's plea agreement or elsewhere about the child pornography material, Petitioners should have been allowed to explore discussions between the prosecutor and the witness—as well as

the witness's subjective beliefs—to disclose potential bias. The relevance of the evidence was not to establish character for untruthfulness, to expose an embarrassing fact, or to demonstrate an explicit promise by the Government. Rather, this line of questioning was critical to explore completely what Stovall understood to be all of the consequences of failing to testify on behalf of, and/or failing to please, the Government. This was the only way to effectively illuminate the totality of Stovall's potential bias for the jury.

At the final pre-trial conference on October 23, 2019, the district court addressed the motions and denied Petitioners the ability to introduce this topic to the jury. App. 22a–27a. During the hearing, the court acknowledged, "Mr. Stovall, obviously his credibility is critical, and credibility is a broad door. . . . What he's getting or might be getting in exchange for testimony is naturally a focal point of any defense cross-examination." App. 22a. The court held, however, that cross-examination of Stovall regarding the child pornography was not "a fair avenue for cross-examination," finding, "Whatever else it may say about Mr. Stovall as a person, I don't see that it bears much on his credibility at all." App. 22a.

The Government's case against Petitioners rested "almost exclusively" on Stovall's testimony. App. 15a. Stovall admitted to being the leader of the drug trafficking conspiracy, in which capacity he directed dozens of people to distribute methamphetamine in Michigan. In addition to leading a drug trafficking organization, Stovall admitted at trial that he had sent money to a "friend" who was evading arrest as a murder suspect. Law enforcement at one time believed that

Stovall solicited a murder-for-hire from this "friend," and it is unclear why, how, or even if that theory was discounted. It is also unclear why Stovall was never charged with aiding and abetting a convicted murderer.

In the court of appeals, the panel majority concluded that the district court did not abuse its discretion by precluding cross-examination of Stovall related to the child pornography and CSC because Petitioners were able to cross-examine Stovall about the other, unrelated reasons he could be biased. App. 8a.

Judge Bernice Bouie Donald dissented from the panel majority's resolution of this question. Judge Donald recognized that "limit[ing] a highly pertinent area of cross-examination in a case resting, almost exclusively, on the testimony of a drug conspiracy leader sets a troublesome precedent." App. 15a. Even though Petitioners were able to cross-examine Stovall on the other reasons he might be biased, Judge Donald agreed that the issue of whether Stovall believed he needed to please the Government to avoid prosecution on CSC and/or child pornography charges was important and of "a different character." App. 14a. She noted the extremely long additional prison sentences for those crimes, and the negative notoriety to inmates convicted of such offenses while in incarceration. Judge Donald concluded that any potential for embarrassment of Stovall was relatively minimal and outweighed by Petitioners' need to cover this area for the jury's consideration. App. 15a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because the fundamental nature of the rights protected by the Confrontation Clause, the sheer volume of interpretive questions under the

Clause, and the failure of the lower courts to properly effectuate the rights of criminal defendants under the Clause.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const., amend. VI. "[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)); accord *Pointer v. Texas*, 380 U.S. 400, 404 (1965); *Alford v. United States*, 282 U.S. 687, 693 (1931) (confirming a defendant's right "to show by cross-examination that [a witness's] testimony was affected by fear or favor growing out of his detention"). A defendant establishes a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences related to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

While district courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination," *ibid.*, "reasonable limits" do not include a complete prohibition of any and all questioning on a classic bias theory. This is true even if the cross-examination has already elicited testimony that could damage the witness's credibility in other ways. The Confrontation Clause fundamentally requires that a defendant be allowed to explore, at least in some form, all potential reasons a witness may be biased. See *id.* at 679.

For instance, in *Delaware v. Van Arsdall*, the prosecution dismissed a public drunkenness charge after the witness agreed to speak with them. *Id.* at 676. The trial court cut off all questioning on the timing of the dismissal and the possibility that it would bias the witness. *Id.* at 679. This Court held that by "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony," the trial court violated the defendant's Confrontation Clause rights. *Ibid.*

Likewise, in *Davis v. Alaska*, a prosecution witness was on probation for burglary when he originally identified the defendant as the perpetrator of another burglary. 415 U.S. at 310–11. The defense sought to cross-examine the witness on his probationary status in part to demonstrate "the witness might have been subject to undue pressure from the police and made his identifications under possible fear of probation revocation." *Id.* at 311. This Court held that the trial court's exclusion of the witness's probation violated the defendant's confrontation rights, and that it was insufficient that the defendant had the ability to ask the witness whether he was biased. *Id.* at 318.

This case is no different. Before trial, the Government disclosed that it found child pornography created by Stovall—specifically, four videos of Stovall engaged in a sex act with a minor—on Stovall's smartphone. The Government disclosed that it questioned Stovall about the videos and the age of the minor, thereby making clear to Stovall that the Government knew about them.

Petitioners sought to explore whether Stovall perceived that his cooperation and testimony were necessary to escape additional prosecution for those offenses. No doubt, Petitioners had the opportunity to cross-examine Stovall regarding other possible motives for his testimony, including his plea agreement in the drug conspiracy case and his hope for a further reduced sentence through cooperation. But, as Judge Donald's dissent noted, the Government's discovery of concrete evidence for child pornography and CSC charges—and Stovall's knowledge of the Government's discovery—opened up a different line of inquiry. Petitioners sought to establish that Stovall feared prosecution for child pornography and CSC crimes, both of which had the probability of adding a significant consecutive prison sentence and would have labeled him a child molester as he entered federal prison on the drug conspiracy conviction. It is well-documented that defendants convicted of sex crimes face unique risks in prison. App. 15a. Stovall had an incentive to shade or fabricate in hopes that the Government decided not to refer him for further prosecution. The Confrontation Clause required that Petitioners be allowed to show their jurors not only Stovall's answers but also his demeanor in answering so they could properly weigh his credibility.

