23-5063 ORIGINAL

No. _____

FILED
JUL 03 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Bradley M. Cox — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

the Seventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Bradley M. Cox
(Your Name)

PO Box 5000, FCI Greenville
(Address)

Greenville, IL 62246
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Regarding generally motions for judgment of acquittal and their consideration and review:

1. Has the "light most favorable to the Government/prosecution" standard been incorrectly applied sufficiency of the evidence review on federal criminal cases?
2. Is this standard a violation of a federal criminal defendant's constitutional rights?
3. Is considering the jury's verdict, whether by the district or appellate court, a correct method for determining the motion?
4. Does the nature of considering a motion for judgment of acquittal require the examination of each element of the crimes charged in the indictment?
5. What is the best standard under which to consider a motion for judgment of acquittal that satisfies the rights of a defendant and the values of society?

Regarding specific statutes and what their language requires to be proven:

6. Of the three alternative interstate nexus elements listed in 18 U.S.C. §2251(a), which one(s) allow indictment and conviction as an attempt under 2251(e)?
7. Does conviction under 18 U.S.C. §875(d) require the Government to present evidence establishing the existence of the property/reputation claimed to be threatened?
8. Under §875(d), must the threat of damage be explicit or can it be inferred as potential collateral damage from the actual threat?

Regarding compulsory process:

9. Can an indigent and incarcerate defendant be denied compulsory process of a necessary witness after multiple good-faith attempts at service?
10. Is timeliness a factor in considering compulsory process motions?

QUESTIONS PRESENTED (continued)

Other:

11. Does Federal Rule of Evidence 404(b) apply to a defendant only or to a third-party as well?
12. Is a defendant's right to a meaningful opportunity to present a complete defense infringed upon when admission of "reverse 404(b) evidence" (third party guilt) is held to stricter standards of relevancy than general 404(b) evidence?
13. When a motion to suppress is made during trial, should the trial judge ascertain if good-cause exists before denying it as untimely?
14. Is a motion untimely per Federal Rule of Criminal Procedure 12(c)(3) if the basis for the motion was not reasonably available prior to trial?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

[√] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[√] reported at 54 F.4th 502; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 23, 2022.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 4, 2023, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Text of following provisions is located in Appendix C.

United States Constitution, Amendment 5
United States Constitution, Amendment 6
Federal Rule of Criminal Procedure 12(b)(1), (3)(C), (c)(3)
Federal Rule of Criminal Procedure 17(b)
Federal Rule of Criminal Procedure 29(a), (b)
Federal Rule of Criminal Procedure 51(a), (b)
Federal Rule of Evidence 103(a), (b)
Federal Rule of Evidence 401
Federal Rule of Evidence 403
Federal Rule of Evidence 404(b)(1), (2)
18 U.S.C. § 875(d)
18 U.S.C. § 2251(a), (e)
18 U.S.C. § 2252A(a)(2)(A), (b)(1)

STATEMENT OF THE CASE

Everything herein, though lengthy, is pertinent to this petition.

Sometime in 2017, Emily Schwartz's Facebook account was hacked. This account was then used to converse with Roger Potter, who sent sexually explicit images/videos of himself and his then-minor girlfriend to the Schwartz account in exchange for images of Schwartz. Potter was then threatened using what he had sent into giving access to his Facebook account to the person using the Schwartz account. In Potter's account were thousands of sexually explicit images, many of minors, and including three of the charged victims in this case (JH, BA, and RN). In December 2017 these victims were contacted through various Facebook accounts in reference to possession of their explicit images and told to contact a specific phone number. Text conversations with the number led to extortionate threats to distribute the images unless more were provided. No images were sent by the victims, and all three subsequently had images posted online and/or distributed through a Facebook account. Specifically, JH's images were sent out through a Facebook account under the name Quinton Sayger, which was one of the accounts initially used to contact victims. Quinton Sayger was also victim JH's ex-boyfriend. The extortionate threats were reported to local police who later obtained the Sayger account's messages and IP logs. The messages included conversations from February to April 2018 with victim 4, AR, during which she sent explicit images and videos to the Sayger account. Sayger was interviewed a number of times, during which he claimed his account had been hacked and he noticed it on December 4, 2017, when he logged in and saw his ex's images sent out from the account. In August 2018, FBI agents, following an address return on one of the IPs linked to the phone number which had sent the threats to victims JH, BA, and RN (which was done using a texting application), went to Burns Construction where they sought permission from the sale manager to search defendant Cox's work computer. They did not have a warrant. Permission was granted and a cursory examination found evidence of two different VPNs on the computer. The Sayger account was

accessed mostly through a VPN, so the agents took the computer for imaging with the sales manager's permission. The agents also interviewed defendant Cox that evening at his home and again the following day at Burns Construction when returning the computer. Neither of these interviews was recorded. Approximately two weeks later, Cox was arrested and interviewed a third time; this interview was recorded. In November 2018 the FBI interviewed Shianna Waller. Her IP address had accessed the Sayger account and her personal Facebook account was linked to it through Facebook's cookie record (this lists all accounts using the same "cookie," a unique identifier, to access Facebook). Waller told the FBI that Sayger had contacted her in February 2017 in order to extort her regarding explicit images he had obtained from hacking her Google Photos account. Waller admitted to accessing the Facebook account at his request. Waller admitted to both knowing victim AR and to using the Sayger account to request explicit material from her. Waller also told the FBI that someone named David Kilcline had used the Sayger account and also communicated with her from an account in his name. Waller did not recognize the name Bradley Cox. Waller discussed two other Facebook accounts (Rolp Lang and Adelynn Rose) out of which there is no charged conduct but which were established to be fake accounts using images of Potter and his girlfriend. Waller did not tell the FBI she had met anyone related to any of the accounts. Waller later received messages from an Instagram account related to the Rolp Lang account, which she reported to the FBI. The lead agent on the case, Agent Stewart, interviewed David Kilcline during the summer of 2019. This interview was recorded. During the interview, Kilcline admitted to accessing accounts related to this case. He also turned over a Mega cloud storage account to Stewart. The Mega included explicit images of a number of girls organized in folders by name. A folder in the account was titled "Emily Schwartz" and another folder contained screenshots of a conversation using Facebook discussing Potter, his girlfriend, and the explicit materials he had sent. IP activity showed regular usage of the Mega from 2017 to 2019, including access by the same VPN IP address used to access the Sayger Facebook account. The FBI also interviewed Alistin Behr, who had communicated

with the Rolp Lang account. She told the FBI she knew Cox because she had been told by the Rolp Lang account to meet and Cox was the one who showed up to the meeting, after which they remained in contact and met a number of times. After his arrest, Cox was deemed indigent, appointed a public defender, and denied pretrial release. Counsel filed a suppression motion based on Miranda. Counsel also retained a digital forensics expert with approval of the court. Cox then chose to represent himself and subsequently filed a number of suppression motions and motions seeking pretrial release, which were all denied.

