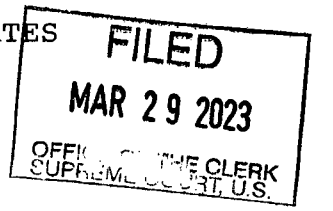
No. 22-7284 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES



HERBERT BERNARD JOHNSON,

PETITIONER,

vs.

UNITED STATES OF AMERICA

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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pro se Petitioner
Herbert Bernard Johnson
Reg. No. 51407-039
FCI Englewood
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Littleton, CO 80123

TABLE OF CONTENTS

INDEX OF AUTHORITIES

QUESTIONS PRESENTED FOR REVIEW

I. Should this Court grant the Petition for a Writ of Certiorari to resolve whether the statutory language of 18 U.S.C. §2252A(a)(5)(B)'s alternative interstate commerce elements constitute separate offenses or alternative means to commit the same offense and whether substitution of one interstate commerce prong for another constitutes a structural error when one prong is charged and another is proved at trial.

II. Should this Court grant the Petition for a Writ of Certiorari to resolve whether and amendment between indictment and trial of §2252A(a)(5)(B)'s alternative interstate commerce elements constitutes harmless error when one prong is charged and another is proved at trial.

Petitioner Herbert Bernard Johnson respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed on September 7, 2022.

OPINIONS BELOW AND JURISDICTION

On September 17, 2015, a federal grand jury in the Eastern District of Michigan returned a two-count indictment against Herbert Bernard Johnson. Indictment, R. 10, ##20-24. This was later followed by five-count and four-count superseding indictments which further alleged child sexual exploitation offenses. First Superseding Indictment, R. 18, ##46-52; Second Superseding Indictment, R. 42, ##109-15. The case focused on the defendant traveling to the State of Michigan and attempting to meet a minor, allegedly for the purpose of sex, and remnants of child pornography which were discovered on his laptop. Based on the events leading up to and including September 9, 2015, Mr. Johnson was charged with Count 1: Attempted Coercion and Enticement of a Minor, 18 U.S.C. §2422(b), Count 2: Travel with Intent to Engage in Illicit Sexual Activity, 18 U.S.C. §2423(b), Count 3: Transportation of Child Pornography, 18 U.S.C. §2252A(a)(1), and Count 4: Possession of Child Pornography, 18 U.S.C. §2252A(a)(5)(B).

Mr. Johnson proceeded to jury trial on November 29, 2016. The jury returned guilty verdicts on Counts 1, 2, and 4 and a verdict of not guilty on Count 3 on December 2, 2016. Jury Verdict Form, R. 53, ##254-56. On March 27, 2018, the district court sentenced Mr. Johnson to one-hundred twenty-one months of imprisonment followed by lifetime supervised release. Judgment, R. 96, ##997-1004.

On May 23, 2018, a three-judge panel of the Sixth Circuit Court of Appeals affirmed Mr. Johnson's convictions in a decision published in the Federal Appendix. See United States v. Johnson, 775 Fed. App'x. 794 (6th Cir. 2019) (Appendix D).

On August 19, 2020, Mr. Johnson filed a motion in the district court to vacate his sentence and convictions. §2255 Motion, R. 109, ##1130-87. He later filed a motion to amend his §2255 Motion on September 1, 2020. Motion to Amend §2255 Motion, R. 114, ##1192-95. In total, he raised twenty claims related to his sentence and convictions. The district court denied both motions on procedural and substantive grounds in a unpublished order. Opinion & Order, R. 120, ##1251-61 (Appendix B).

Mr. Johnson then petitioned the Sixth Circuit Court of Appeals for a Certificate of Appealability as to six of those issues. The Sixth Circuit denied the petition in part and granted it in part on October 7, 2021. Appendix E (Granting on the claim: "Whether the district court erred in dismissing on procedural-default grounds Johnson's claim that the district court's jury instructions on Count Four constructively amended the indictment" and denying a certificate on all other grounds). Mr. Johnson petitioned the Sixth Circuit for a rehearing and rehearing en banc as to other issues for which he was denied a certificate of appealability and that petition was denied on February 22, 2022. Appendix F. As to those denied issues, Mr. Johnson petitioned the United States Supreme Court for a writ of certiorari which was denied on October 3, 2022. Appendix G.

Both parties briefed the issue granted by the certificate of appealability and the Sixth Circuit affirmed the district court's

judgment on September 7, 2022. Appendix A. Mr. Johnson petitioned the Sixth Circuit for a rehearing and rehearing en banc and that petition was denied on January 5, 2023. Appendix C.

