23-5899

**SUPREME COURT OF THE UNITED STATES**

Rande Brian Isabella,

*Petitioner*,

vs.

United States of America,

*Respondent*.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

# PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

## QUESTION PRESENTED

As a Matter Of Public Importance

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In light of the Tenth Circuit Court of Appeals' recent finding that "the District Court erred" concerning when jeopardy attached at trial, the Supreme Court is needed to review consequences of a manifest constitutional error, by deciding the question:

> After the Government Concedes To Actual Innocence With Jeopardy Attached, and The District Court Terminates Jeopardy In the Substantive Offense Over Defendant's Objections, Can the District Court, Then, By Erroneously Characterizing That Action As a "Pre-Trial Dismissal", Place Defendant Back Into Jeopardy Under the Lesser Included "Attempt Portion" Of That Same Count, In Conflict With the "Discrete Bases Of Liability" Rule Under Sanabria v. United States, 437 U.S. 54 (1978), Without Denying His Fifth Amendment Guarantees?

OR, in the alternative, the Honorable Circuit Justice is needed to issue a Certificate Of Appealability.

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OTHER REFERENCES

4 W. Blackstone, Commentariees on the Laws of England 329 (1769).....13

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Order Denying Certificate of Appealability
United States v. Isabella, 2023 U.S. App. LEXIS 3681 (10th Cir. 2023) (22-1101)
Pet. Reh. En Banc denied (April 16, 2023)

## JURISDICTIONAL STATEMENT

An order denying Certificate of Appealability as to all issues was filed by the Tenth Circuit Court of Appeals on February 16, 2023. Petition for rehearing was denied on April 16, 2023. Applicant is a prisoner in federal custody on petition for writ of habeas corpus. U.S. Const., Sec. 9(2), Art. I.

A petition for Writ of Certiorari may be filed to review the denial of a COA. "Unless a circuit justice or judge issues a Certificate of Appealability an appeal may not be taken to the Court of Appeals from -- the final order in a proceeding under Section 2255." 28 U.S.C. §2253(c)(1)(B). Hohn v. United States, 524 U.S. 236 (1998).

In the alternative, this petition may be construed as an application seeking a Certificate of Appealability from an individual circuit justice, pursuant to Fed. R. App. P. Rule 22(b).

## STATUTORY PROVISIONS

"No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a **grand jury**...nor shall any person **be subject for the same offence to be twice put in jeopardy** of life or limb...nor be deprived of life, **liberty**, or property, without **due process** of law..." United States Constitution, Amendment V

"The government may, with leave of court, dismiss an indictment, information or complaint. **The government may not dismiss the prosecution during trial without the defendant's consent.**" Federal Rules of Criminal Procedure, **Rule 48(a)**

"A Certificate of Appealability may issue...if the applicant has made a substantial showing of the denial of a constitutional right." **28 U.S.C. §2253(c)(2)**

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## STATEMENT OF THE CASE

A federal grand jury indicted Ohio Petitioner, Rande Isabella, with four criminal counts under six jeopardies of imprisonment - each carrying mandatory 10 or 15 years to life sentences. (Doc.#1 D. Colo. 1:14-CR-00207-CMA-01) Appendix Volume A - Page 49 (Volume - Page @ Line Number). During trial the government conceded to actual innocence: someone other than the defendant actually committed the crime of producing child pornography found on Colorado minor "S.F."'s cellphone. United States v. Isabella, 918 F.3d @n.2 (10th Cir. 2019) (Case#: 17-1197) hereafter referred to as "Isabella I". For this reason, the District Court terminated the jeopardy in Count 2, but only in the substantive "completed" portion of Count 2. It then granted the government's motion to shift and proceed in prosecuting the "attempt" portion of Count 2 over defense objections on constitutional grounds. A-76 @4 to 80 @6.

On a Friday afternoon of a federal holiday weekend following an eleven-day trial, a two-hour deliberation ended in a split decision: Not Guilty in Counts 3 & 4 concerning an H.S.I. undercover operation; and Guilty in Counts 1 & 2 concerning production of the child pornography separate from that found on minor S.F.'s cellphone. Judgment was entered May 24, 2017 without opinion. Trial counsel prosecuted the appeal, but did not raise well-preserved meritorious issues after agreeing to do so. More meritorious than those raised by counsel, such issues were preserved by seeking leave and filing supplemental briefs in propria persona. Case #: 17-1197 (Doc.# 01019985126 / 125; 010110090673 / 1189). For example, a claim clear in the record under Napue / Brady / Giglio was raised to the Tenth Circuit, and so preserved for habeas review under 28 U.S.C. §2255, when appellate counsel agreed to raise, but inadvertantly omitted the claim. See Amended Motion Doc.#341-1 pg.9 - 15; 82-95. The allegation was not disputed by the government and not addressed by either the District or Circuit courts. Id.; A-19. Despite the Napue / Brady / Giglio issue being preserved in propria persona, the habeas review panel denied COA after invoking a procedural default for counsel's failure to raise the issues.