Further, Petitioners sought to explore whether any of Stovall's conversations with Government agents regarding the evidence of his child pornography and CSC crimes led Stovall to believe that a favorable outcome regarding any related charges might result from his cooperation and testimony. Even if the Government did not have a formal agreement with Stovall not to prosecute him for child pornography and

CSC, the Government may have dangled the possibility that a prosecution of Stovall in the future was possible unless the Government was happy with him. Such a "possibility of a reward" would have given Stovall "a direct personal stake in [Petitioners'] conviction[s]," which only would have been amplified by the fact that the reward or punishment was not guaranteed. *United States v. Bagley*, 473 U.S. 667, 683 (1985) (opinion of Blackmun, J.).

These facts, if borne out by Petitioners' proposed line of cross-examination of Stovall, would have given them a record from which to argue that Stovall had a significant, additional, independent basis to testify as the Government wished. Cf. *United States v. Kohring*, 637 F.3d 895, 904 (9th Cir. 2011) ("[E]vidence of Allen's sexual misconduct with a minor would have shed light on the magnitude of Allen's incentive to cooperate with authorities and would have revealed that he had much more at stake than was already known to the jury."). Because the district court precluded all questioning that touched on the child pornography evidence against Stovall, it is impossible to say whether Petitioners' proposed cross-examination would have been effective. But it is equally impossible to say whether this exclusion of a significant area of potential bias was harmless beyond a reasonable doubt, given the undisputed importance of Stovall as the star witness against Petitioners. Had the jury disbelieved Stovall, it may well not have convicted Petitioners.

This Court has made clear that the ability of criminal defendants to effectively cross-examine witnesses is a fundamental right under the Confrontation Clause. Because district courts have wide discretion as gatekeepers of evidence, legal

questions related to what a defendant has the right to explore in cross-examination arise with regularity. Since 2015, more than 1,000 lower federal and state court cases have examined Confrontation Clause contours. While courts are clear that defendants have the right to cross-examine witnesses about formal, clear promises to witnesses like in plea bargains, there is much more confusion about circumstances—as here—of a witness's subjective belief, or expectation, of a possible benefit. Those who practice in the criminal law know that such implied or perceived benefits are commonplace, and justice is not served if these are not explored for juries. Similar cases continue to occur across the country. Cf. *United States v. Giovanetti*, No. 07-CR-295, 2008 WL 2095370 (M.D. Fla. May 16, 2008) (acknowledging that existence of child pornography could be proper impeachment of a cooperator related to plea agreement, even if not "in and of itself . . . admissible evidence"). But few present the ideal vehicle for review that this matter does. See, *e.g.*, *McGee v. McFadden*, 139 S. Ct. 2608, 2609 (2019) (Sotomayor, J., dissenting from denial of certiorari on habeas review).

Because it is a case where the witness's testimony was the lynchpin of the Government's case and the district court completely barred any inquiry into a source of potential bias, this case presents a uniquely clean and appropriate vehicle to address this critical and recurring Confrontation Clause issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Sarah Riley Howard
Counsel of Record
Pinsky, Smith, Fayette & Kennedy LLP
146 Monroe Center St NW, Suite 418
Grand Rapids, MI 49503
(616) 451-8496
showard@psfklaw.com

Counsel for Petitioner Tremain Lamar Braxton

Parker Douglas
Counsel of Record
Assistant Federal Public Defender
Western District of Michigan
50 Louis NW, Suite 300
Grand Rapids, MI 49503
(616) 742-7420
parker_douglas@fd.org

Counsel for Petitioner Timothy Roy Mason

Brian P. Lennon
Counsel of Record
Charles R. Quigg
Warner Norcross + Judd LLP
150 Ottawa Avenue NW, Suite 1500
Grand Rapids, MI 49503
(616) 752-2000
blennon@wnj.com

Counsel for Petitioner Darrell Lee-Lamont Summers II

AUGUST 26, 2022

APPENDIX

TABLE OF CONTENTS

APPENDIX A - Opinion of the Sixth Circuit Court of Appeals 1a
APPENDIX B - Excerpts from 10/23/2019 Transcript 18a

NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0135n.06

Nos. 20-1491/1492/1515/1522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 29, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TREMAIN LAMAR BRAXTON (20-1491); TIMOTHY ROY MASON (20-1492); DARYL KEVIN CANNON (20-1515); DARRELL LEE-LAMONT SUMMERS II (20-1522),

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Before: MOORE, KETHLEDGE, and DONALD, Circuit Judges.

KETHLEDGE, J., delivered the opinion of the court in which MOORE, J., joined in full, and DONALD, J., joined in part. DONALD, J. (pp. 14–17), delivered a separate opinion dissenting from Part II.A.v. of the majority opinion.

KETHLEDGE, Circuit Judge. After a ten-day trial, Tremain Braxton, Timothy Mason, Daryl Cannon, and Darrell Summers II were convicted of crimes relating to a large drug conspiracy. The defendants raise a host of arguments on appeal, attacking both their convictions and their sentences. We vacate Cannon's sentence but otherwise affirm.

I.

In August 2018, law-enforcement agents searched a dozen drug houses and arrested 18 members of a conspiracy to distribute crystal methamphetamine in southwest Michigan. A grand jury thereafter indicted 24 people for participating in the conspiracy, including Braxton, Mason, Summers, and Cannon, each of whom chose to go to trial. The trial lasted ten days.