At Cox's trial in December 2021, the government called Agent Stewart; Emily Schwartz; Roger Potter; Alie Shultz (Potter's girlfriend); Quinton Sayger; victims JH, BA, RN, and AR; Shianna Waller; Michael Burns; Katelyn Shanks (Cox's ex-fiancee); Alistin Behr; and FBI Agent Erin Gabor, a digital forensics specialist, to testify, as well as witnesses from Facebook and Pinger (parent to Textfree, the text application used to communicate with JH, BA, and RN) who testified remotely. Cox represented himself but had his advisory counsel and digital forensics expert at the defense table. Waller testified that she had initially been contacted by the Rolp Lang account, that she accessed all the accounts in question at Lang's request, that she did not ask victim AR for explicit material, and that she had met Cox in person after being directed to meet by the Lang account. On cross she acknowledged her testimony was different than what she originallu told the FBI but stated she did not tell the FBI she had asked AR for explicit materials. She did admit that she gave the FBI David Kilcline's name; that she knew him to have access to the Sayger account; that he had communicated with her through his personal Facebook account, asking her to send him explicit material and to meet him in person (which she did not do); and that Kilcline was the person she was communicating with when she was taking screenshots of a conversation with Kyrstin Drubert from the Sayger account, which were then sent by Waller to the Sayger account. She also admitted she only assumed Cox was behind the Rolp Lang account because he is the one who showed up to the meeting, but that the account was never discussed in person. Behr's testimony fairly mirrored her interview, although she admitted to the same assumption as Waller regarding Cox

and the Lang account, and she stated she had not been asked for explicit images by Cox nor had she ever heard of the Quinton Sayger account. AR testified she knew Sayger personally, had communicated with him through Facebook before, and that initially she thought she was communicating with him, but that eventually she though he was acting different and felt threatened. Messages between AR and the Sayger account (the entirety of which was stipulated admissible) show the first interaction during the indictment period were explicit materials sent by AR without any request by the Sayger account. JH testified she had dated Sayger and sent him explicit images during that time at his request, but that the ones which were distributed were ones she sent only to Potter. During Sayger's testimony he denied knowing victim AR or that he asked JH for images containing nudity at any time, only that he asked for clothed sexual images. He testified that on December 4, 2017, he was at school when he logged on to his Facebook account using his school laptop and saw JH's pictures had been sent out from the account. He admitted to accessing the account later in December and changing the password to try to keep the hacker out of the account. He stated that his school Wifi blocks Facebook so to access Facebook on December 4 (or any other time at school) he would have had to use a VPN, and that this is what he did (see App. D at). The IP log for the Sayger account shows that only 2 unique IP addresses accessed it during December 2017; both of those were linked through provider requests to the Anonymox VPN; and the same unique Anonymox IP sent out the images of JH on December 4, changed the password later in December, and accessed the the Sayger account during the charged conduct with victim AR. Michael Burns testified that he gave the FBI permission to search Cox's work computer. He stated many of the employees at Burns Construction (including himself; his father Dan Burns ran the company) were in and out of Cox's office daily and he had never heard of anyone seeing Cox doing something inappropriate. Following questions during cross related to his position and ownership interest in the company, Cox moved to suppress the computer evidence based on Burns not having authority to grant permission to search it. After hearing a response from the prosecutor, the court denied the motion as untimely. After conferring with advisory counsel, defendant clarified

for the record that the motion was for an illegal search under the Fourth Amendment. The court acknowledged the clarification (but did not construe it as a renewal) and further offered a second reason for denying the motion notwithstanding its untimeliness, to-wit: defendant did not have privacy rights in a company-owned computer and so the motion would still have been denied. Agent Stewart testified about the early stages of the investigation. He stated that during the two unrecorded interviews Cox made many incriminating statements and, for brevity's sake, that Cox basically admitted to everything involved in the charged conduct and more. Stewart acknowledged there was a third, recorded interview upon Cox's arrest, but did not testify to any of the contents of the interview on direct examination. On cross, Stewart confirmed a number of discrepancies (after having his memory refreshed from his reports) between the original statements by certain witnesses to the FBI and their trial testimonies. Stewart admitted that a number of the statements he attributed to Cox from the first two interviews turned out to be incorrect. Stewart admitted that the majority of the third interview revolved around how someone else had committed the crimes. Stewart stated no images of child pornography or related to the victims were found on Cox's work computer, phone, or any of his accounts. Stewart admitted he was aware multiple people were using the accounts in question, that there were a number of IP addresses he did not follow up on, and that certain things relating to the accounts occurred after Cox's arrest and so could not have been Cox. Stewart also testified that he had acknowledged finding deleted texts on Cox's phone directing him to meet with Waller, and that the number directing Cox might have been the same one connected to a TextNow account under the username "rolplang" which had extorted an uncharged victim in much the same manner as those in the instant case. Stewart admitted that although evidence of VPN usage was found on Cox's work computer there was no indication what the VPN was used for, and that VPN usage in itself is not a crime. Stewart testified that the text app used to contact victims was not accessed by the VPN, attributed to the Facebook accounts; Cox's personal Facebook, though showing active use from Burns Construction, was never accessed through a VPN; that none of the 3 accounts at issue show any access from the Burns