HABEAS PROCEEDINGS

- Habeas Corpus Motion at 28 U.S.C. §2255 (Doc #330) (March 30, 2021)
- U.S. Attorney Ordered to "Answer" (Doc #332) (April 13, 2021)
- Movant's Motion for Equitable Tolling (Doc #333) (April 30, 2021) (Denied)
- Government Answer Directed to #330 (Doc #338) (June 9, 2021)
- Movant Amends §2255 at Rule 15(a)(1)(B) (Doc #341-1) (June 25, 2021)
- Government Defaults Statutory Period to Answer ("14 Days" - Rule 15(b))
- Motion to Compel a More Definite Statement (Doc #347) - To "Answer" Amend. Mot.

The Motion to Amend movant's motion under §2255 was granted as to all claims made, and was denied as to an attached affidavit certifying facts presented, within the body of the District Court's order denying the §2255 habeas pleading

as to all claims. (Doc. #349) (November 17, 2021). The motion to compel the government to "answer" the amended/operative brief and the motion for equitable tolling were "denied as moot". Id.

The District Court's order expressed a belief that "at a pre-trial conference, the government informed the Court that it would be proceeding on a attempt theory only for Count 2 (Doc. #291, Tr. at 290)." A-13-14. But that cite is to the trial transcript for "September 22, 2016", 2 days after the jury was empaneled and sworn; and so not "at a pre-trial conference"; see Doc. #291, page 290 (A-80). In a motion for reconsideration pursuant to Rule 59(e), Petitioner highlighted the District Court's error - clear within the record - in his opening sentence; (Doc. #350). Without addressing that clear error the District Court denied the Rule 59(e) motion; (Doc. #351) (January 3, 2022).

Petitioner filed a Notice of Appeal (#22-1101) and an application to Circuit Judge Rossman; seeking a Certificate of Appealability on that error and other denials of Constitutional rights; denied on February 16, 2023 by a three-judge panel -- the Honorable Circuit Judges Bacharach, Baldock, and Carson; the panel analyzed the record and decided that "Mr. Isabella is correct in that a jury trial jeopardy attaches when the jury is empaneled and sworn"; United States v. Isabella, 2023 U.S. App. LEXIS 3681 at 8 (10th Cir. 2023) ("Isabella II"); (A-1); then decided that "the District Court erred" in its belief that the dismissal action had occurred at the September 14 "pre-trial conference"; Id. at 9; the panel issued its own chronology to correct the "confusion" regarding the record. See Id. @ n.1 (A-6 @ n.1). This correction establishes that the District Court's dismissal action following the government's conceding to actual innocence and waiving the inquiry into evidence sufficiency, did occur with jeopardy attached, and so, was not a "pre-trial" action. Id.

Seeking correction of that identified error and reconsideration of habeas

denials due to the District Court's expressed belief that jeopardy had not yet attached, Petitioner filed a motion for rehearing en banc; denied on April 16, 2023 without addressing the error or consequentially erroneous conclusions of law. This petition for writ of certiorari is to appeal the denial, to correct the manifest error and, in the alternative, to seek a Certificate of Appealability.

## STATEMENT OF THE FACTS

### Background

**"August 9, 2013"** is the date the naked "torso pic" was created; since metadata (EXIF) was readily apparent "in the Camera folder", A-109 @ 9-11; it was known since the first day of investigation.

**"September 19, 2013"** is the date of the first communication between Ohio Petitioner and "S.F." of Colorado; A-111 @ 14-19; on the "Minus" social media/ dating app. A-87 @ 1-16; a "three-month relationship" ensues, including occasional fantasy role-play. *1

**September 28, 2013** - A single nude or partially nude photo is exchanged A-88 @ 1-16; S.F. sends a "screen capture" of the same naked "torso pic" image produced on "August 9, 2013", 40 days before initial contact with Petitioner. A-95. *2

On **November 20, 2013**, S.F.'s mother and then boyfriend "Randy T.", contacted Homeland Security Investigations "about images they discovered on [S.F.'s] cellphone". A-30 @ 16-19; Agent Williams told the grand jury that he "instantly" knew it was child pornography (A-31 @ 22-23)/

*1 Minor S.F. writes: "Sleep amazing. Dream of [yo]u kissing me...then kissing [yo]ur body and touching [yo]u and slowly unzipping your pants...sliding my hand...now you c[o]me up with what you want." A-101 @ 13-24.

*2 The government has maintained that the "torso pic" is "child pornography", whereas former George W. Bush appointed National Coordinator of Child Exploitation/Prosecution swore in an affidavit that it is "not child pornography". A-129

**On December 11, 2013** H.S.I. initiated an undercover operation by sending a "friend request" by 26 year-old "Camilla Silva" to Petitioner's Facebook; which was set to "no public access"/unsearchable (due to his being a college professor over 10 years); then shifted her persona to a Colorado teen, but keeping the adult profile. A-101 @ 6 - 102 @ 17.