The government's star witness was Raymond Stovall, a co-conspirator who had pled guilty to charges related to the drug conspiracy and agreed to cooperate with the government.

At trial, Stovall testified that he and his co-conspirators bought crystal methamphetamine in Arizona and California (sometimes traveling by plane and other times sending drugs and cash through the mail) and then sold the meth in Michigan for a large profit. Stovall testified that Summers and Cannon were two of his suppliers and that Mason and Braxton were two of his downstream distributors. Five other co-conspirators likewise testified against the defendants. The government also introduced other evidence—such as intercepted drug packages, shipping records, flight records, phone records, wiretapped phone calls, and text messages—that corroborated their witnesses' testimony. The jury returned a guilty verdict, convicting all four defendants of conspiracy to distribute and to possess with intent to distribute 50 grams or more of methamphetamine. *See* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii), 846. Braxton, Mason, and Cannon were also convicted of additional crimes arising from the same conspiracy. The district court sentenced Braxton and Mason to 180 months' imprisonment, and Cannon and Summers to 240 months' imprisonment. This consolidated appeal followed.

II.

We address the defendants' arguments in turn, beginning with their convictions and then turning to their sentences.

A.

i.

Braxton and Mason argue that the district court should have granted their motion to suppress evidence that the government had obtained through a wiretap. While investigating the conspiracy, law-enforcement agents applied for wiretap orders to intercept Stovall's and another

conspirator's communications. The district court entered the orders, and agents intercepted thousands of phone calls and text messages, some of which implicated Braxton and Mason.

To obtain authorization for a wiretap, the government must show both probable cause and necessity. 18 U.S.C. § 2518(3). To establish probable cause, the government must show a fair probability "that an individual is committing" a crime and "that particular communications concerning that offense will be obtained" through the wiretap. *Id.* § 2518(3)(a)–(b). To establish necessity, the government must show that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *Id.* § 2518(3)(c).

The defendants argue that the government met neither of these requirements here. We review "the district court's findings of fact for clear error and questions of law de novo." *United States v. Poulsen*, 655 F.3d 492, 503 (6th Cir. 2011).

Probable cause "is not a high bar," and here the wiretap application easily clears it. *Kaley v. United States*, 571 U.S. 320, 338 (2014). The application laid out that officers had conducted nine controlled buys, intercepted drug packages, surveilled Stovall and other conspirators, seized meth from some of the conspirators, listened to a drug-related phone call between Stovall and a prison inmate, and tracked conspiracy-related communications to the two target phones. That was enough to establish probable cause. *See, e.g.*, *Poulsen*, 655 F.3d at 504.

The defendants counter that two confidential informants, a postal worker, and an undercover police officer, each of whom played some part in the investigation, were "unreliable." But the information these sources provided was corroborated by controlled buys, intercepted drug packages, surveillance of conspiracy members, and recorded phone conversations. In addition, in its wiretap application, the government disclosed the "problems with its sources," which allowed

the district court to make its own determination that, though some of the informants "might have credibility problems," others did not. The district court did not err in concluding that the wiretap application established probable cause.

The same is true as to necessity. The affidavit detailed law enforcement's attempts to gain information through informants and its attempts to use an undercover agent. The affidavit also recited the reasons why, at the time, execution of search warrants or other methods of investigation would have been imprudent. True, the wiretap application did not demonstrate the futility of every other investigative procedure; but the government need not "prove that every other conceivable method has been tried and failed" to satisfy the necessity requirement. *United States v. Alfano*, 838 F.2d 158, 163 (6th Cir. 1988). Here, the affidavit laid out the normal investigative procedures that police had already attempted and explained why others would be futile. That was enough to establish necessity. *See, e.g.*, *United States v. Young*, 847 F.3d 328, 344–45 (6th Cir. 2017). The defendants' argument is therefore without merit.

ii.

Relatedly, Braxton argues that the district court abused its discretion when it allowed the government to admit recordings of the wiretapped phone calls into evidence and use "transcripts" of the calls as aids at trial. Specifically, Braxton contends that the recorded calls were incomprehensible and that the government's "transcripts" were unreliable.

A party may admit a recording into evidence only if the recording is "sufficiently comprehensible for the jury to consider the contents." *United States v. Wesley*, 417 F.3d 612, 620 (6th Cir. 2005) (internal quotation marks omitted). If a recording contains incomprehensible portions that are substantial enough "to render the recordings as a whole untrustworthy," then the recording is inadmissible. *United States v. Wilkinson*, 53 F.3d 757, 761 (6th Cir. 1995) (internal

quotation marks omitted). Similarly, a party may use a transcript at trial only if the transcript is reliable. *See United States v. Robinson*, 707 F.2d 872, 875–79 (6th Cir. 1983). If the parties have not stipulated to the accuracy of a transcript, then the court should "make an independent determination of accuracy by reading the transcript against the tape." *Id.* at 878–79. In the end, "the decision to employ recordings and transcripts" rests within "the sound judicial discretion of the trial court." *Id.* at 875.

Here, the district court listened to the recordings and compared them to the transcripts that the government had prepared. The court found that, though the calls were "difficult" to understand "at points," the audio "was pretty clear" during the parts that the government had transcribed. Our own review of the recordings confirms that the audible portions of the recordings were clear enough to submit to the jury and that the incomprehensible portions were not so substantial as to render the whole untrustworthy. Likewise, the transcripts fairly reflected the audible portions of the recorded calls and indicated where the audio was unintelligible. The district court did not abuse its discretion by admitting the recordings into evidence or allowing the jury to read the transcripts during trial.

iii.