Construction IP or Cox's home IP; and that the Sayger account had no cookies linking it to Cox's personal account. During Stewart's extensive testimony, the court sought information on the defendant's planned witnesses. Cox sought to call Kyrstin Drubert, Hailéy Wolfe, and Marc Hazelwood to the stand. The government objected to the relevance of all three witnesses, so the court held voir dire for each outside the presence of the jury. Drubert's testimony would describe how she was extorted through text and messaging with the Sayger account, regarding explicit images which she had sent to Potter, and that the person communicating with her went by the name David. Wolfe's testimony would describe how she had dated Kilcline for about 3 years, up to approximately 2016; that she knew him in person; that after she sent him explicit images he began requesting more and threatening to distribute them; that he did eventually distribute them; and that the conversations where she sent Kilcline images took place through Facebook Messenger. Hazelwood's testimony would describe how he went to high school with Kilcline and knew of former acts by Kilcline of blackmail and violence toward minors involving explicit materials; and that in 2017 he was dating Emily Schwartz's sister when her Facebook account was hacked, the hack involved explicit images, during communications with the hacked account the person revealed himself by name as David Kilcline, and that a police report was filed by him and his girlfriend regarding the incident. The court denied Wolfe and Hazelwood's potential testimony as irrelevant, and Cox objected as the record already amply showed Kilcline had a connection to the case and this was the main component of his defense. Also during Stewart's testimony, Cox sought to compel the attendance of Kilcline through a court-issued subpoena. Cox's expert (Darren Miller) testified to multiple attempts at serving Kilcline. It was unknown if Kilcline would show up, as the Government also had Kilcline on its witness list but would not reveal whether he had bee successfully subpoenaed by the prosecution. The court denied compulsory process of Kilcline as untimely and deemed the attempts as technically deficient. The Government closed its case, at which time Cox moved orally for a judgment of acquittal, which the court took under advisement. Regarding other evidence submitted during the Government's case-in-chief, whether relating to witness relevance or

the sufficiency question: the cookie logs for the Sayger, Lang, and Rose accounts all show shared cookies with accounts name David Kilcline; IP logs for the Lang account showed access over a 4-day period from a hotel in Illinois which Stewart admitted he did no follow-up on and Shanks (Cox's ex-fiancee) testified could not have been him; and Cox's cell phone carrier was firmly established as T-Mobile, but screenshots from cell phones sent through the various accounts showed carriers of AT&T (which Sayger admitted to being his carrier), Verizon (which Waller admitted were screenshots she took and sent), and Sprint (unknown), but no T-Mobile. Also regarding the witness relevance, as can be seen in App. D at , Cox stated to the court and the prosecutor did not deny that Kilcline had admitted to accessing these accounts to the FBI.

Cox called Kilcline as a witness and when he did not appear Cox moved for a mistrialand that Kilcline be declared as unavailable, both of which were denied. Cox called Drubert to the stand during which her testimony fairly reflected her voir dire. Cox rested the defense. After the jury was released to deliberate, the court ruled on the judgment for acquittal (for the first time) by stating that the motion was waived because it was not renewed after the close of the defense's case. After deliberation, the jury returned a verdict of guilty on all six counts. Cox was subsequently sentenced to 35 years in federal prison.

The Seventh Circuit Court of Appeals appointed an attorney to represent Cox for his direct appeal. Despite repeated letters giving specific direction regarding which arguments to present on appeal (including specific caselaw), the appointed counsel limited the appeal to a Miranda argument, the motion to suppress the search of the work computer, the barring of Wolfe and Hazelwood's testimony, the denial of compulsory process for Kilcline, and the sufficiency of the evidence. Counsel incorrectly believed the motion for judgment of acquittal had been waived (despite Cox stating it was not) so he did not argue any specific reasons why the evidence was insufficient (as Cox had directed him to). The Seventh Circuit affirmed the district court on all matters. Specifically, the court did not reach the merits on the suppression because it stated "it is not unreasonable to burden Cox with raising good cause himself" (App. A at 6) although it acknowledged "the court did quickly deny Cox's motion as

untimely without mentioning a good-cause exception." Ibid. The exchange from the trial transcript is included in App. D at , which shows the prosecutor stating unequivocally (and incorrectly) that suppression motions must not be raised during trial, and the court agreeing. The Seventh Circuit also considered the excluded potential testimonies of Wolfe and Hazelwood as "barely probative" (App. A at 16) and "likely [to] have added even more confusion to an already-complex fact pattern" (Id. at 17) despite the Government's own witnesses and digital evidence directly linking Kilcline to the case and the potential that the issue of who was using the Sayger account to communicate with AR (the basis of counts 5 and 6) would have been clarified rather than confused. The Court also affirmed the sufficiency of the evidence collectively, regarding the case as a whole rather than actually looking at the elements of each charged crime to be sure that sufficient evidence was presented to prove each element beyond a reasonable doubt. Cox filed pro se a motion for rehearing, followed by an extensive brief (included at App. E to give better understanding to the issues underlying this petition) detailing why counsel's arguments were deficient and the ruling should be reconsidered. The motion was denied. Cox did not receive notice of the denial but became aware of it through his facility's law library and subsequently filed a motion for rehearing en banc, which the Court accepted with no regard to timeliness and denied. Cox now seeks review by the Supreme Court of the United States of America.

Final note: Cox does not have copies of all orders potentially relevant to the petition but will include copies of what he has and cite those unavailable when necessary.

REASONS FOR GRANTING THE PETITION

Regarding Question 1, it is easily acknowledged that the standard at issue, in one form or another, is firmly established case-law in all Circuits under Supreme Court precedent. However, the problem is that the precedent itself was initially carried over to criminal cases from civil cases by the Circuits with no distinction of function or constitutional considerations, cited as if already established by the Supreme Court without discussion, and expounded on in a case dealing with habeas review of a State conviction, from which all Federal Circuits have since based their standard for considering (and reviewing) motions for judgment of acquittal. This is no less an issue than the precedent overturned by this Court in **Ramos v. Louisiana**, 140 S. Ct. 1390 (2020), and in fact may be more pressing as it is so much more widespread and deals with the same constitutional rights. "[A] defendant enjoys a constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury..." Id. "[T]he constitutional protection here ranks among the most essential: the right to put the [Government] to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment." Id. (Sotomayer, J., concurring). Tracing the history of the standard reveals the root of the problem. In **Musacchio v. United States**, 577 U.S. 237 (2016), the Court quoted **Jackson v. Virginia**, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) as the standard to rely on in determining if there was legally insufficient evidence to convict. A number of other prior cases made reference to **Jackson**, using the standard interchangeably whether a federal criminal case or a habeas review of a state case. However, in **Herrera v. Collins**, 113 S. Ct. 853, 122 L. Ed. 2d 203, 506 U.S. 390 (1993), the Court stated the "decision in Jackson... held that a federal habeas court may review a claim that the evidence adduced at a state trial was not sufficient to convict a criminal defendant beyond a reasonable doubt. But in so holding, we emphasized: '[T]his inquiry... the relevant question is... This familiar standard...'" Id. (citing **Jackson**). This acknowledges that **Jackson** was only setting a standard for habeas review of state convictions,