**On February 14, 2014** H.S.I. conducted an armed raid of Rande Isabella's Ohio home, searching for "evidence of child pornography". Doc. #79-1, pg. 28, ¶48. The day after jeopardy attached the government released results from F.B.I. deep forensic searches of 4 computers, 2 iPhones, various storage drives, email/social media accounts and web histories. A-61-62; the record shows no allegation that Petitioner had possessed, viewed, searched for or otherwise inquired about actual "child pornography"; A-85 @19 - 86 @13; see also results of the digital forensics report:

> "Of the thousands of images, none were found that I believe would meet the federal definition of child pornography...partial nudity of females that were obviously adult...none of them were pornographic or hinted at younger models...most of the videos were of scenic, travel, or home videos of family." A-56

**On February 20, 2014** - H.S.I. brought minor S.F. in for questioning about the origins of 56 images of child pornography

Napue v. Illinois Violation

**On May 20, 2014** the prosecutor withheld the metadata (EXIF) and S.F.'s statements concerning when and where the child pornography was actually produced. Focused on the "torso pic", the government witness made no mention of the "August 9, 2013" creation date (A-109 @11), which would have been impossible to reconcile with the "September 19, 2013" first communication date. A-40 @14. Despite both S.F. and the forensic video being available, the prosecutor asked Agent Williams to tell the jury about what he heard S.F. answer about what she heard Rande Isabella say:

> "She stated that he made threatening statements against her younger sister, who I believe is approximately seven years old, if she failed to continue the relationship. And he would direct her to send him images of her performing sexual activity." A-39 @ 15-21. "He portrayed himself as a 17-year-old boy, Kyle." @5.

Awaiting trial in a federal detention center for 27 months, on July 19, 2016 a government filing noted "there were 56 child pornographic images" on S.F.'s cellphone "which were never sent to the defendant". Doc#116 p.2-4.

**On September 13, 2016**, the government recognized that the defense's digital forensic expert discovered that the "torso pic" was actually produced "by an individual other than the defendant". Doc. #196, pg. 2, ¶3-4. No dismissal was filed.

**On September 14, 2016**, as the panel noted, the government "did not move to dismiss" any charge at the "pre-trial conference". Isabella II at n.1 (A-6)

**On September 17, 2016**, the digital forensics expert filed his report, revealing the "torso pic" to be one of "18 different images which depicted S.F. and a blonde white male during a sexual encounter"; A-57-58; unrelated to Rande Isabella. A-59-60. No charge was dismissed.

**On September 19, 2016**, at voir dire, the District Court introduced the defendant and read the charges, including completed production of child pornography, (see A-72 @1-17) and said "the child involved in this case was 14 years old...and Mr. Isabella was in his late 50's". A-71 @19-25. By the time the jury was empaneled and sworn, Rande Isabella had faced a real possibility of conviction for producing child pornography found on S.F.'s cellphone.

With Jeopardy Attached, Trial Begins | A-73 @12.

**September 22, 2016 (the actual dismissal date)** the government gives notice that S.F. has recanted what she told agents 31 months earlier and will testify that "she lied" about needing "to send pictures to him or he was going to hurt [her] sister"; Doc. #198, p. 4; and "that the defendant was not

responsible for the taking of the nude images of [S.F.]". Id. at 5.

As the appellate panel noted:

> "The government conceded that Mr. Isabella had played no role in the only alleged child pornography in this case". (Isabella I @ n.2); See A-89 @6-9 - 91 @12.

The September 22 Trial Conference

The Court: So my understanding is you are moving to dismiss Count 2, to the extent that it is the completed production of child pornography?

AUSA Riewerts: Yes, to dismiss the completed offense, not the attempted offense. A-76 @ 22 - 77 @ 1

The Government Waives the Court's Inquiry

The Court: I was going to ask wehther you have any evidence that would support a completed charge... (A-76 @19-20); if you have no evidence to substantiate a production of child pornography count then I don't see any basis to move forward...if there is no evidence for this, it seems to me it should be dismissed (A-78 @ 21-23).

The Defense Objects to the Dismissal During Trial

Mr. Gainor: The grand jury was presented with specific testimony that she was threatened by the defendant...lies were presented to a federal grand jury, then they indicted. (A-74 @ 11-18); for the same reasons...altering it after the grand jury returned it with this particular set of modalities, is a material change in the indictment, and we would object to that.

AUSA Riewerts: To the extent - in terms of the indictment, itself, the government's position is that it would be moving forward with the theory of attempt as opposed to dismissing the completed offense.

Mr. Gainor: So leave it in. They can go into that theory. But to alter it at this late stage of the game is a material alteration of the indictment; and the defense objects. (A-77 @ 10 - 79 @ 3) We object to a material change in Count 2. Id.

The Court: So I am going to go ahead then, based on the government's - I will consider that an oral motion to dismiss the completed - what I refer to as the completed production of child pornography, as distinct and separate from the attempt to produce child pornography. (A-80 @ 1-6).

The Government Disregards the Court's Preclusion Order

The Court: It is, however, very prejudical if you refer to [the torso pic] as child porn but you can't tie it to him. Because that is the implication [-] that he was the one who produced it or it was produced at his behest. (A-81 @ 16-24)...it imples that he is guilty of producing child porn, and is going to open a whole can of worms. Id.