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE AND FACTS

Defendant Herbert Bernard Johnson was named in an indictment charging, Count 1: Attempted Coercion and Enticement of a Minor, 18 US.C. §2422(b), and Count 2: Travel with Intent to Engage in Illicit Sexual Activity, 18 U.S.C. §2423(b). Indictment, R. 10, ##20-24. A First Superseding Indictment was thereafter filed further alleging Count 3: Distribution of Child Pornography, 18 U.S.C. §2252A(a)(2), Count 4: Receipt of Child Pornography, 18 U.S.C. §2252A(a)(2), and Count 5: Possession of Child Pornography, 18 U.S.C. §2252A(a)(5)(B). First Superseding Indictment, R. 18, ##46-53. A Second Superseding Indictment followed, changing the statutory references in Counts 3-5 to include Count 3: Transportation of Child Pornography, 18 U.S.C. §2252A(a)(1), and Count 4: Possession of Child Pornography, 18 U.S.C. §2252A(a)(5)(B). Second Superseding Indictment ("SSI"), R. 42, ##109-15.

The charges were based on allegations that Mr. Johnson traveled from Colorado to Michigan in order to meet with a 15-year old boy for the purposes of engaging in sexual activity with him. The investigation began when a federal agent, posing as a 15-year old boy, responded to a Craigslist advertisement by Herbert Bernard Johnson. Trial Tr., R. 63, ##412 & 416.

On August 25, 2015, Special Agent Raymond Nichols was reviewing Craigslist advertisements, looking for individuals offering child pornography or looking to have sex with minors. Id., R. 63, #435. Craigslist is Internet-based advertising used to sell items or meet individuals. Id. The agent located an advertisement posted from an email address of zenofbj@gmail.com, with a phone number of 303-335-9313. Id., R. 63, ##438-39. The advertisement was posted

on August 24, 2015 and had been reposted at a later time. It was posted to the Detroit Metro/Oakland County area in the "Personals" section of the "Casual Encounters" categcry. Id., R. 63, #440. "Casual Encounters" is a section for adult only posters and the Craigslist Terms of Use was admitted as Defense Exhibit 100. Id., R. 64, #691.

The title of the advertisement was "daddy looking for a smooth young son - m4m". The "m4m" was recognized by the agent as "male for male." Id., R. 63, #441. The advertisement specifically requested a young man, under 19 years of age, or a father/son team to perticipate in sexual play:

> Abusive pervy dad looking for a yng btm son to teach sexual servitude and obedience. Dad likes a son who wants his dad's thick cock in his mouth and then to show his cute little butt so dad can push his face into a pillow and plow him while his screams are muffled by the pillow. You be 19 or less and available to play. Looking for a real situation or even Dad/son team that wants to play. If you're very submissive, even femme, abused, picked on in your childhood, I might mistreat you too. If you're easily overpowered because of your size and weight you're going to be perfect. You can complain about it, but in the end you just take it because that's how you've been treated all your life.
> Pervy yng incest taboo all good. No experience necessary. Let's get naked and have a good time.

Gov't. Trial Ex. 1.

The advertisement included several photographs of male-on-male sexual activity. Id., R. 63, ##442-46. Some of the males in the photographs appeared small in stature but there was no evidence that they were less than 18 years of age. Id., R. 63, ##447 & 501.

Agent Nichols responded to the advertisement by creating an email address and fictional 15-year old named Jason Laitham. Id., ##449-50. He and the Craigslist poster exhanged a series of emails between August 25, 2015 and September 4, 2015. Id.,

#449.

On August 25th, the poster asked for information about Jason and also asked for a photograph. Jason responded that he was 15 years old and asked for a photograph from the poster. He received a photo of a nude male from his chin to his thighs. Agent Nichols sent a return photo of a youthful looking adult FBI officer wearing underwear. Id., ##454 & 504. Jason said that he had "never done this before" and was not sure how it worked. When the poster failed to respond by the next day, Jason emailed again, "If you weren't interested you could have just said so..." Gov't. Trial Ex. 2. The poster simply responded that he would not be available for a week and a half.

On September 1st, Jason again reached out to the poster, "ok. really curious. You gonna let me know?" Id., #454; Gov't. Trial Ex. 2 at 6. The poster asked if Jason could get to Troy and asked Jason what he had in mind. Id., R. 63, #455. The poster made no sexual suggestions during any of the communications. Id., #505. On September 2nd, Jason questioned whether the poster was for real. There was no response for two days at which time the poster again asked about Jason's location. Several days later, September 4th, there was an additional exchange during which Jason suggested that they continue to communicate through texting, and the poster responded,

> "What number to text? I guess we could meet and talk about your expectations. No promises on my end though. When is a good time to meet?"

Id., #457.

The two discussed meeting in the parking lost of a shopping mall. Id., #459; Gov't. Trial Ex. 3. On September 8th, when Jason

asked when the poster would be available, he responded, "Not sure yet. I could pick you up. I'm headed out in 20 min to get something to eat. Your welcome to come with me." Gov't. Trial Ex. at 1. Jason declined and the two agreed to talk again the following afternoon. The poster offered to pick up Jason so they could talk. Trial Tr., R. 63, #463. On September 9, 2015, as Jason's suggestion, they agreed to meet in a park in Warren, Michigan.