and answering the questions set forth in this petition will not affect the standard set in **Jackson** and affirmed in **Herrera**, as habeas review is not part of the questions. To find where the "light most favorable to the prosecution" standard originated from, **Jackson** at first seems to be no help as it states "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See **Johnson v. Louisiana**, 406 US, at 362, 32 L Ed 2d 152, 92 S Ct 1620." **Jackson**. The cited case is one of the very cases overturned by **Ramos** and makes no reference to this standard that I could find. In the concurring opinion by Justice Stevens, in which the Chief Justice and Justice Rehnquist joined, it was said that "the Court's opinion should not obscure the fact that its new rule is not logically compelled by the analysis or the holding in Winship or in any other precedent, or the fact that the rule reflects a new policy choice rather than the application of a preexisting rule of law." **Jackson**. (Stevens, J., concurring). However, a footnote reference to the majority opinion directs attention to **Glasser v. United States**, 86 L. Ed. 680, 315 U.S. 60 (1942), which states "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Here, finally, is a standard, though it is not the one adopted in **Jackson**. **Glasser**'s standard differs in that it requires "substantial evidence" "to support it." Id. So it seems the **Jackson** concurrence was correct. **Glasser**'s standard itself was stated without discussion as if it had already been recognized by the Court as established law, despite citing only Circuit cases. In fact, other than a brief mention in **Quercia v. United States**, 77 L. Ed. 1321, 289 U.S. 466 (1933) (Solicitor General referencing as argument and citing Circuit cases, the Court made no comment on it), I found no Supreme Court case endorsing or even mentioning this standard in relation to criminal cases prior to **Glasser**. Following the **Glasser** Court's reference ("**United States v. Manton**, 107 F.2d 834 (2nd Cir. 1938), and cases cited") shows that the **Manton** court adopted the standard (without discussion) from **Hodge v. United States**, 13 F.2d 596 (6th Cir. 1926) ("considering the motion to direct

verdict, we must take the view of the evidence most favorable to the party against whom direction is asked") and **Fitzgerald v. United States**, 29 F.2d 881 (6th Cir. 1929) ("that view of the evidence most favorable to appellee"). **Fitzgerald** simply cites **Hodge** as Circuit precedent. The **Hodge** court cites three cases: **Rochford v. Pennsylvania Co.**, 174 F. 81 (6th Cir. 1909), a civil case; **Burton v. United States**, 50 L. Ed. 1057, 202 U.S. 344 (1906), in which the Supreme Court extensively discusses the considerations inherent in a motion to direct verdict with no reference to a party-deferential standard; and **Kelly v. United States**, 258 F. 392 (6th Cir. 1919) ("It was for the jury to pass upon the facts; and it is for this court to determine whether there was evidence introduced which was proper to go to the jury and legally sufficient to sustain the verdicts."). **Kelly** further cites a number of cases, of which none of the Supreme Court cases cited (**Burton**, supra; **Crumpton v. United States**, 34 L. Ed. 958, 138 U.S. 361 (1891); and **France v. United States**, 41 L. Ed. 595, 164 U.S. 676 (1897)) advocate the standard later adopted by **Glasser**. The **France** Court, however, did mention a standard. "We assume the truth of all the evidence given on the part of the government with all proper inferences which may be drawn from it." Id. This is significantly different from looking at the evidence "in the light most favorable to the Government." Also, the root issue has become clear as the motion being considered in these older cases was for a directed verdict, which was used in both criminal and civil trials at the time. This is part of why the Rule was changed so the motion in a criminal trial would better address what was being requested. So in sum, the **Glasser** Court, without considering any constitutional conflicts, adopted a standard held by only a few Circuits, a standard which was established by carrying the civil court standard into the criminal court, where the verdict is not decided on the same burden of proof and where the "duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective." **Brown v. Mississippi**, 297 U.S. 278 (1936).

This brings us to Question 2, whether the standard is unconstitutional, and reasonably included in that question is wh ether the Circuits are using the right standard (**Jackson** or **Glasser**?) and if they have constitutionally remained within their discretion in augmenting the standard. "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised

between guilt and innocence." **Glasser**. "These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with the resulting forfeitures of life, liberty, and property." **In re Winship**, 397 U.S. 358; 25 L. Ed. 2d 368; 90 S. Ct. 1068 (1970). "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." **Schlup v. Delo**, 115 S. Ct. 851, 130 L. Ed. 2d 808, 513 U.S. 298 (1995). "That concern is reflected, for example, in the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Id. (quotations marks omitted). "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." **Winship**. "Uncertaint of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials." **Burrage v. United States**, 134 S. Ct. 881, 187 L. Ed. 2d 715, 571 U.S. 204 (2014). "The standard of proof beyond a reasonable doubt... plays a vital role in the American scheme of criminal procedure, because it operates to give concrete substance to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." **Jackson**. (citations omitted). In reviewing the sufficiency of the evidence in a federal criminal case, the standard of "the light most favorable to the Government (or prosecution)" is unconstitutional. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **Winship**. "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt." **United States v. Powell**, 105 S. Ct. 471, 83 L. Ed. 2d 461, 469 U.S. 57 (1984). This is so "a criminal defendant... is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts," Id., because "the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions." **Winship**. (Harlan, J., concurring). A "jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." **Jackson**. The problem is two-fold. First is conflict deriving from the standard itself and guidance in applying it. "Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal." **Burks v. United States**, 437 U.S. 1, 57 L. Ed. 2d 1, 98