The sole physical evidence alleged to be "child pornography" was the "torso pic", shown over and over throughout the government's case-in-chief and the focus of the government's summation:

AUSA Riewerts: In terms of the production of child pornography under federal law, again **you have seen the images numerous times** (A-114 @ 8-10) ...As you will recall she is nude from her neck down to right at the tops of her thighs. So her breasts are exposed in that picture. And breasts are not child pornography under federal law. However, also exposed in that picture is her pubic area... you are also allowed to use your common sense to determine that." A-115 @ 15-24.

Prosecutor proves the "torso pic" is child pornography:

> In terms of that picture, it is clearly a picture that is designed to elicit a sexual response in the viewer. She is posed in a coy position...she is nude from her neck down to her upper thighs. In terms of that particular picture, it does elicit a sexual response in the defendant. A-116 @3-18 . He responds by saying "That is youuuuu? So nice!! Got one with face?" Id. "Send me one of your pretty face. That, because she was 14, if she would have followed his direction, **that is child pornography.**" A-117 @20-25.

## SUMMARY OF THE ARGUMENT

### Introductory Overview

It is an extraordinary case, when the government concedes to actual innocence on a count of indictment, (carrying a 15-to-30 year manadatory sentence), 3 days after the jury is empaneled and sworn. It is unusual when a District Court, after determining that evidence is insufficient to convict, grants the government's "dismissal" of a charge during trial and over Defendant's constitutional objections. But, when the District Court then places Defendant back into jeopardy on that same count, by severing that charge into discrete "portions", (and permitting Defendant to be tried and convicted under a lesser included attempt theory by facts not heard by the grand jury), it rises to a constitutional level of concern shared by the public.

In its order denying habeas relief pursuant 28 U.S.C. §2255, the District Court reasoned that jeopardy had not yet attached to its "dismissal". However, the Tenth Circuit disagreed and has clarified that jeopardy had, in fact, attached 3 days prior to the government conceding to actual innocence and moving to dismiss. As a consequence, Petitioner stands convicted and is serving an 18 year sentence (plus 20 years supervised release), for attempting to commit the "same offense" that digital forensic evidence irrefutibly proves, the victim agrees, and the goverenment concedes, someone else had actually committed beforehand. Conviction now rests on the same count in which Petitioner's jeopardy had been terminated for insufficiency of the evidence during trial - the equivalent of an acquittal.

Thus, having once overcome allegations of having committed the egregious crime of exploiting a minor for the purpose of producing child pornography, Petitioner was placed back into jeopardy under an attempt theory not presented to the Grand Jury or listed on the Indictment - lesser included on the same count.

Because the "torso pic" photo's metadata, which agents testified had included a creation date 40 days prior to the first communication was "in the Camera folder", the alleged child pornography shown to the grand jury included knowingly false evidence. Clearly negating guilt, the metadata was withheld from the grand jury in order to obtain the indictment - causing the government's abandonment of that theory when invalidated to raise an additional rare concern.

The fact that F.B.I. deep forensic searches of four computers, two iPhones and storage drives, performed over an eighteen month period, failed to show that Petitioner had ever shown an interest in child pornography or underaged persons, casts a shadow of doubt on all government theories and causes a need for clear and correct factual and legal positions. However, the judgment was affirmed under a conclusion unique to the Federal Registry - the panel decided that there was "sufficient circumstantial evidence of the substantial step" to convict.

But even if all of the above were not so, the D.C. Circuit Court of Appeals expressly disagrees with the decision below, citing the Tenth Circuit's reliance on factors which permit a conviction to rest on subjective intent alone, in light of their recent revelation of Supreme Court precedent under five cases. Irrespective of any constitutional denials, United States v. Hillie, 454 U.S. App. D.C. 311 (D.C. Cir. 2021) raises doubt about whether 18 U.S.C. §2256 is unconstitutional as applied to the conviction below.

**Outline of the Argument**

**Section I.** of the argument below begins with analysis of the habeas panel's finding that "the District Court erred", concerning when jeopardy attached at trial, and how the Supreme Court has decided that jeopardy's attachment is a precise point in time which is neither functional, nor discretionary. When the defense expert revealed the EXIF data showing that Ohio Petitioner could not have committed the Colorado crime, the government "took a chance" and entered into trial without sufficient evidence to convict. When the District Court determined that evidence was insufficient to convict in Count 2, it terminated jeopardy, mischaracterizing its action as a dismissal. Supreme Court authority recognizes that such action, however characterized, represents the equivalent of an acquittal, and so should have triggered principles of protection under the Double Jeopardy Clause. Because Petitioner had objected to the dismissal during trial and wanted the jury to decide his fate in Count 2--as the grand jury had charged it - it was error for the District Court to disregard Rule 48(a) and to permit the government to "dismiss during trial without the defendant's consent". The Grand Jury Clause should have prevented the District Court from permitting the government from shifting its theory of offense to one relying on facts not presented to the Grand Jury.