Three of the defendants—Braxton, Mason, and Summers—argue that the district court abused its discretion when it denied their emergency motion to adjourn trial. *See United States v. Garner*, 507 F.3d 399, 408 (6th Cir. 2007). A few days before trial, the government produced over 13 gigabytes of "Jencks Act material," including witness interviews, jail phone calls, grand-jury transcripts, and proffer reports. The Jencks Act requires the government to produce any statements made by its witnesses that relate to "the subject matter as to which the witness has testified" and that the government has in its "possession." 18 U.S.C. § 3500(b). The Act requires the

government to produce these statements only after the witness "has testified on direct examination." *Id.* Here, in the district court, the defendants did not argue that the government failed to comply with the Jencks Act. Yet they moved to continue the trial for one week, complaining that they did not have enough time to review the material. The district court denied the motion, noting that the government had produced the material earlier than the Act required, and that the production for the most part comprised only "about 10 hours of audio and video recorded interviews." The court also found that counsel had "plenty of time" to review the material before trial.

A district court has "wide discretion in the scheduling of a trial," which we will not disturb absent "manifest abuse." *United States v. Van Dyke*, 605 F.2d 220, 227 (6th Cir. 1979). Thus, to prevail on appeal, the defendants must show that the denial caused them to suffer "actual prejudice"—meaning, for example, that "additional time would have produced more witnesses" or "added something" to their case. *United States v. Martin*, 740 F.2 1352, 1360–61 (6th Cir. 1984).

The defendants barely attempt to show prejudice here. Summers contends that reviewing the material "necessarily drew his counsel's attention away from other critical trial-preparation tasks." But "inconvenience" alone cannot establish actual prejudice. *Van Dyke*, 605 F.2d at 227. The defendants also say that the short time between production and trial prevented them from reviewing the material "with any meaningful thoroughness." Yet the defendants point to no specific document or recording that they would have used at trial had the trial been adjourned. Indeed, they nearly concede the absence of any prejudice, stating that they "cannot possibly know with certainty what they could have used and in what way they could have used it." And if the defendants in fact had suffered any concrete prejudice as a result of the court's decision, they

presumably would be able to articulate it now. They have not. The district court did not abuse its discretion by denying the motion to adjourn.

iv.

Cannon argues that the district court abused its discretion when it denied his motion for a mistrial. *See United States v. Knipp*, 963 F.2d 839, 844–45 (6th Cir. 1992). The defendants so moved after the district court admonished Prospective Juror 123, a corrections officer, for statements he had made during voir dire. Specifically, Juror 123 said that he "would have a hard time being impartial" because he "deals with felons every day" and that it was in his "best interests for there to be more prisoners just for job security." The district court told him that his answers were "crass" and "really disappointing," given that he held a position of public trust. Soon after, Juror 123 added that, because the four defendants and their family members knew his first and last name and where he worked, the court was "jeopardizing [his] safety" by making him participate in the trial. The district court again criticized Juror 123 for his "disregard for the constitutional norms that we all live by," and then excused him for cause.

On appeal, Cannon argues that Juror 123's comments "poisoned the pool" of prospective jurors. His theory is that, after Juror 123 expressed safety concerns, others on the jury panel would have been scared too, which would have inclined them to find him guilty.

The question whether a jury is fair and impartial "is essentially one of credibility," and the district court's resolution of that question is entitled to "special deference." *Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (internal quotation marks omitted). Here, the district court observed that, during voir dire, Juror 123 had admitted that he "really" did not want to serve on the jury, which in the courts view tainted his credibility in the minds of the other prospective jurors. Indeed, the court said that the other prospective jurors were "rolling their eyes" at Juror 123's remarks. The

court ultimately found that there had been no "poisoning of the well at all." On this record we see no abuse of discretion in that determination. *See Knipp*, 963 F.2d at 845.

v.

Braxton, Mason, and Summers argue that the district court abused its discretion when it barred them from cross-examining Stovall about child pornography that police had found on his cellphone. *See United States v. Callahan*, 801 F.3d 606, 623 (6th Cir. 2015). By way of background, law-enforcement agents obtained a warrant and searched Stovall's phone after he was arrested in 2018. There they found multiple videos of Stovall engaging in sexual conduct with a 15-year-old female. Although the government questioned Stovall about these videos, Stovall was not charged with any crimes related to them. At trial, the defendants sought to cross-examine Stovall as to any potential "bias" related to the pornography on his phone and any "discussions with the government regarding chargeable conduct." But the district court barred cross-examination on the topic.

The Sixth Amendment affords all criminal defendants the right to cross-examine witnesses about matters especially important to their credibility, such as their potential bias or motive to present false testimony at trial. *See Davis v. Alaska*, 415 U.S. 308, 315–16 (1974). That the government and the witness have some "understanding or agreement as to a future prosecution," for example, is important to the witness's credibility. *Giglio v. United States*, 405 U.S. 150, 154–55 (1972). But a district court retains "wide latitude" to impose reasonable limits on cross-examination. *Callahan*, 801 F.3d at 623 (internal quotation marks omitted). "So long as cross-examination elicits adequate information to allow a jury to assess a witness's credibility, motives, or possible bias," a limitation on cross-examination does not violate the Sixth Amendment. *Id.* at 624 (internal quotation marks omitted).