The FBI arranged for assistance from local law enforcement and approximately 15 law enforcement officers responded to Shaw Park in Warren. Id., #466. A local law enforcement agent posed as Jason while Agent Nichols remained seated in a police vehicle, communicating with both the undercover "decoy" and the poster. Agent Nichols watched the decoy as he approached the poster's vehicle. When the radio call went out from another officer to stop the vehicle, several unmarked emergency vehicles proceeded to the park entrance with lights flashing. The officers were able to block the park exit and Herbert Bernard Johnson was arrested. Id., #470.

Mr. Johnson was the sole occupant of the vehicle. The officers seized a cell phone and two hotel keys. They determined the cell phone had been used to text Jason. Id., #471. Mr. Johnson was thereafter interviewed at the Warren Police Department by Agents Nichols and Christensen.

Mr. Johnson told the agents that he was employed by Hewlett-Packard and lived in Colorado. He was in Detroit to provide customer assistance at Delphi. He purchased airfare to travel to Detroit on August 21, 2015, prior to posting the relevant advertisement. Id., #477. He had posted other advertisements for sex and had

met with approximately two dozen adults through Craigslist. Id., #480. He denied collecting child pornography. He used his laptop computer to interact on Craigslist through the use of a virtual machine. This allowed him to run another computer from his laptop. Mr. Johnson provided the password to the agents and gave permission for law enforcement to search his computers as well as the email account he used for Craigslist postings. Id., ##480-82.

Mr. Johnson acknowledged he had communicated with Jason and he knew Jason was 15 years old. "He said his intentions were to just meet Jason and talk to him." Id., #487. Agent Nichols agreed that all the conversations between Jason and Mr. Johnson related to meeting in a public place - a restaurant, a park, or a mall. Id., #510. There were no discussions about sexual activity nor any suggestions for Jason to visit Mr. Johnson's hotel room. Id., ##512 & 516. Mr. Johnson did not send any sexually explicit texts or emails to Jason. He did not send links to pornographic websites. Mr. Johnson did not talk about past sexual experiences nor did he engage in grooming behaviors. Id., ##524-25.

During his investigation, Agent Nichols received over 100 advertisements placed on Craigslist by Mr. Johnson, between November 2014 and August 25, 2015. Id., #491. The general nature of the advertisements were to meet people for sex. Many advertisements were posted or renewed. Mr. Johnson indicated interests in couple situations, adult men, father-son situations, parent-child situations, and he suggested an interest in daughters' panties. Some of the advertisements included photographs. Agent Nichols did not identify any text message or email response nor any photographs of, or from, any individual under the age of 18 years. Id., #520.

Michigan State Police Lieutenant Twana Powell was involved with the investigation as part of the local task force. Id., #523. Her role was to conduct surveillance from a picnic table in Shaw Park. She was able to watch the decoy approach the vehicle and contact its occupant, saw the decoy give a physical signal and then notified the other unit members by radio. Trial Tr., R. 64, ##563 & 566. Once the signal was given, the various law enforcement officers began moving towards the car.

At the time of the signal, there were no patrol vehicles inside the park. Id., #568. Mr. Johnson sped off towards the park exit. The vehicle "jumped the curb" and the patrol vehicles heading into the park as a result of the signal, stopped the car and pulled the occupant out of the vehicle. Trial Tr., R. 63, #538. A mobile phone and hotel room key were located in the vehicle.

Lt. Powell went to the Embassy Suites Hotel in Troy, Michigan and remained in the lobby until a warrant was secured. She thereafter assisted in executing a search warrant in the hotel room. Id., #533. She identified photographs of the hotel room as well as physical items seized. These items included a video recorder, a tripod and a case, a black case holding Viagra pills, a flash-drive memory stick, a 128 Gb computer device, a package of condoms, unopened vinyl gloves, a bottle of lubricant, a laptop computer, and a pair of little girls' panties. Id., ##547-50; Trial Tr., R. 64, #558.

Livonia Police Officer Matthew Petrul was the officer posing as Jason at Shaw Park. Trial Tr., R. 64, #578. He had no email or text communications with Mr. Johnson. He had cell phone contact with Agent Nichols. Once Mr. Johnson entered the park and flashed

his headlights, Officer Petrul approached the vehicle and spoke with Mr. Johnson. Mr. Johnson invited him into the vehicle and the officer gave a verbal and physical signal for the arrest. As the officers in the park ran toward the vehicle and identified themselves, Mr. Johnson accelerated towards the exit. Id., #582.