**Section II.** focuses on the second prosecution following the equivalent of an acquittal, and under a lesser included theory of attempt. Supreme Court precedent prohibiting the severing of a count of indictment into "discrete bases of liabilities" should have prevented the District Court from placing Petitioner back into jeopardy of conviction on the same count in which he was functionally acquitted. Because both completed and attempted production require proof of its specific intent "for the purpose of producing", attempted production could not have been proven without placing Petitioner back into jeopardy of the crime that the government conceded that Petitioner had "played no role" in - causing the jury's decision to be based on <u>some</u> role.

**Section III.** raises the fairly included issue that the habeas panel's finding that the District Court erred concerning when jeopardy had attached begins, not ends, the inquiry into denials of Petitioner's right to protection under the Grand Jury, Due Process, and Double Jeopardy Clauses of the Fifth Amendment, plus notice and valued right to a trial by the jury (not judge), as guaranteed under the Sixth Amendment. The first habeas claim is reviewed as an example of the consequences of the District Court remaining under a mistaken belief that jeopardy had not attached to its dismissal actions. Infringing on Rule 48(a) is reversible error. The habeas panel made an extensive merits-based determination that Petitioner failed to show that the Circuit Court "would have reversed his convictions", then denied COA accordingly. This increased the prisoner's burden beyond what Supreme Court authority calls the threshold inquiry for COA. The manifest/clear in the record constitutional error must be corrected before a final order of judgment is entered. And jurists of reason would find the District Court's error has led to denials of constitutional rights, debateably warranting further review by the granting of a Certificate of Appealability.

## LEGAL BACKGROUND

The threshold inquiry for a Certificate of Appealability (COA) is articulated at 28 U.S.C. §2253(c)(2) and provides that a COA may issue "only if the applicant has made a substantial showing of the denial of a Constitutional right." 28 U.S.C. §2253(c)(2). Proof of an actual infringement is not necessary, only "whether jurists of reason would find" the District Court's decision denying the claim, COA or reconsideration, "to be debateable" or is "adequate to deserve encouragement to proceed fruther". Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The Court in Miller-El added "the threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. Id. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition." Id.

The Tenth Circuit holds that "a court can grant relief under Rule 59(e) only when the court has **misapprehended the facts...**" Castanon v. Cathey, 969 F.3d 1125 (10th Cir. 2020); see also Jenkins V. Rivers, 394 F.3d 850, 954 (10th Cir. 2005) (reversing under Rule 59(e) "to determine the decision was not guided by erroneous conclusions"); "...a clearly erroneous finding of fact or a manifest error in judgment." United States v. Austin, 231 F.3d 1278 (10th Cir. 2008).

The Tenth Circuit's finding, that the District Court was under a mistaken belief that jeopardy had not attached to its dismissal on the merits, being clear in the record or "plain and indisputable", is called a "manifest constitutional error", because it affects substantial rights, and "can be reviewed by a Court of Appeals even if the appellant did not object at trial." Blacks Law Dictionary, Ninth Ed. (2009), Bryan Garner, (West).

Such "error was consequential, for it introduced confusion into what we have consistently treated as a bright-line rule: a trial begins, and jeopardy

attaches, when the jury is sworn." Martinez v. Illinois, 572 U.S. 833 (2014). While the Supreme Court is invited to grant certiorari to make constitutional determinations, the gateway process to COA was "never intended to be a ruling on the merits of Petitioner's claim." Miller-El. Thus, the Panel's conclusion that jeopardy had attached before the District Court's dismissal action, should re-open the issue to judicial debate, since such "conclusion that jeopardy has attached **begins**, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." Illinois v. Somerville, 410 U.S. (1973).

The bar on further prosecution following an acquittal of a charge of indictment is "the most fundamental rule in the history of double jeopardy jurisprudence." United States v. Martin Linen Supply Co., 430 U.S. @ 571 (1977); e.g. United States v. Ball, 163 U.S. 662 (1896); 4 W. Blackstone, Commentariees on the Laws of England 329 (1769). This prohibition prevents the government "with all its resources and power" see Green v. United States, 355 U.S. 184 (1957); from abuse of prosecution; such as by forcing a defendant "to defend against **charges or factual allegations which he overcame**," Ashe v. Swenson, 307 U.S. 436 (1970); thus causing stress and prolonged uncertainty at "the possibility that he may be found guilty even though innocent." United States v. DiFrancesco, 449 U.S. 117 (1980).

The first question in an appellate inquiry concerns whether or not the District Court's "dismiss[al] for lack of evidence, [has] amount[ed] to an acquittal." See United States v. Schwartz, 785 F.2d 673 (9th Cir. 1986);

> The Tenth Circuit has agreed on a closely related statute that "double jeopardy based on the resolution against the government of some or all of the factual elements of the offense as the first charged bars any later prosecution under the Mann Act for the same sexual conduct 'even if based on a different theory...' United States v. Hunt, 212 F.3d 539, 547 (10th Cir. 2000)." United States v. Miles, 327 Fed. App'x. 797 (10th Cir. 2009). "Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offence charged [United States v.] Jenkins[, 420 U.S. 358 (1975)] establishes that further prosecution is barred by the Double Jeopardy Clause," Lee v. United States, 432 U.S. 23 (1977); see also Sanabria v. United States, 437 U.S. 54 (1978) (A dismissal on the merits precludes further prosecution on that offense and that count, even if "based on an egregiously erroneous foundation.")