Here, the defendants had no evidence at all of any agreement between the government and Stovall regarding a potential child-pornography charge. Meanwhile, the jury did know that Stovall had faced a life sentence for his involvement in the conspiracy, which he avoided by means of his plea agreement and testimony at trial. The jury also knew that, even though the government suspected that Stovall had ordered his subordinates to murder two men in connection with his drug dealing, the government had not charged Stovall for the murders. The jury thus already knew that Stovall had ample incentive to testify favorably to the government so as to avoid being charged with future crimes. *See id.* The defendants counter that a conviction for child pornography would bring consequences (e.g., a designation as a sex offender) that Stovall's drug convictions would not. But that concern was marginal, given the indisputably severe consequences that the jury already knew that Stovall was facing as a result of his conduct. Meanwhile, as the district court found, disclosure of the child pornography would have been highly prejudicial and at most only moderately probative of Stovall's credibility as a witness. The district court did not abuse its discretion by limiting the scope of Stovall's cross-examination.

vi.

Mason argues that the prosecutor committed misconduct—namely that he elicited false testimony when Stovall testified that he sold meth to Mason on July 11, 2018. According to Mason, that statement contradicted Stovall's testimony from an earlier trial, at which Stovall said that, on July 11, he had told Antwan Mims that he did not have any meth to sell. Mason also says that Stovall's testimony about the July 11 sale to Mason contradicted the testimony of another co-conspirator, Richard James, who said that he and Stovall were out of meth on July 10 and 11. Mason did not raise this argument in the district court, so we review it for plain error. *See United States v. Blood*, 435 F.3d 612, 627 (6th Cir. 2006).

To succeed on this claim, Mason must show that the challenged testimony "was actually false." *Rosencrantz v. Lafler*, 568 F.3d 577, 583 (6th Cir. 2009). And to make that showing, he must demonstrate that the testimony was "indisputably false." *United States v. Lochmondy*, 890 F.2d 817, 822–23 (6th Cir. 1989).

Ample evidence supported Stovall's testimony about the July 11 drug deal. For one thing, police intercepted more than a dozen messages and phone calls between Mason and Stovall, which corroborated Stovall's account of the July 11 deal. Mason does not even attempt to explain what those messages were about, if not a drug deal. For another, when Mason's counsel cross-examined Stovall about the inconsistencies between his testimony at the two trials, Stovall said that he had simply lied to Mims on July 11—because he would have made more money selling the meth to Mason than to Mims. And Mason otherwise points to "mere inconsistencies" in Stovall's testimony, which are not enough to prove prosecutorial misconduct. *Id.* at 822. This claim is without merit.

vii.

Cannon and Summers each argue that insufficient evidence supported their convictions. We view the evidence in the light most favorable to the government, asking whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

We begin with Cannon, who argues that insufficient evidence supported his conspiracy conviction. But plenty of evidence tied Cannon to the conspiracy: Stovall testified that he and Cannon traveled to California to buy drugs from Cannon's supplier; flight records confirmed that Cannon had flown to California 17 times in less than two years; and two other conspirators testified about Cannon's involvement in the conspiracy. Moreover, phone records showed that Cannon

communicated with Stovall 118 times and with other co-conspirators at least 111 times. Sufficient evidence supported Cannon's conspiracy conviction.

The same is true as to Cannon's conviction for distribution of methamphetamine: several witnesses testified about Cannon's distribution activities, and we will not second-guess their credibility here. *See United States v. Washington*, 715 F.3d 975, 981 (6th Cir. 2013). Sufficient evidence supported both of Cannon's convictions.

Summers likewise argues that insufficient evidence supported his conspiracy conviction. In his view, the evidence demonstrated only that he "associated" with Stovall and that he sold meth "independently," not that he agreed to join a conspiracy. But Stovall and another co-conspirator testified that Summers and Stovall had traveled together to Arizona to purchase meth. Stovall also testified that he met Summers in California to buy meth on one occasion, and that on many other occasions he sold drugs that he had bought from Summers. Another co-conspirator testified that he had sold over 50 pounds of meth to Summers. The testimony of these co-conspirators, on its own, was sufficient to support Summers's conviction.

B.

We turn to the defendants' arguments about their sentences. Braxton argues that the district court erred in counting his conviction under Mich. Comp. Laws § 333.7401 as a "serious drug offense." 18 U.S.C. § 924(e)(2). But he concedes that our recent decisions in *United States v. Thomas*, 969 F.3d 583, 585 (6th Cir. 2020), and *United States v. Booker*, 994 F.3d 591, 594–96 (6th Cir. 2021), hold otherwise. So we reject that argument here.

Cannon raises three sentencing arguments. First, he argues that the district court clearly erred when it held him responsible for 30 pounds of methamphetamine. *See United States v. Russell*, 595 F.3d 633, 646 (6th Cir. 2010). A district court may calculate "the amount of drugs

for which a defendant should be held accountable" using only "testimonial evidence from a co-conspirator." *United States v. Hernandez*, 227 F.3d 686, 697–98 (6th Cir. 2000). Cannon admits that Stovall's testimony supports the 30-pound calculation, which is reason enough to reject this argument.

Second, Cannon argues that the district court erred in applying a two-level enhancement for obstructing justice. *See* U.S.S.G. § 3C1.1. At sentencing, the district court explained:

> I think the obstruction enhancement does apply. Obviously anybody has the right to testify, but that doesn't carry the right to commit perjury. And if you get on the stand [and] . . . affirmatively assert "I wasn't involved in this, you know, I didn't do this," when in fact the jury finds beyond a reasonable doubt that you did, and you go even beyond that and are trying to articulate an alternative narrative to explain the evidence about the food truck business, I think there has to be and appropriately is a penalty for that.