Warren Police Office Scott Taylor was also present at the time of Mr. Johnson's arrest. He had been assigned to conduct surveillance at Shaw Park and was seated on the park bench with Lt. Powell. He saw the decoy approach Mr. Johnson's vehicle. Lt. Powell gave the order to move in and Officer Taylor, along with four or five other officers, headed towards Mr. Johnson's vehicle. Mr. Johnson turned around and exited the parking lot, hitting his back tire on the curb. Id., #592.

Officer Taylor recalled there had not been any marked or unmarked police vehicles in the parking lot, nor any sirens or lights activated prior to Mr. Johnson exiting the park. Id., #594. As he exited, the police stopped Mr. Johnson and removed him from his vehicle. He was arrested without incident and transported to the Warren Police Department. Id., #594.

FBI Agent Adam Christensen was assigned to the arrest team for September 9, 2015. He and two other officers were stationed in the bathroom at Shaw Park. Id., #599. Thus, he was not able to see anything until the arrest signal was given. By the time that the agent exited the bathroom, Mr. Johnson was already in handcuffs. Agent Christensen thereafter accompanied Agent Nichols to interview Mr. Johnson at the Warren Police Department. The video equipment at the Warren Police Department was not functional. Id., #609.

Agent Christensen recalled Mr. Johnson admitted posting ads on Craigslist and told the agents he had sexual encounters with a couple dozen men between the ages of 18 and 50 as a result of those advertisements. Id., ##605-10. He denied ever seeking out child pornography and denied communicating with underage individuals except on the instant occasion. He gave the officers consent to search his cell phone and his email account.

Mr. Johnson told the officers, he "wanted to talk with [Jason] about his sexual experiences but did not want to have sex with him." Id., ##603-04. Mr. Johnson acknowledged he sent nude photographs to Jason. He added that, as soon as Jason approached him in the park, "he didn't feel right so he took off." Id., #604.

Agent Nichols was recalled to testify regarding the forensic evidence seized from Mr. Johnson and located in his hotel room. He suggested that, based on his training, there were code words used in Mr. Johnson's Craigslist advertisements which the agent recognized from child pornography investigations, including the terms "taboo" and "incest." Id., #616. The agent also explained how he analyzed the virtual machine on Mr. Johnson's laptop using several forensic tools which was employed to preview and recover internet files, i.e..search histories, instant messages and images. Id., ##624-26.

In his analysis, Agent Nichols located fragments from Craigslist advertisements, searches performed using Google Maps, and searches performed on the Google search engine. Id., #630. Many of the search terms included sexual references.

Agent Nichols also identified 36 images on the virtual machine that appeared to be child pornography. Id., #640. These were thumbnails

that were automatically created by the computer's operating system when someone plugged a USB device into the comuter. Id., ##641-43. Agent Nichols could not state that Mr. Johnson (or anyone for that matter) actually played any videos nor that Mr. Johnson had personally created or manipulated any of the images. Id., #682.

Agent Nichols also analyzed the remaining electronic devices in Mr. Johnson's hotel room which included a portable hard drive containing a deleted video of Mr. Johnson having sex with another adult in a hotel room. Id., #669. Agent Nichols similarly previewed a deleted video on Mr. Johnson's video camera which appeared to depict Mr. Johnson moving a camera around a hotel room with sounds of rustling in the background. Id., #671. He suggested that Mr. Johnson might have been trying to hide a camera in the hotel room. Id. He did not, though, have any information to suggest that there was a camera either set up or running in the room, or otherwise ready for use, at the time of the within incident. Id., #683.

The jury convicted Mr. Johnson on Counts 1, 2, and 4, acquitting him on Count 3. Trial Tr., R. 65, ##784-85. The Defendant renewed his Rule 29 motion and filed a Motion for a New Trial, pursuant to Rule 33. Those motions were denied on March 1, 2017 (Defendant had made a timely Rule 29 motion). Trial Tr., R. 64, ##689-90. The motion was denied by the trial court subsequent to the jury verdict. Trial Tr., R. 65, #786; Sent. Hr'g. Tr., R. 102, #1072.

After addressing objections, the trial court determined the sentencing guideline range to be 121-151 months imprisonment. Id., #1082. The government requested a sentence of 180 months. Id., #1086. Mr. Johnson requested a sentence at the low end of the guidelines of 121 months (Count 1 carried a mandatory minimum

of 120 months of imprisonment). The court imposed a sentence of 121 months in the custody of the Bureau of Prisons, to be followed by lifetime supervision with specific conditions placed on that supervision. Id., ##1093-98. Mr. Johnson filed a timely Notice of Appeal. Notice, R. 97.

Mr. Johnson argued in his direct appeal that the evidence was insufficient to support any of his three convictions. The Sixth Circuit Court of Appeals affirmed his convictions on May 23, 2019, finding, as to the child pornography conviction, "the evidence supporting defendant's guilt is copious." United States v. Johnson, 775 Fed. App'x. 794, 800 (6th Cir. 2019) (Appendix D).