The Supreme Court in Sanabria has decided that, whether characterized as a "dismissal" or an "acquittal", when the grounds are insufficiency of the evidence, "however erroneous, [it] bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's errors." Id. at 68-69.

"Although the government could prove [production of child pornography] in more than one way...an acquittal of the offense of [intent to use or coerce a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct]...barred any later prosecution under the same statute for the same conduct, even if based on a different theory." Hunt at 547 (explaining the Sanabria holding); 18 U.S.C. §2251(a).

"Ending a defendant's jeopardy - even when not followed by any judgment... prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." Green v. United States, 355 U.S. 184 (1957). When the government conceded to actual innocence and insufficiency of the evidence during trial, the Defendant had a "right to insist on a disposition on the merits" by the jury he selected "and may properly object to a dismissal." United States v. Woodring, 311 F.3d 412 (9th Cir. 1963). A provision under the Fifth Amendment's principles of protection, codified by Congress, provides that "the government may not dismiss the prosecution during trial without the defendant's consent." Federal Rule of Criminal Procedure 48(a). "The same rule governs the dismissal of one or more counts of an indictment." United States v. Delgarza, 650 F.2d 1166 (10th Cir. 1981). The Fifth Circuit reversed a case where the Government dismissed "without consent" to gain a strategic advantage at trial, because the court "had no choice but to vindicate the purpose of Rule 48(a) to protect the defendant's rights." United States v Salinas, 693 F.2d 348 (5th Cir. 1982). Fed. R. Crim. P. Rule 48(a).

The Sanabria court decided that "participation in a single gambling business is but a **single offense**, no matter how many [] statutes" or theories of offense are implicated - "We have no doubt that petitioner was truly acquitted." Id. @ 71. "The Double Jeopardy Clause is not such a fragile guarantee that...its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spacial units, [] or... into '**discrete bases of liability**'." @ 72.

This petition for Writ of Ceritorari is also an application for COA - "A court should not decline the application merely because it believes the applicant will not demonstrate an entitlement to relief." Welch v. United States, 136 S.Ct. 1257 (2016); see also Fleming v. Evans, 481 F.3d 1249 (10th Cir. 2007) ("It is sufficient for purposes of granting a COA that any one of the claims in the habeas petition states [a valid constitutional claim]".) The Ninth Circuit, in an en banc review, decided that "any doubts about the propriety of a COA should be resolved in the petitioner's favor." Lambright v. Steward, 220 F.3d 1025 (9th Cir. 2000) (en banc).

## I. The Habeas Panel Found That the District Court Erred and That Jeopardy Had Actually Attached Before It "Dismissed" Without Consent, the Substantive Charge In Count 2 Due To the Government Conceding To Actual Innocence

### A. THE TENTH CIRCUIT PANEL FOUND THAT THE DISTRICT COURT DID NOT APPLY JEOPARDY TO ITS DISMISSAL - IN CONFLICT WITH THE SUPREME COURT'S "BRIGHT LINE RULE" UNDER MARTINEZ V. ILLINOIS

In Crist v. Bretz, 437 U.S. 28 (1978), Justice Stewart wrote that "the time when jeopardy attaches in a jury trial [] serves as the linchpin for all double jeopardy jurisprudence." Id. "As Crist explains, the precise point at which jeopardy [attaches] in a jury trial might have been open to argument before this Court's decision in Downum v. United States, 372 U.S. 734 (1963)... but Downum put any such argument to rest: It's holding 'necessarily pinpointed the stage in a jury trial when jeopardy attaches, and [it] has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn.'" Martinez v. Illinois, 572 U.S. 833 (2014).

In the current case, the District Court has stated its belief that its dismissal had occurred at a "pre-trial" conference on September 14, 2016. See United States v Isabella, 2021 U.S. Dist. LEXIS 221663 (D.Colo. 2021) /A-13 @10-11. On habeas review the panel cleared up "confusion about the series of underlying events, particularly the date." See United States v Isabella, 2023 U.S. App. LEXIS 3681 (10th Cir. 2023) / Isabella II @5-6 (A-6 @n.1).

The panel determined that it was actually "on September 22" (Id), when the Government moved "to dismiss the completed" offense in Count 2 based on a "supplemental forensic report" showing that Petitioner had "played no role" in that crime. A-76 @22. *3 The panel's own chronology states that jeopardy had attached three

*3 The District Court's mistaken belief originated in the Government Reply to the Original (non-operative) motion. Doc. #338. By stating that the dismissal was on "September 14, 2016", the Government misled the court by misstating fact, then failed to correct the error when it was identified by Petitioner. Doc. #341-1, P. 7, ¶1,2. There was no motion to dismiss. Doc. #289.

days before the District Court's dismissal/acquittal action. Isabella II @n.1.