A defendant's perjury is ground for a § 3C1.1 enhancement only if the district court identifies the "particular portions of the defendant's testimony that it considers to be perjurious." *United States v. Roberts*, 919 F.3d 980, 990 (6th Cir. 2019) (internal quotation marks omitted). The district court must then either "make specific findings for each element of perjury" or at least make a finding that covers all the elements of perjury (that the defendant made "a false statement under oath" about a "material matter . . . with the willful intent to provide false testimony"). *Id.* at 990–91 (internal quotation marks omitted). These requirements limit the danger that "every accused who testifies at trial and is convicted" receives the enhancement. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

Here, the district court simply did not explain the bases for the enhancement with the specificity that *Roberts* requires. The court did not identify any "particular portions" of Cannon's testimony as perjurious. *Roberts*, 919 F.3d at 990. Nor did the court explain how any of his

testimony satisfied each element of perjury. The court therefore did not make the findings necessary to support the obstruction enhancement.

Third, Cannon argues that his 240-month sentence was substantively unreasonable. But given our vacatur of the obstruction enhancement, we decline to consider that argument here. *See United States v. Wilson*, 614 F.3d 219, 226 (6th Cir. 2010).

Finally, Summers argues that the district court clearly erred in finding that he was "an organizer or leader" of the drug conspiracy. *See* U.S.S.G. § 3B1.1(c). The court found that Summers supervised one co-conspirator, Scotty Campbell. The evidence at trial supported that finding: Stovall testified that Campbell was Summers's right-hand man; another co-conspirator testified that Campbell had worked with Summers, that the two were best friends, and that Campbell bought meth from Summers; and ample evidence showed that Summers and Campbell had a close relationship. The district court did not clearly err when it found that Summers supervised Campbell. *See United States v. Sexton*, 894 F.3d 787, 794 (6th Cir. 2018).

* * *

The district court's judgments are affirmed, except that we vacate Cannon's sentence and remand for the district court to determine whether to apply the obstruction enhancement.

BERNICE BOUIE DONALD, Circuit Judge, dissenting in part and concurring in part.

I.

I disagree with the majority that the defendants' impeachment of Stovall eviscerated the need for further cross-examination in line with the Sixth Amendment. I therefore must dissent from Part II.A.v. of the majority opinion.

"At the core of the Confrontation Clause is the right of every defendant to test the credibility of witnesses through cross-examination." *Boggs v. Collins*, 226 F.3d 728, 736 (6th Cir. 2000). Revealing a witness' bias or motivation to lie plays a vital role in casting doubt on a witness' credibility. *Id.* Thus, "'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)). Accordingly, a trial court may not prohibit a criminal "from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness," *id.* at 680, or unduly limit "information concerning formative events . . . of the witness' motives and bias," *United States v. Fields*, 763 F.3d 443, 464 (6th Cir. 2014). Unfortunately, the majority allows the district court to do just that in this case.

I agree that Stovall's testimony underwent various attacks and his credibility resultantly suffered. However, the line of inquiry that the defendants sought to pursue at trial—Stovall's potential motivation to avoid child pornography charges—is of a different character than the other areas of impeachment.

Production of child pornography is a federal crime that entails heavy penalties. *See* 18 U.S.C. § 2251. For instance, production of child pornography carries a mandatory minimum sentence of fifteen-years' imprisonment. *See id.*; *see also United States v. Sweet*, No. 21-1477,

2021 WL 5371402, at *4 (6th Cir. Nov. 18, 2021) (noting that production "carries a far longer sentence than that associated with mere possession"). While that alone may not differentiate it from Stovall's other impeachable conduct, a conviction for child pornography additionally triggers the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq*. SORNA requires offenders to publicly report their name, residential address, and criminal history. *See* 34 U.S.C. § 20914. It also subjects offenders to future criminal liability for failing to register or update their registration. *See* 34 U.S.C. § 20913. Furthermore, it is well known that defendants convicted of child sex crimes face harsh treatment in prison. *See, e.g.*, Brian D. Gallagher, *Now that We Know Where They Are, What Do We Do with Them?: The Placement of Sex Offenders in the Age of Megan's Law*, 7 WIDENER J. PUB. L. 39, 63 (1997) (quoting a prison inmate describing the violence that occurs against child sex offenders in prison); *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 327, 339 (2003) ("Within the hierarchy of prisons . . . sex offenders in general—and child molesters in particular—are considered the lowest of the low.").

Under these circumstances, the minimal, if any, potential for harassment or embarrassment cannot serve as a basis to preclude this prototypical form of cross-examination. Even if temporary embarrassment exists, it is "outweighed by [the defendants'] right to probe into the influence of possible bias in the testimony of a crucial [government] witness." *Davis*, 415 U.S. at 319. *See id.* at 320 ("[T]he State's desire that [the government's witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of [the defendant] to seek out the truth in the process of defending himself.").

To limit a highly pertinent area of cross-examination in a case resting, almost exclusively, on the testimony of a drug conspiracy leader sets a troublesome precedent. For the aforementioned reasons, I respectfully dissent.

II.

I reluctantly concur in Part II.A.iii. of the majority opinion. I write separately to express my disagreement with the Jencks Act. The Jencks Act is an outmoded means of discovery. Congress passed the Act in 1957, when case complexity, globalization of evidence, and technology did not play a central role in the pretrial process. This is not the case today. Today, the pretrial process is fraught with lengthy, multi-defendant trials and encrypted, digitized discovery. Given the significant change in the judicial process, the Jencks Act is no longer practical or fair.

Allowing the government to strictly follow the timing provision of the Jencks Act would result in substantial judicial disruption. Such late disclosures would require trial judges to routinely continue cases to allow defense counsel the opportunity to review each witness statement prior to cross-examination. Notably, sufficient time to review a witness statement does not necessarily translate to sufficient time to prepare proper cross-examination. Many federal investigations are conducted over an extended period of time with voluminous amounts of information accumulated. When the government releases this information only after a witness has testified, defense counsel is often limited to what the government provided. There is little opportunity for the defense to verify the information or conduct additional searches for pertinent points of cross-examination. Proper cross-examination is crucial in fact-intensive cases, such as this one.