S. Ct. 2141 (1978). Yet, what "a defendant is entitled to on a sufficiency challenge is for the court to make a 'legal' determination whether the evidence was strong enough to reach a jury at all." **Musacchio**. Determining any amount of strength of the evidence is necessarily weighing it, and looking at the evidence "in the light most favorable to the Government" is essentially assigning weights to the evidence according to what fits the charged conduct. This also contradicts leaving credibility determinations up to the jury, as carte blanche is given to ignore testimony from the Government's own witnesses that doesn't fit or even contradicts the Government's case. For example, see **U.S. v. Boykins**, 2022 U.S. App. LEXIS 17031 (2nd Cir. 2022) ("In light of the jury's guilty verdict, we must resolve all issues of credibility in favor of the prosecution." (quotation marks omitted)). Only if all evidence is given equal weight can it be "decided as a matter of law that the jury could not properly have returned a verdict of guilty." **Musacchio**. Second is the fact that many of the Circuits have used the standard to "support any rational determination of guilt," giving mere lip service to the words "beyond a reasonable doubt." **Powell**. The Court has "defined a reasonable doubt as one based on reason which arises from the evidence or lack of evidence." **Johnson**, supra. Without attempting to define reasonable doubt myself, the burden of proof beyond a reasonable doubt in itself means if a reasonable doubt exists then the burden is not met. The burden itself is counterintuitive to looking at the evidence in the light most favorable to the Government, especially as a means of preventing unjust convictions. Yet some of the Circuits have taken it far beyond the "substantial evidence" once required by both **Glasser** and **Burks**. "A court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." **Boykins**. (citation omitted). See also **Padillow v. Crow**, 2022 U.S. App. LEXIS 14992 (10th Cir. 2022) ("all of the evidence must be considered in the light most favorable to the prosecution, and the prosecution need not rule out every hypothesis except guilt."), **U.S. v. Womack**, 2022 U.S. App. LEXIS 26481 (3rd Cir. 2022) ("Where the record may support multiple possibilities, we draw all rational inferences in the prosecution's favor."), **U.S. v. Naranjo**, 2023 U.S. App. LEXIS 1353 (5th Cir. 2023) ("the question is not whether the jury's determination was correct, but whether it was rational."), **U.S v. Gomez**, 801 Fed. Appx. 715 (11th Cir. 2020) ("The evidence is sufficient so long as a reasonable trier of fact, choosing among reasonable interpretations of the evidence, could find guilt beyond a reasonable doubt."), **U.S. v. Sanderson**, 2022 U.S. App. LEXIS

10499 (6th Cir. 2022) ("The government may carry its burden with circumstantial evidence alone, and such evidence need not exclude every possible hypothesis except that of guilt." (citations omitted)), **U.S. v. Nieto**, 29 F.4th 859 (7th Cir. 2022) ("review the evidence in the light most favorable to the Government and will overturn a verdict only when the record contains no evidence, regardless of how it is weighed, from which the jury could have found guilt beyond a reasonable doubt."), **U.S v. Meises**, 645 F.3d 5 (1st Cir. 2011) ("The testimony of a single witness can be enough to support the government's case, and even the uncorroborated testimony of an informant may suffice 'to establish the facts underlying a defendant's conviction.'" (internal citations omitted)). In the situation where a defendant in the First Circuit fails to raise the Rule 29 motion, the courts "review [the] challenge to the sufficiency of the evidence for clear and gross injustice." **U.S. v. Gordon**, 37 F.4th 767 (1st Cir. 2022). Yet the standard used is no different, as "there can be no clear and gross injustice if the evidence, scrutinized in the light most congenial with the verdict, can support a finding of guilt beyond a reasonable doubt." Id. The Supreme Court has said that "[a]ny evidence that is relevant... could be deemed a 'mere modicum.' But it could not seriously be argued that such a modicum of evidence could by itself rationally support a conviction beyond a reasonable doubt," **Jackson**, yet that modicum is sustaining verdicts in many Circuits due to the light it is viewed under, disregarding a defendant's Due Process right to an objective review of the evidence presented to convict in order to prevent convictions on anything less than "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **Winship**. That the standard currently applied by the courts "is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent," **Jackson**, because it "fails to supply a workable or even a predictable standard for determining whether the due process command of Winship has been honored." Id.

Regarding Question 3, "an appellate court's reversal for insufficiency of the evidence is in effect a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal, rather than submitting the case to the jury." **Lockhart v. Nelson**, 109 S. Ct. 285, 102 L. Ed. 2d 265, 488 U.S. 33 (1988). A Rule 29 motion is usually raised before the case goes to the jury. It is often initially denied (and occasionally granted) before going to the jury. In these cases, the standard for considering the evidence has no relation to the jury's verdict, as it hasn't been decided. Yet when considering the exact same motion post-conviction many courts

(district and appellate) are basing consideration on the verdict rather than making "a 'legal' determination whether the evidence was strong enough to reach a jury at all." **Musacchio**. See **U.S. v. Reynoso**, 38 F.4th 1083 (D.C. Cir. 2022) ("Our review is highly deferential to the jury's decision."), **Gomez**, supra, ("accepting all reasonable inferences in favor of a jury's verdict."), **U.S v. Simpson**, 2023 U.S. App. LEXIS 458 (5th Cir. 2023) ("will affirm the jury's verdict unless, viewing the evidence and reasonable inferences in the light most favorable to the verdict..."), **U.S. v. Schily**, 2022 U.S. App. LEXIS 21119 (8th Cir. 2022) ("viewing the evidence in the light most favorable to the jury's verdict"). At least one Circuit even reverses motions of acquittal granted post-conviction, stating "we must reverse the acquittal and let the guilty verdict stand if the verdict finds support in a plausible rendition of the record." **U.S. v. Guerrero-Narvaez**, 29 F.4th 1 (1st Cir. 2022). This same Circuit has stated "Rule 29 motions require a court to take into accound all evidence, both direct and circumstantial, and [to] resolve evidentiary conflicts and credibility disputes in favor of the jury's verdict." **U.S. v. Matta-Quinones**, 2023 U.S. Dist. LEXIS 10413 (1st Cir. 2023) (internal quotation marks omitted). Yet Rule 29 itself does not endorse this "requirement," nor has the Supreme Court. "The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached." **Jackson**. (footnote 13 of majority opinion). Regardless of the timing of the motion (as long as it is timely) or the court considering the merits, the manner of review should be the same; evidentiary concerns cannot be resolved in favor of the jury's verdict when the motion itself was meant to determine if the "evidence was strong enough to reach a jury at all." **Musacchio**. To hold an appellate court and a trial court to different standards "would create a purely arbitrary distinction between defendants based on the hierarchical level at which the determination was made." **Lockhart**. (quotation marks omitted). "[A] federal appellate court applies no higher a standard;" **Burks**, supra, "it must be this same quantum of evidence which is considered by the reviewing court." **Lockhart**.