On August 19, 2020, Mr. Johnson filed a Motion to Vacate his convictions and sentence under 28 U.S.C. §2255. §2255 Motion, R. 109, ##1130-87. On September 1, 2020, he filed a Motion to Amend his §2255 Motion, raising the number of claims to twenty. Motion to Amend §2255 Motion, R. 114, ##1192-95. The district court denied both motions on procedural and substantive grounds. Opinion & Order, R. 120, ##1251-61. Mr. Johnson filed a timely Notice of Appeal. Notice, R. 122, ##1267-68.

Mr. Johnson petitioned the Sixth Circuit for a Certificate of Appealability as to six of the claims he raised in the district court in his §2255 Motion. No. 21-1147, 6th Cir. The Sixth Circuit found only one of his claims to be arguably meritorious, granting him a Certificate of Appealability as to: "Whether the district court erred in dismissing on procedural-default grounds Johnson's claim that the district court's jury instructions on Count Four constructively amended the indictment." Order, No. 21-1147, p.7.

(Order, October 7, 2021, Granting Certificate of Appealability in part and denying in part). After both parties fully briefed the issue, the Sixth Circuit affirmed the district court's judgment, concluding that "a variance occurred, rather than a constructive amendment," and that "[t]here was also evidence from which a juror could infer that, once Johnson arrived in Michigan, he copied images of child pornography onto his work computer." Order, No. 21-1147, pp. 4-5 (Appendix A).

Mr. Johnson petitioned the circuit court for a rehearing and rehearing en banc arguing that the court decided the issue of a constructive amendment contrary to Supreme Court and Sixth Circuit law and that by deciding that a juror could infer that he had copied child pornography to his hard drive after arriving in Michigan it had ignored the great weight of the evidence to the contrary and that the government had never even suggested such a theory in their case, and that such an error could not be found to be harmless error.

The Sixth Circuit denied his petition for rehearing and rehearing en banc on January 5, 2023, stating that "the issues raised in the petition were fully considered upon the original submission and decision of the case." Order, No. 21-1147 (Appendix C).

ISSUES AND ARGUMENT

I. THIS COURT SHOULD RESOLVE WHETHER THE STATUTORY LANGUAGE OF 18 U.S.C. §2252A(A)(5)(B)'S ALTERNATIVE INTERSTATE COMMERCE ELEMENTS CONSTITUTE SEPARATE OFFENSES OR ALTERNATIVE MEANS TO COMMIT THE SAME OFFENSE AND WHETHER SUBSTITUTION OF ONE INTERSTATE COMMERCE PRONG FOR ANOTHER CONSTITUTES A STRUCTURAL ERROR WHEN ONE PRONG IS CHARGED AND ANOTHER IS PROVED.

An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. United States v. Ford, 872 F.2d 1231, 1235 (6th Cir. 1989). An amendment is "per se prejudicial." Id. (This is not the case in all circuits).

Title 18 U.S.C. §2252A(a)(5)(B) has two separate prongs that can satisfy its interstate commerce jurisdictional element. Section 2252A(a)(5)(B) prohibits:

> (a) Any person who --
> ...
> (5) either --
> ...
> (B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography (1) that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or (2) that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; ...

(additional enumeration and emphasis added to distinguish jurisdictional nexus prongs). The first prong ("travels-in-commerce" prong) establishes the interstate commerce nexus by prohibiting the possession of child pornography when the material has traveled in or affected commerce. The second prong ("materials-in-commerce" prong) establishes the interstate commerce nexus by prohibiting the possession of child pornography where the child pornography was produced using

materials which have traveled in or affected commerce.

Mr. Johnson's Second Superseding Indictment ("SSI") alleged in Count Four that he "knowingly possess[ed] material containing child pornography ... where the production of child pornography involved the use of a real minor engaged in sexually explicit conduct, that had been produced using materials that had been mailed and shipped and transported in interstate commerce by any means, including by computer." (emphasis added) R. 42, SSI, #112.

Mr. Johnson's jury was instructed that Mr. Johnson could be found guilty if he: 1) "knowingly possessed any material, including but not limited to, a computer and/or a hard drive, that contained an image of child pornography"; and "that the defendant knew that the material contained child pornography"; and "that image of child pornography was shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer." (emphasis added) R. 55, Jury Instr., #279. Furthermore, the instructions defined child pornography to include visual depictions where "[t]he visual depiction has been created, adapted, or modified to appear that an identifiable minor was engaging in sexually explicit conduct." (emphasis added) Jury Instr., #281. Affecting interstate commerce was defined to mean "having at least a minimal effect upon interstate commerce." Id., #283.