> "Mr. Isabella is correct that jeopardy attaches in a jury trial, when the jury is empaneled and sworn. See Serfass v United States, 420 U.S. 377 [] (1975)." Id at 9.

In Serfass, the Supreme Court held that "the concept of attachment of jeopardy defines a point in criminal proceedings at which the purposes and policies of the double jeopardy clause are implicated." Serfass, 420 U.S. at 377. Because, in the instant case, the District Court did not acknowledge jeopardy's attachment, that "point" passed without those "purposes and policies of the double jeopardy clause" being applied. Id. It is this error that forms the bases for denials of protection claimed in Petitioner's §2255 habeas motion. Doc. #341-1, pg. 7-32.

In Serfass, the District Court reviewed "material facts from the Petitioner's affidavit", inter alia, and "entered a pre-trial order dismissing the indictment." Serfass, 420 U.S. 377. Granting writ of certiorari, 8 Supreme Court Justices agreed that jeopardy had not attached to the "pre-trial order", because the defendant had not been "put to trial before the trier of the facts". Id (quoting United States v Jorn, 400 U.S. 470 (1971)). Absent a waiver of a jury trial, the "District Court is without power to make any determination regarding the defendant's guilt or inncence." Id. Accordingly in the present case, the District Court abused its discretion by making a "determination regarding the defendant's guilt or innocence", without his consent and absent a waiver of a jury trial. With jeopardy attached, it is that determination of innocence in Count 2 that functions as an acquittal on the merits. "The time when jeopardy attaches...serves as the linchpin." Crist.

In Martinez v Illinois, 572 U.S. 833 (2014), when the state "declined to present any evidence" after being denied a continuance to locate its first witness, the defendant "moved for a directed not-guilty verdict". Id. In this case, the trial court "told the State on the day of trial that it could 'move to dismiss [its] case' before the jury was sworn. Had the State accepted that invitation, the double jeopardy clause would not have barred it from recharging Martinez." Id. @843.

The Martinez Court found "the trial court referred to its action as a 'dismissal' rather than an acquittal." Id @841. In the present case the District Court did not recognize that jeopardy had attached prior to its determination of insufficiency of the evidence; A-78 @6 to 80 @5; "so I am going to go ahead, then, based on the Government's ...oral motion to dismiss..." Id. *

In Martinez, the Supreme Court of Illinois agreed with the Government that, because "the defendant was never at risk of conviction, jeopardy did not attach for purposes of retrying defendant." Martinez@840. Granting certiorari, the Supreme Court decided that "the Illinois Supreme Court's error was consequential, for it introduced confusion into what we have consistently treated as a bright-line rule: a trial begins, and jeopardy attaches when the jury is sworn." Id.

## B. WHEN DIGITAL FORENSIC EVIDENCE PROVED PETITIONER "PLAYED NO ROLE" IN PRODUCING THE CHILD PORNOGRAPHY ON S.F.'S CELLPHONE, THE GOVERNMENT "TOOK A CHANCE" AND ENTERED TRIAL WITHOUT EVIDENCE TO CONVICT

Same as the Marintez Court recognized, "when the [government] declined to dismiss its case, it took a chance...enter[ing] upon the trial of the case without sufficient evidence to convict". Martinez, 572 U.S. at 843. The digital forensic report showing the "torso pic" to be one "of 18 different images which depicted SF and a blonde white male during a sexual encounter between the two of them," was filed on September 16, 2016 - three days before voir dire. See A-57-60. However, the government first declared its intention "to move to dismiss the completed..." on September 22, 2016 - three days after the jury was empaneled and sworn. A-76 @ 4-25.

The government was given ample notice of the defense's discovery of the metadata negating guilt, in Count 2. Id. It could have dismissed Count 2 before the jury was empaneled and sworn but made a tactical choice not to do so.

Faced with undisputable metadata and photographic defense evidence of a "blonde white male" producing the child pornography on S.F.'s cellphone and minor S.F. "clarif[ying] that defendant did not play a role" in producing those images, the government made a stretegic move not to dismiss the entire count.

> The Court: So, my understanding is you are moving **to dismiss** Count 2 to the extent that it is the completed production of child pornography?
> [AUSA] Riewerts: Yes, **to dismiss** the completed offense, not the attempted offense. A-76 @ 22 - 77 @ 1

The Serfass Court acknowledged that "the word 'acquittal' has no significance unless jeopardy has attached" to a dismissal action. Serfass, 420 U.S. at 387. The habeas panel in the present case has agreed that jeopardy had attached prior to the District Court's "dismissal" action on the merits. Isabella II @ n.1. Consequently, that action functioned as an implied acquittal on the merits in Count 2.

The Supreme Court in Green v. United States, 355 U.S. 184 (1957) recognized that the substance of the District Court's action "**ending a defendant's jeopardy**" on the merits - "**even when 'not followed by any judgment' is a bar to a subsequent prosecution for the same offense.**" Id. at 188 (quoting United States v. Ball, 163 U.S. 622, 671 (1896)). Green clarified that "it is not even essential that a verdict of guilt or innocence be returned for a defendant to have been once placed into jeopardy." Id. Principles of the Double Jeopardy Clause should have applied to the present case, due to this "implicit acquittal" rule under Green @ 184.