Regarding Question 4, **Jackson** acknowledges the question as whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Many Circuits follow suit, using word-for-word the same standard. See **U.S. v Kirst**, 54 F.4th 610 (9th Cir. 2022); **Sanderson**, supra; **U.S. v. Hector**, 2022 U.S. App. LEXIS 3606 (4th Cir. 2022); **Boykins**, supra; **Reynoso**, supra. Yet the appellate courts are consistently inconsistent in looking at the elements when reviewing the sufficiency of the evidence. See **Kirst** and **Boykins**

(not looking expressly at the statutory elements); **U.S. v. Hall**, 44 F.4th 799 (8th Cir. 2022) (refers to elements standard, does not look at elements) and **U.S. v. Joiner**, 39 F.4th 1003 (8th Cir. 2022) (standard doesn't mention elements, does look at elements) **Nieto**, supra, and **U.S. v. Benjamin-Hernandez**, 49 F.4th 580 (1st Cir. 2022) (standard doesn't mention elements, do not expressly look at elements). In the instant case, the court barely discussed the individual charges, did not examine the elements, and did not differentiate between the evidence regarding use of the text app to commit counts 1-4 and the evidence regarding use of the specific Facebook account used to commit counts 5-6 (see generally App. A at 19-22). Had the court done so it may have realized that there was no evidence on specific elements of counts 1-4 and that only speculation, not reasonable inferences, connected me to the commission of counts 5-6 (see App. E at 11-13). As the Supreme Court has noted, "a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm." **Jackson**. Thus it is of utmost important that the lower courts examine the elements, even after a jury convicts, as "the only facts the court can be sure the jury so found are those constituting elements of the offense-as distinct from amplifying but legally extraneous circumstances." **Descamps v. United States**, 570 U.S. 254, 133 S. Ct. 2226, 186 L. Ed. 2d 438 (2013). "A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense." Id. When the elements are not examined, or when non-evidence (opening statements, closing statements, etc.) is considered in determining the sufficiency of the evidence, a defendant is not "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence." **Powell**. "Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." **Glasser**.

Regarding Question 5, crafting a new standard which better encompasses all of a criminal defendant's constitutional rights and the values of society is beyond my personal power. However, as someone on this side of the glass, I would put some points forward for consideration which I feel to be important. First, the **Glasser** and **Burks** standard requiring "substantial evidence" better reflects a burden of proof beyond a reasonable doubt, which **Winship** recognized as a constitutional right. Second, the Supreme Court's statement in **France**, supra, that "[w]e assume the truth of all the evidence given on the part of the government with all proper inferences which may be drawn from it," makes more logical sense

in relation to leaving credibility determination up to the jury. This is because in looking at the evidence in the light most favorable to the Government, the courts are not only deciding which witnesses are credible and which are not, but even determining some of a single witness's statements as credible (if they support the charges) or as not (if they do not support the charges), which further leads to improper inferences not supported by the evidence as a whole. The focus on proper inferences as opposed to just rational inferences is important as well, as many possibilites could be rational but not as many might be proper. Third, I ask the Court to consider the Carrier standard generally. "The Carrier standard reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt." **Schlup**. "The Carrier standard is intended to focus the inquiry on actual innocence." Id. In **Schlup**, the Court acknowledged that the Carrier standard is lower than that adopted in **Jackson** (both referring to habeas review) because the issue is not just evidentiary sufficiency but the claim of actual innocence. This is analagous because in the federal courts a defendant goes to trial to maintain his actual innocence and is presumed innocent until proven and found guilty, including at the point when a motion for judgment of acquittal can initially be raised and considered. Thus the Carrier standard is already a more fitting starting point than **Jackson** when reviewing a motion for judgment of acquittal. Will a new standard in line with these considerations cause more defendants to be acquitted by the courts? Most likely. But this will only be because the Government's evidence was not "strong enough to reach a jury at all." **Musacchio**. In some cases this will prevent wrongful convictions, which is desirable since "we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty." **Winship**. (Harlan, J., concurring). Additionally, a better standard will have the benefit of "safeguarding against overzealous prosecutions," **Ramos**, by forcing the Government to produce more concrete evidence of guilt instead of relying on speculation, sensationalism, and connect-the-dot testimony by federal officers (who literally work for the Government) to secure convictions. While developing a new standard may seem like a daunting task, "this Court should not shy away from correcting its errors where the right to avoid imprisonment pursuant to unconstitutional procedures hangs in the balance." Id. (Sotomayer, J., concurring). Neither society nor the justice system "sanction[s] the conviction at trial... of some defendants who might not be convicted under the proper constitutional rule." Id. (Kavanaugh, J., concurring). "The Constitution demands more than the continued use of flawed

criminal procedures-all because the Court fears the consequences of changing course." Id. (Sotomayer, J., concurring).

I also need to address more specifically how the standard being discussed in Questions 1-5 applies to my case. Sometimes there is evidence in a case which by itself makes it impossible to prove the defendant is guilty beyond a reasonable doubt. The best example I can give of this is DNA evidence in a rape case. It doesn't matter how many witnesses testify or what story the Government cobbles together, if the DNA does not match then it is doubtful any jury would convict or any court would uphold a jury's guilty verdict. Yet under the "light most favorable to the Government" standard and the way the Circuits are applying it, a defendant's conviction can be upheld based on the "testimony of a single witness," **Meises**, supra, regardless of how much exculpatory evidence there is or how concretely exculpatory any particular pieces are. This is similar to what happened in the instant case. As argued in my brief for rehearing (App. E at 13-18), not even considering all the evidence that someone else did commit the crimes, the fact that Sayger testified to accessing his personal Facebook account on December 4, 2017, on his school laptop while at school and that he would have been using a VPN to do so, plus his statement he changed the password later in December, combined with the fact that the only IP address using his Facebook on December 4 and the only one changing the password in December is the same VPN IP address used to access the account during the charged conduct with AR, makes it impossible for the Government to have met its burden of proving beyond a reasonable doubt that I was the one accessing it at those times because they cannot prove Sayger himself did not access the accounts at those times. And to be clear, this is not a question of Sayger's credibility. This is simply assuming his under oath statements are true, as the oath itself would indicate. To pick and choose which statements to credit simply because they fit the Government's case is literally doing what the courts are not supposed to, determining credibility, which is leading to sustained guilty verdicts contrary to the exculpatory evidence. I respectfully assert that this is not justice.