"To determine whether a constructive amendment occurred, the court must decide whether the elements of the crime were altered." United States v. Perkins, 897 F.2d 530 (6th Cir. 1990) (emphasis in original) (citing United States v. Atisha, 804 F.2d 920, 927 (6th Cir. 1986). Here the answer is clear. While both the SSI

and the jury instructions involve the knowing possession of child pornography, other elements quickly diverge. First, and most notable is the removal of the materials-in-commerce prong and substitution of the travels-in-commerce prong which allowed conviction on a showing that the child pornography traveled in commerce versus the allegation that the government would prove that the material used to produce the child pornography traveled in commerce.

Second, the jury instructions improperly broadened the indictment language by no longer requiring the government to prove that the production of child pornography involved the use of an actual minor, instead allowing the jury to convict only based on the appearance that the images depicted an actual minor.

Third, the indictment language was broadened to include child pornography which only affected commerce.

The combination of these changes undermined Mr. Johnson's Fifth and Sixth Amendment protections to be indicted by a grand jury to protect against charges of double jeopardy and the right to be apprised of the cause and nature of the charges against him.

The jury instructions were not the only point at which the SSI was amended. The evidence and closing argument presented by the government specifically amended the charges alleged in the indictment by targeting the travels-in-commerce prong, disputing whether the images depicted a minor based on appearance, and instructing the jury that banners on images would fulfill the interstate commerce element. R. 65, Trial Tr., ##736-740. In particular, the government abandoned any attempt to demonstrate that the material used to produce the child pornography moved in commerce and that

the production of the alleged child pornography involved an actual minor. Instead, the government proved its case on the amendments.

In the quintessential case on constructive amendments (although it did not refer to them in that language), Stirone v. United States, 361 U.S. 212 (1960), the grand jury indicted Stirone under Hobbs Act for unlawfully obstructing interstate commerce, to wit the movement of sand. Id. at 213-14. But at trial, the government introduced evidence that he also interfered with steel shipments, and the district court instructed the jury that the interstate commerce element of his Hobbs Act charge could be satisfied "either on a finding that" Stirone obstructed the movement of sand or steel. Id. at 214 (emphasis added). This Court held that this amounted to a constructive amendment, in violation of the Fifth Amendment Grand Jury Clause. "[W]hen only one particular kind of commerce is charged to have been [affected,] a conviction must rest on that charge and not another[.]" Id. at 218. By allowing the jury to convict Stirone based on the uncharged allegations of interfering with steel, "the basic protection the grand jury was designed to afford is defeated," for one "cannot know whether the grand jury would have included in its indictment a charge that commerce in steel... had been interfered with." Id. at 218-19. Because interference with steel "might have been the basis" for Stirone's conviction, the district court committed a "fatal," reversible error. Id. at 219.

Mr. Johnson's constructive amendment is arguably more serious than that in Stirone. Unlike in Stirone, we do not have to wonder if the amendment might have been the basis of Mr. Johnson's conviction; we know with absolute certainty that it was. This is true because,

in Stirone, the jury was allowed to convict based on an additional means of interference with interstate commerce (i.e. steel). In Mr. Johnson's case, the district court and government substituted the interstate commerce nexus in its entirety so that Mr. Johnson could only have been convicted on the improper changes submitted to the jury (that is the travels-in-commerce prong versus the martials-in-commerce prong).

Both the government and the Sixth Circuit recognized this as trial error, but the government categorized it as a missing element error and the circuit court distinguished it as a variance rather than a structural error. Had the circuit court seen it as a constructive amendment, it would have been compelled to reverse Mr. Johnson's conviction as "per se prejudicial." Ford at 1235.

While this Court has been reluctant to extend the umbrella of errors considered structural and requiring automatical reversal, it has also also recognized the futility in distinguishing regular trial error and structural error and that they "can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial." Arizona v. Fulminante, 499 U.S. 279, 291 (1991); Cf. Chapman v. California, 386 U.S. 18, 24 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a resonable doubt.").

While there was no dispute as to whether the changes between indictment, jury instructions, evidence, and closing argument constituted error, the Sixth Circuit proclaimed that the "variance" between the two were merely "two alternative methods by which one crime... could have been committed." Order, No. 21-1147 (6th