Pretrial discovery of witness statements is necessary to afford a more efficient judicial process, limit the prosecutorial advantage at trial, and guarantee effective assistance of defense counsel. However, under current law, the government can statutorily withhold such statements until after the witness has testified on direct examination. *See* 18 U.S.C. § 3500(a). Braxton,

Mason, and Summers' argument is thus foreclosed by the rigid—and in my opinion impractical—requirements under the Jencks Act. Therefore, I have no choice but to concur.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

_____

UNITED STATES OF AMERICA,

Plaintiff,

DOCKET NO. 1:18-cr-250

vs.

TREMAIN LAMAR BRAXTON;
DARRELL LEE-LAMONT SUMMERS, II;
DARYL KEVIN CANNON;
TIMOTHY ROY MASON,

Defendants.
_____/

TRANSCRIPT OF FINAL PRETRIAL CONFERENCE

BEFORE THE HONORABLE ROBERT J. JONKER, CHIEF JUDGE

GRAND RAPIDS, MICHIGAN

October 23, 2019

Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court
685 Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Proceedings reported by stenotype, transcript produced by computer-aided transcription.

THE COURT: Oh, he's in trial on that starting tomorrow.

MS. HOWARD: Right. Yes, Your Honor.

THE COURT: Okay. All right. In terms of the issues that were briefed already, there's the motion on the voir dire and there's the motion on a potential avenue of cross-exam for Mr. Stovall.

Anybody want to further amplify their position on those issues?

MR. PRESANT: No, Your Honor.

THE COURT: Or anybody at defense table? Let me start with Mr. Douglas since the poor guy doesn't get a chance to do anything except say "Me too."

MR. DOUGLAS: I think it's been fully briefed, Your Honor.

THE COURT: Okay. Mr. Beason?

MR. BEASON: Same, Your Honor.

MR. LENNON: Same, although for the record we would have joined it. I think we intended to join both motions and may not have formally joined both, and we would ask that we do so.

THE COURT: Anything else from Ms. Howard?

MS. HOWARD: No, Your Honor, not other than what's been briefed already.

THE COURT: Okay. On the implicit bias video, which

I think is out there in the Western District of Washington, I am going to deny that motion. I don't intend to show that to the jury in voir dire. In my view for multiple reasons. I think the implicit bias science is interesting but evolving. I don't think that we're at a point where it is particularly good for the Court to weigh in on either side. I think the issues that the parties need to get to and the Court needs to get to on voir dire regarding possible racial bias can and are better actually addressed in a much more indirect way. I've only seen one lawyer in this court try to raise implicit bias with a venire, it didn't include the video, but I'll just say it didn't go well. The jury all got their backs up, and it wound up, I think, being counterproductive. And in part that's because the whole theory of implicit bias tends to put people on the defensive and doesn't -- doesn't provide an easy fix. It almost suggests that "Well, you're telling me that, you know, I'm automatically biased and I don't even know it," and that's not an especially fruitful way to introduce yourself to the jury. I think that the indirect questions, some of which I saw in the proposed voir dire already, some of which I know counsel at the defense table have already used effectively, is a much better way to get the attitudes of the jurors fronted without doing so in a way that becomes threatening or potentially a backlash. And I think that the interests can be fully protected and better protected in that fashion.

It's true -- and my final point is that it's true in this case we're down to four African-American defendants, but it would be -- and I think -- I don't know who the government is going to call in terms of cooperators, but there are both black and white defendants involved in the overall alleged conspiracies here, and so in some ways it would be an even odder situation in which to use it than one where everybody on the defensive side and is part of the alleged conspiracy is of the same race. But more fundamentally I don't think it's an effective way or the most effective or best way to front the issue and get to it.

On a lighter note that's related, I don't know if any of you ever watch the -- I think it's a CBS show, *Bull*, which is, of course, stylized, not the way it really goes, but it's all about a jury consultant. And it's based on and in fact Dr. Phil McGraw is, I think, one of the producers or directors. Among other things he's a jury consultant. And what you will see -- again stylized and over the top -- but what you will see if you watch *Bull* are -- in every episode -- some way in which the jury is -- and the important issue of juror bias, whatever it happens to be in the case -- is fronted in an incredibly indirect way. I think that's the way to go. I think that's the best way to go on whatever your issues are. So the prospective jury doesn't even know what you're getting at but you do. So I think that creative counsel can find ways to

approach that issue in a way that's fair to everyone.

On the cross, Mr. Stovall, obviously his credibility is critical, and credibility is a broad door. People are allowed to get into lots of different things. What he's getting or might be getting in exchange for testimony is naturally a focal point of any defense cross-examination. He certainly was aggressively crossed the last time Mr. Stovall testified, and I would expect it here.

The particular focus, as I understand the motion, is on pictures that were found on his phone, and I think the pictures involve somebody who is a woman who is 15 years of age or thereabouts providing oral sex to Mr. Stovall. I don't know if they were movies or stills. But from the defense point of view they want to cross-examine him on that as potentially being in possession, maybe even sending or producing, child pornography, which would obviously be potentially something that might make jurors frown on Mr. Stovall as a person.