Regarding Question 6, we "start where we always do: with the text of the statute." **Van Buren v. United States**, 141 S. Ct. 1648, 210 L. Ed. 2d 26 (2021). However, answering the question requires a plain reading of 18 U.S.C. § 2251 as it would be framed in an indictment. To me, the only legal and logical way to begin wording an attempt under 2251(a) and (e) would be by stating "On or about ___, John Doe did attempt to employ, use, persuade,..." or "did attempt to have a minor assist..." or "did attempt to transport any minor..." While I do not know if there

is a rule requiring "attempt" phrasing to be placed with any particular element, I do believe changing the statutory language in an unnatural way to fit in the word "attempt" creates a constitutional issue. With this being said, the only interstate nexus element that fits with a natural reading of an attempt is "knows or has reason to know that such visual depiction will be transported or transmitted... or mailed," because the other two alternative elements require the existence of the visual depiction ("if that visual depiction was produced or transmitted using... if such visual depiction has actually been transported or transmitted..." 2251(a)). While the answer to this part of the question does not affect the instant case (as I believe I was charged under the "knows or has reason to know" element on the attempted exploitation), the reasonably included question of what evidence is then required to meet that element does pertain to my case because, as argued in my brief for rehearing (App. E at 12-13), the Government failed to present any evidence that proves the element, meaning my conviction on the count should be vacated for insufficient evidence. However, I ask the Court to answer Question 6 more for the fact that at least one Circuit is inventing its own phrasing for charging attempted exploitation to avoid using the correct interstate nexus element. See **U.S. v. Hensley**, 982 F.3d 1147 (8th Cir. 2020) ("(2) he attempted to entice the minor to engage in sexually explicit conduct;... and (4) he used a means of interstate or foreign commerce."); **U.S. v. Schwarte**, 645 F.3d 1022 (8th Cir. 2011) ("materials used to attempt to produce the visual depiction were mailed..."). In **United States v. Taylor**, 142 S. Ct. 2015, 213 L. Ed. 2d 349 (2022), the Supreme Court established that there is a distinction between an attempted crime and the completed act regarding what elements must be proven at trial. This same concept would apply to the statutory language limiting chargeable alternative elements when indicting on an attempt. Thus it is unconstitutional to charge someone under an element that is not a natural reading of the statute, as the Eighth Circuit is doing, and so I ask the Court to intervene. I am confident the only alternative element which fits an attempt is the one requiring a proof of mens rea. But exactly what that mens rea requires is also in question. Does it suffice to convict a person of the crime of "production of child pornography" for knowing or having reason to know that the visual depiction would be sent over the internet? This crime has a mandatory minimum of 15 years, which is what the ACCA gives for someone with 3 prior qualifying crimes of violence. Add to that mandatory 15 the mandatory sex offender registration, and it is clear that Congress considers this a very serious crime, and rightly so. But would Congress's intent in crafting the law be fulfilled in allowing such a broad definition of

meeting the mens rea requirement? Hardly. Congress's intent in the harsh penalties of this statue has always been to punish child sexual predators, especially those who "memorialize" the abuse and then distribute it to others. The Congressional Notes on succeeding amendments to the stature lay this out, often in detail. Based on these facts, it seems unlikely Congress would approve of a mandatory 15 year sentence for the 19-year-old who asks his 17-year-old girlfriend (or boyfriend), who lives in the same region, for some sexually explicit images, just because the person knew or should have known the images would have been sent through the internet. In order to separate the actual predators and producers of child pornography from those without any criminal intent, I would ask the Court to rule that what the element "knows or has reason to know that such visual depiction will be stransported or transmitted..." requires to be proven is: (a) evidence that in "using any means or facility of interstate or foreign commerce," the person knew or had reason to know that whatever manner would have been used to send the depiction is a means or facility of interstate or foreign commerce; and (b) evidence that "in or affecting interstate or foreign commerce," the person knew or had reason to know the visual depiction would travel accross state lines or country borders. These interpretations are much more faithful to the statutory language and fall in line with the interpretory method used by this Court in **Rehaif v. United States**, 139 S. Ct. 2191 (2019). So I ask the Court to answer if the first of the three alternative interstate nexus elements is the only one which can be charge in conjuction with an attempt under 2251(a) and (e), and the reasonably included question of what constitutes proof beyond a reasonable doubt that a person is guilty of the mens rea required by that element.

Regarding Questions 7 and 8, I point to the brief I filed with my motion for rehearing, as no evidence was presented on specific elements of the crimes charged if the arguments presented therein are correct. See App. E at 11-12. "The statue [18 U.S.C. § 875] should require first what the words say (a subjectively intended threat) and second what constitutional avoidance principles demand (an objectively real threat)." **U.S. v. Jeffries**, 692 F.3d 473 (6th Cir. 2012) (Sutton, J., dubitante). An objectively real threat requires an objectively real property or reputation to injure, and thus evidence must be introduced to establish the property or reputation exists. In **Gomez**, supra, "Gomez attempted to establish... she was not guilty of extortion because [the victim]'s reputation was already tarnished." So in some manner the victim's reputation was established on the record, and "[the victim], his wife, and [their attorney] testified at length that they considered the... communications true threats to the reputation and livelihood of [the victim] and his family." Id. This is far

different from the instant case where, according to the texts offered into evidence, the threat was to distribute the victims' images if more were not sent. There is no threat to injure reputation, and only by speculating what the victims' reputations actually were and speculating that the unexpressed intent behind the wording of the threats was to injure their reputations can the convictions be sustained. If the Government can convict under 851 based on potential collateral damage from what was actually threatened then the law becomes vague, and "a vague law is no law at all." **United States v. Davis**, 139 S. Ct. 2319 (2019).

Regarding Question 9, this was also somewhat addressed in my rehearing brief (App. E at 5-6). I point out that I was deemed indigent by the court and had no way of controlling the actual service of the subpoenas. The bottom line is that numerous efforts for service were made in good faith and there was no way of knowing if Kilcline would respond to the subpoenas left at his residence. Once it seemed clear he was not going to show up as a Government witness (as he was on its witness list), I requested compulsory process. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." **Glasser**. "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." Id. Compulsory process is a fundamental right, and it should not be denied after good faith attempts at service.

Regarding Question 10, the Seventh Circuit noted a number of Circuits have adopted considerations of timeliness when looking at Fed. R. Crim. P. 17(d), see App. A at 17-19. This is a constitutional issue, however, as the Fifth Amendment states "the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor," and the Rule itself does not grant the courts an exception. Timeliness considerations could have easily been written into the Rule (as they are in many other Rules), but since they were not it is a violation of a defendant's constitutional rights to be denied compulsory process based on issues of timeliness.