Cir. 2022). The circuit court made this conclusory statement without addressing Mr. Johnson's argument, citing United States v. Combs which guides the Sixth Circuit on how to determine what constitutes a different offense. Combs, 369 F.3d 925, 932 (6th Cir. 2004). In analyzing whether 18 U.S.C. §924(c) defined two distinct offenses, a "use" offense and a "possession" offense, the Combs court focused first on the statutory text observing that "the two prongs of the statute are separated by the disjunctive 'or,' which, according to precepts of statutory construction, suggests the separate prongs must have different meanings." Id. at 931. The two prongs of §2252A(a)(5)(B) are also separated by the disjunctive "or." The Combs court also considered whether the two prongs required a set of facts the other did not. Id. Like §924(c), §2252A(a)(5)(B)'s prongs are facially distinct in the facts that must be proved. While one prohibits the knowing possession of material containing child pornography which has a nexus to interstate commerce, the other prohibits the knowing possession of material containing child pornography where the material used to produce the child pornography has a nexus to interstate commerce. One involves the possession of a material (not necessarily child pornography) and the other possession of child pornography; One requires the child pornography to have a nexus to interstate commerce, and the other more broadly only requires that the material used to produce child pornography have a nexus to interstate commerce. These findings support the conclusion that the alternative prongs of §2252A(a)(5)(B) create distinct offenses.

For the foregoing reasons, this Court should grant the defendant's petition for a Writ of Certiorari to resolve the issue presented

regarding the circuit split as to whether charging one interstate commerce element and then singularly proving another at trial constitutes structural error and requires automatic reversal of the conviction.

II. THIS COURT SHOULD RESOLVE WHETHER AN AMENDMENT BETWEEN INDICTMENT AND TRIAL OF §2252A(a)(5)(B)'S ALTERNATIVE INTERSTATE COMMERCE ELEMENTS CONSTITUTES HARMLESS ERROR WHEN ONE PRONG IS CHARGED AND ANOTHER IS PROVED.

If Mr. Johnson's argument presented in §I, supra, is not found to warrant automatic reversal, harmless error analysis comes into consideration. Under a harmless error review, "an appellant does not need to show innocence." United States v. Baird, 134 F.3d 1276, 1283 (6th Cir. 1998). The government has the burden of proof under the harmless error standard. United States v. Olano, 507 U.S. 725, 734 (1993). If, after the reviewing court conducts a thorough examination of the record, it cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error, it should not find the error harmless. Neder v. United States, 527 U.S. 1, 18-19 (1999). The court should ask "whether the record contains evidence that could rationally lead to a contrary finding." Id. (citation omitted) (internal quotation marks omitted).

In this particular case, it is an impossible bar for the government to show that the error was harmless and did not contribute to the verdict. There are two prongs to §2252A(a)(5)(B) -- the first prong providing an interstate commerce nexus by the child pornography material traveling in interstate commerce ("travels-in-commerce" prong) and the second providing an interstate commerce nexus by material used to produce child pornography traveling in interstate commerce ("materials-in-commerce" prong). The defendant was indicted on the materials-in-commerce prong, but the jury was only instructed as to the travels-in-commerce prong. Furthermore, the government's evidence and closing arguments specifically targeted the improper amendments in the interstate commerce prong. The

amendments and arguments proved fatal to Mr. Johnson's defense and deprived him of his Fifth Amendment right to be indicted by a grand jury and his Sixth Amendment right to be apprised of the cause and nature of the charges against him.

In addition to the amendment, the government urged that adult images looked like children, even after the government's forensic expert on child pornography had testified that he could not characterize those photos as children. Trial Tr., R. 64, ##680-81, 737. It also instructed the jury that the interstate commerce nexus could be satisfied based on banners in images or by the assumption that the images were downloaded by the defendant or available elsewhere on the Internet, all again in support of the travels-in-commerce prong of the statute. Id., ##736-38. See also details of these amendments and arguments in §I, supra, pp. 17-19. There was no doubt that Mr. Johnson was convicted only on the travels-in-commerce prong because it was all the jury was instructed on and was where the prosecutor focused her closing arguments.

The jury rejected any theory that Mr. Johnson had transported any child pornography (physically or via the Internet) when it acquitted him on Count Three (transportation of child pornography). This means that he could only have been convicted under the possession count for child pornography under an "affected" interstate commerce theory since the jury did not believe that he had moved any child pornography in interstate commerce. It also means that he could only have been convicted on the travels-in-commerce prong for which he was not indicted.

The government's original theory at trial was that Mr. Johnson had flown from Colorado to Michigan with a laptop in his possession

that had contained child pornography. Trial Tr., R. 63, ##414-15. In order to support its theory, the government attempted to prove that Mr. Johnson had transported his laptop into the State of Michigan when he traveled there. It did this by introducing travel records and photographs showing that Mr. Johnson had scheduled travel from Colorado to Michigan and that his baggage had airline baggage tags attached. Id., ##485-89; Exs. 4 & 6. However, upon cross-examination of Michigan State Patrol Officer Powell, who testified as to the content of the photos taken of Mr. Johnson's baggage, the defense was able to successfully show that what the prosecution was presenting as a baggage tag on Mr. Johnson's laptop case was actually a hotel folio receipt laying next to the case and that Ms. Powell was mistaken in her identification. Trial Tr., R. 64, ##570-74. Furthermore, it was known that this picture had been "staged" with receipts since Mr. Johnson's laptop and laptop case were found in a nightstand. Id., ##571-72. No actual baggage tag for the laptop case was introduced into evidence, as no such baggage tag existed. Id., #574. There is good reason for this -- the laptop had never been on an airplane or otherwise traveled across state lines. The government presented evidence of numerous computer items that Mr. Johnson used in his home office indicating that he worked on other equipment in Colorado. Johnson at 796 ("A search of defendant's residence in Colorado turned up approximately thirty additional electronic media, including multiple hard drives, computers, laptops, and servers.").