I do intend to grant the government's Motion In Limine on it, though, because I don't think it's a fair avenue for cross-examination in this case. Whatever else it may say about Mr. Stovall as a person, I don't see that it bears much on his credibility at all. And, you know, the acts itself don't really fundamentally involve honesty or dishonesty. And although if it were clear to me from the record of the case that the government knew about it and had said, "Well, we're

not going to prosecute you on that because of your cooperation," at that point it may well be that the information would be fairly subject to cross despite the prejudice. But that's really the final point. I don't see that here. There's nothing that has insulated Mr. Stovall from the risk of that. And more to the point, even if there were that, I'd have to look at it, the potential prejudice under 403 I think would substantially outweigh whatever limited relevance there might be, at least on the present record.

Certainly it's exactly the kind of information that threatens to distract the fact-finder from focusing on whether they believe what Mr. Stovall says or not, whether they think he's a credible person in telling his story and just have him focus on something completely different and unrelated and say, "Well, we think he's a bad person, and we don't like what he's doing with this 15-year-old or what he's letting the 15-year-old do to him." So under those circumstances, to me even if there were some limited relevance, which I really don't see on the credibility here, it would be substantially outweighed by the 403 prejudice. So those would be my rulings on those issues.

Were there other aspects of the cross-exam that you wanted to get at with Mr. Stovall?

MS. HOWARD: Yes, Your Honor. I would like to be heard on that.

THE COURT: Okay.

MS. HOWARD: Part of the concern is what Stovall's state of mind was when he's giving information to the government. And it would appear to me from the information that we have that the government questioned him about that issue. And so clearly he knew that prosecution was a potential. And if he thinks it's a potential that he can be prosecuted for that, he's certainly going to do what he thinks he needs to do, whether he's correct or not, to make the government happy or give himself additional avenues for downward departure motions, substantial assistance motions. And we think that there's enough threat given -- clearly they talked about it. Even if there's nothing in the agreement, his thought that that could come up later because they talked about it is enough to create bias and why he might name additional people, talk about additional quantity. And I think it's very relevant in terms of the bias of what he was getting or thought he was getting, Your Honor.

THE COURT: Okay. And there's no other topic area? That's the topic area you're talking about? Those pictures or the videos, whatever they are?

MS. HOWARD: It's my understanding it's a movie, Your Honor, but yes.

THE COURT: Movie. Okay.

MR. LENNON: And just we would want to point out,

Your Honor, that not only is it a possession of child porn issue, it's also a potential CSC second, a 15-year felony. And based on the reports -- I'm not sure if that made it in the motion or not -- but based on the reports of that, when we're talking about credibility, Mr. Stovall himself said, "I thought the woman was 18." I think that would -- and so I would ask the Court to at least keep it open and allow us to maybe make an argument closer. But my understanding is Mr. Stovall's explanation was "I thought she was 18." That, I think, would be something that we would be able to challenge or ask the Court to consider to allow us to challenge.

The other thing I would suggest, Your Honor, is that, you know, we don't know what part of the -- that this played in a deal, and we'd ask that maybe we be allowed to have access or let the Court have access to the Kalamazoo records on what the referral says, what the deal may be down with respect to the Kalamazoo prosecutor, and ask the Court to review that in camera before making a ruling. Or at least ask the Court to do that before reconsidering the Court's ruling.

THE COURT: Anything else from Mr. Beason or Mr. Douglas?

MR. BEASON: I join it, Your Honor.

THE COURT: Mr. Douglas?

MR. DOUGLAS: Yes, Your Honor. Just to make the fine point on the record, I think if we did get the Kalamazoo

records at least before Your Honor, we are talking about, you know, a possible prosecution for 15 years or more that could be held in abeyance, and I think that goes strictly to what we might ask Mr. Stovall about on cross.

THE COURT: All right. Anything that you want to respond on, Mr. Presant?

MR. PRESANT: I think it's all treated in the briefing, Your Honor. Thank you.

THE COURT: I don't think that changes my analysis. From my perspective it's still of marginal relevance on the record I see and certainly substantially outweighed by the possibility of prejudice.

To the extent there's some undisclosed deal, the government has got Brady and Giglio issues that would invalidate things down the road anyway, and I'm not going to be the Brady and Giglio police up front. That's what Brady and Giglio are there for. And the government certainly has not disclosed any kind of a deal that involves that.

With respect to, you know, whether Mr. Stovall, you know, was credible or not in thinking -- or saying this was an 18-year-old, if we were dealing with a sex crime or a child porn case, I might be more open to that. But this has nothing to do with drug distribution. And if you start opening the door to what people are saying about entirely unrelated things, I think you'd never get to the end of a trial. And I don't see

in this case, particularly with the potential for a distracting prejudice, that we would open the door -- that I would open the door to that kind of cross-exam.

Anything else on those motions?

MR. PRESANT: Not from the government.

THE COURT: Okay. Yeah. And obviously in any motion in limine, and that's true of this one too, if things develop on the ground at trial in a way that opens doors, then things change. But for preliminary planning purposes in terms of what you need to expect, that, I think, is what you ought to plan on: That I would sustain the government's objection and will grant the motion in limine based on what I know now.

Are there other things -- those were the only motions I saw still pending. Are there other -- first of all, are there any I missed? And then are there any other things that we can usefully do today? Anything -- any motions I'm missing from the government?

MR. PRESANT: No, Your Honor. We have no other issues.

THE COURT: Say again.

MR. PRESANT: We have no other issues.

THE COURT: Okay. Anything else from the defense that needs attention on the motions?

MS. HOWARD: Not on the motions, Your Honor.

THE COURT: Okay. On motions anything else?

(Proceeding concluded at 4:47 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I further certify that the transcript fees and format comply with those prescribed by the court and the Judicial Conference of the United States.

Date: June 22, 2020

/s/ Glenda Trexler

Glenda Trexler, CSR-1436, RPR, CRR