Regarding Question 11, "there is a split among the circuits regarding the appropriate standard to apply to reverse 404(b) evidence." **Wynne v. Renico**, 606 F.3d 867 (6th Cir. 2010) (Martin, Jr., Circuit Judge, concurring). "The majority of circuits have rightly held that Rule 404(b) primarily exists to protect a criminal defendant from the prejudice of propensity taint and should not be applied in cases where, as here, the defendant offers prior-act evidence of a third-party to prove some fact relevant to his defense." Ibid. "[H]istory makes clear that the policy underlying the rule at common law sought to protect the criminal

defendant." Ibid. "The [Advisory Committee Notes] give no indication that they were intended to protect any other party." Ibid. "[T]he prejudice concern does not apply equally to a defendant and a third party not being tried for a crime. Specifically, a third party not on trial for a crime is in no danger whatsoever that the jury will convict him for being a 'bad man.' Thus here and in probably most reverse evidence cases, one of 404(b)'s two justifications would vanish completely. In such a situation, one wonders if, left with only one pillar to support it, the whole structure of 404(b) collapses under the weight of a defendant's constitutional right to present a defense. Most circuits have found that it does." Ibid. (see footnote 3 listing Circuits and cases). That pretty well sums up the whole issue, and since the trial judge and the Seventh Circuit considered the admissibility of the proffered testimony by my witnesses under the "reverse 404(b) evidence" standard, I am asking the Court to decide if, in a criminal trial, Fed. R. Evid. 404(b) does apply to any person or only to a defendant.

Regarding Question 12, much of the issue here was addressed in my brief for rehearing (App. E at 6-10). The problem is that, whether Rule 404(b) applies to third parties or not, it is a grave constitutional injustice to bar evidence of third party guilt when the potential evidence is more relevant than what a Circuit generally allows against a defendant under Rule 404(b). In the instant case, I was barred from presenting evidence that David Kilcline (who was directly linked to the case by multiple government witnesses and digital evidence) had previously extorted a minor regarding explicit images through Facebook and had hacked a different girl's Facebook account with the hack involving explicit images, actions mirroring those undertaken in the charged conduct and clearly proving knowledge and intent according to Rule 404(b)(2). Yet the Circuits (including the Seventh) have regularly affirmed the allowance of years to decades old conduct by defendants which has no direct correlation to the charged crimes, especially in sex cases, under Rule 404(b). See sample case listing in App. E at 10. There is no way for a defendant to present a complete defense when evidence of third-party guilt is barred based on stricter evidentiary standards than evidence against the defendant is held to. Thus, it is unconstitutional to bar such evidence.

Regarding Question 13, the Court can see in App. D at 7-8 that I moved mid-trial, following a clear line of questioning, to suppress evidence obtained illegally from my work computer. The motion was denied without further discussion following the prosecutor's response. Most of the arguments from my rehearing brief apply (App. E at 1-3), but I would reiterate that the Seventh Circuit's statement "it is not unreasonable to burden Cox with raising good cause himself,"

App. A at 6, considering that they are requiring me to raise good cause following the denial of the motion, is a violation of Fed. R. Crim. P. 51. Further, putting the burden on the defendant to object to a ruling in order to present good cause removes the trial judge's obligation to maintain judicial order and clarity in the proceedings. "Basic responsibility for making proper evidentiary ruling[s] must lie with [the] trial judge; therefore except where reason for objection is obvious to all, judge should refrain from immediate ruling, and should inquire into ground of objection and basis of question asked and judge should then state reason for his ruling." **U.S. v. Walker**, 449 F.2d 1171, 146 U.S. App. D.C. 95 (D.C. Cir. 1971). "Denial of defendant's mid-trial motion to suppress was improper as it was unclear whether there was good cause for untimely suppression motion." **U.S.v Mulholland**, 628 Fed. Appx. 40 (2nd Cir. 2015). For this reason I ask the Court to clarify that it is part of a trial judge's duty to determine if motions have good cause for being untimely (or if they are actually untimely at all, see discussion on Question 14 below) rather than simply denying them without question.

Regarding Question 14, a natural reading of Fed. R. Crim. P 12(b)(3), which states "[t]he following... must be raised by pretrial motion if the basis for the motion is then reasonably available...," would indicate that if the basis for the motion is not reasonably available before trial, then it no longer falls under Rule 12(b)(3). This in turn means the motion would no longer fall under Fed. R. Crim. P. 12(c)(3), because it only sets a "deadline for making a Rule 12(b)(3) motion." So, if a motion's basis was not available before trial then when that motion is made after trial has started it cannot be untimely. "[D]efendant did not waive right... because basis... was not reasonably available before trial." **U.S. v. White**, 850 F.3d 667 (4th Cir.), cert. denied, 137 S. Ct. 2252, 198 L. Ed. 2d 687 (2017).

Finally, I respectfully ask the Court to grant this petition. While I would prefer to see all the Questions answered because they all affect defendants' rights, Questions 1-6, 11, & 12 are probably the most important and pressing to be answered at this time, not just for myself but for all people facing federal criminal charges, now or in the future. Juries sometimes convict innocent people. A look at some of The Innocence Project's aided exonerations shows that sometimes the Government can paint a compelling picture and yet still be wrong. When you account for malicious prosecutions and the cognitive biases inherent in investigative procedures it is increasingly important for the sufficiency review to be an objective tool for protecting against unjust convictions rather than a rubber

stamp saying the Government put forth a convincing argument, especially when a defendant is prevented from presenting a complete defense. So I would doubly ask that the Court answer Questions 1-6, 11, & 12 if not all of them. However, if the Court chooses not to address any of the Questions at this time, I would still ask the Court to use its oversight power and grant a summary ruling that the Seventh Circuit erred in its sufficiency review and should vacate my convictions for counts 1-4 for the Government's failure to present any evidence on an essential element (as described in App. E at 10-13) and for counts 5 & 6 because the evidence presented by the Government was insufficient to prove beyond a reasonable doubt that I used the Quinton Sayger Facebook account to exploit and receive child pornography from victim AR (as described in App. E at 13-18). Or, alternatively for counts 5 & 6, I ask the Court to order a new trial be granted where I am able to present a complete defense by allowing Marc Hazelwood and Hailey Wolfe to testify on my behalf (as described in App. E at 6-10).

Thank you all greatly for your consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bradley Cox

Date: July 3, 2023