Both Special Agents Nichols and Christensen testified that Mr. Johnson was in Michigan to perform IT support activities at Delphi, a local company in Troy, Michigan, on behalf of his employer,

Hewlett-Packard (HP), whose divisional office was in Pontiac, Michigan. Trial Tr., R. 63, ##477, 488-89; Trial Tr., R. 64, ##602-03. His computer equipment was a HP asset specifically issued for support of this customer and their "go live" activities. Id., #675. These assets were provided to Mr. Johnson to use in his hotel as the activities would run twenty-four hours a day during the activities period.

The jury deliberated and agreed unanimously that Mr. Johnson had not traveled across state lines with child pornography or downloaded child pornography when they acquitted him of transportation of child pornography.

In the Sixth Circuit, the government argued for the first time that if the laptop had crossed state lines that the interstate commerce nexus for possession of child pornography would have been met because the laptop was used to "produce" child pornography when thumbnail images were created on the laptop when a thumb drive was plugged into the computer. For this proposition it cited United States v. Lively, 852 F.3d 549, 560 (6th Cir. 2017).

In Lively, the Sixth Circuit joined other circuits in holding that "producing" includes copying to a hard drive within the context of §2251(a). Lively at 560 ("We hold that 'producing' child pornography, as used in §2251(a), encompasses copying images onto a hard drive."). But the Sixth Circuit did not decide that "producing" included copying to a hard drive within the context of §2252A(a)(5)(B)'s materials-in-commerce prong. Nor did it decide that a computer function carried out without human intervention would qualify. Indeed, doing so would be very dubious in this case. In the context of Lively, the child pornography was actively produced by partici-

pants in the criminal act of creating the child pornography. In Mr. Johnson's case, an unknown thumb drive was plugged into his computer by an unidentified person. Trial Tr., R. 64, ##676-78, 682. When this happened, the computer operating system automatically created thumbnail images without any user intervention. Because of this, and because §2251(a) requires an intent to produce child pornography, Lively could not apply in this case. Doing so would create a far too attenuated nexus between "producing" child pornography and interstate commerce. United States v. Lopez, 514 U.S. 549 (2005).

But even if Lively were to be applicable to the materials-in-commerce prong of §2252A(a)(5)(B) and non-human computer operations, there is insufficient evidence to support the conviction. As previously discussed, the jury acquitted Mr. Johnson on the transportation of child pornography count. This is a clear indication that the jury rejected the government's theory that Mr. Johnson had traveled across state lines with the laptop. If the laptop did not cross state lines, there is no interstate nexus for the materials-in-commerce prong. The government also introduced no evidence of a real minor engaged in sexually explicit conduct that occurred in conjunction with the "producing" of child pornography.

In determining if Mr. Johnson's conviction for child pornography should be reversed, the Sixth Circuit should have applied a harmless error standard. Chapman v. California, 386 U.S. 18 (1967). This standard does not require Mr. Johnson to show he is innocent, but instead requires that the government must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict." Hedgpeth v. Pulido, 555 U.S. 57, 61 (2008). Instead, in the government's

brief it made the conclusory statement that the government "presented ample evidence to satisfy the element that the district court incorrectly recited from Count Four." Gov't. Brief on Appeal, R. 24, p. 27. It provided no harmless error analysis in it's brief to support such an assertion, and as Mr. Johnson has repeatedly argued, the evidence cast considerable doubt on any finding. Although Mr. Johnson made these arguments, the Sixth Circuit parroted the government's assertion, also without any harmless error analysis: "as the government points out, the evidence would have been sufficient to convict Johnson under the 'material[s]-in-commerce prong' as well." Order, Sep. 7, 2022, No. 21-1147, p. 4.

Since the district court and the Sixth Circuit have failed to conduct any harmless error analysis, this Court should resolve the issue whether an amendment between indictment and trial of §2251A(a)(5)(B)'s alternative interstate commerce elements constitutes harmless error when one prong is charged and another is proved at trial.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Mr. Johnson respectfully requests that a Writ of Certiorari issue to resolve these important questions regarding constructive amendments of §2252A(a)(5)(B)'s interstate commerce elements.

Respectfully submitted,

DATE: March 26, 2023

/s/ Herbert Bernard Johnson