If there were no such "implied acquittal" rule, then, should Petitioner's guilty verdict on the lesser included charge be overturned on appeal, the government would not be barred from re-prosecuting him on the greater included charge. This is precisely what the Double Jeopardy Clause was intended to prevent. The term "with prejudice" encompasses this concept - that the merits

have once been adjudicated and so, invoke the guaranteed protections under the Double Jeopardy Clause. The application of double jeopardy principles to the action of "ending a defendant's jeopardy - even when not followed by any judgment...prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." Id. @ 188.*4

In the present case, the government waited five days after the digital forensics report negated guilt - until after the jury had met the defendant and heard the charge that he produced actual child pornography - to "concede [] that Mr. Isabella had played no role in the only alleged child pornography in this case." Isabella I @ n.2. Thus, prejudice by the real risk of conviction had attached. It is because that prejudice could not be severed from a second prosecution under the lesser included attempt to commit theory, which illustrates the denial of the Constitution's promise - that Petitioner may face the risk of conviction once, but may not be twice subjected to jeopardy of conviction for the same offense. U.S. Constitution, Amendment V. There is simply no way to "determine whether or not the [production] charge [(heard by the jury)] against the petitioner induced the jury to find him guilty of the [(seemingly)] less serious offense of [attempted production] rather than to continue to debate his innocence." Price v. Georgia, 398 U.S. 323 (1970).

The District Court's disregard for the Federal Rule of Criminal Procedure, "the government may not dismiss during trial without the defendant's consent," Rule 48(a), demonstrates that double jeopardy principles were not applied during trial. This is also a strong indicator that the District Court believed that "the precise point at which jeopardy attaches" was "functional" - a premise expressly rejected by the Supreme Court under Martinez.

*4 Petitioner raised due process claims related to the variance in proof, elements and prosecutorial misconduct in his §2255 motion at claims 7, 8, 9 and 14. Doc. #341-1, pg. 33-58; 82-95.

The Supreme Court in Evans v. Michigan, 568 U.S. 19 (2013) has recognized that a District Court's error has no effect on whether or not double jeopardy principles apply to a court action - deciding that they still apply:

> "...Even if the acquittal is 'based upon an egregiously erroneous foundation', Fong Foo v. United States, 369 U.S. [at 143] (1962); '...Even if it is premised upon an erroneous decision to exclude evidence', Sanabria v. United States, 437 U.S. [at 68-69] (1978); 'a mistaken understanding of what evidence would suffice to sustain a conviction', Smith v. Massechuetts, 543 U.S. [at 473] (2005); a 'misconstruction of the statute' defining the requirements to convict, Arizona v. Rumsey, 467 U.S. 203 (1984); cf Smalis v. Pennsylvania, 476 U.S. [at 144-145, n.7] (1986). In all these circumstances, 'the fact that the acquittal may result form [the District Court's error]... does not alter its essential character. [United States v.] Scott, 437 U.S. at 98 [(1978)]. (Internal quotation marks omitted)." Evans v. Michigan, 568 U.S. at 318-19.

It does not matter that the error did not result in an erroneous judgment of acquittal being entered, and rather was based on an error regarding the precise point "at which the purposes and principles of the Double Jeopardy Clause are implicated." Serfass, 420 U.S. at 377. As the Evans court clarified in its holding:

> "Most relevant here, an acquittal encompasses **any ruling** that the prosecutor's proof is insufficient to establish criminal liability for an offense. ...In constrast to procedural rulings, which lead to dismissals or mistrials on a basis unrelated to factual guilt or innocence, acquittals are substantive rulings that conclude proceedings absolutely, and thus raise significant double jeopardy concerns." Evans v. Michigan at 313.

In Isabella as the Court decided in Evans, "There is no question the trial court's ruling was wrong," predicated on a mistaken belief that jeopardy had not yet attached, "but that is of no moment. Martin Linen, Sanabria, Rumsey, Smalis, and Smith all instruct that an acquittal due to insufficient evidence precludes retrial, whether...correct or not...and regardless of whether" the Court was under an erroneous belief. Id. And since "an acquittal encompasses any ruling that the prosecutor's proof is insufficient to establish criminal culpability," the District Court's termination of jeopardy in the substantive charge of indictment in Count 2, following its determination that "...there is

no evidence for this..." and amending the indictment to exclude the greater included Count 2 charge, functioned as an "implicit aquittal" on the merits. Green @ 184.

Akin to a jury verdict, the District Court "evaluated the government's evidence," accepted the government's concession that Petitioner played no role in the crime, "and determined that it was legally insufficient to sustain a conviction." Evans @ 323. "Culpability, (i.e., the ultimate question of guilt or innocence) is the touchstone." Id. @ 324.

### C. NO ASPECT OF THE DISTRICT COURT'S TERMINATION OF JEOPARDY WAS "UNRELATED TO FACTUAL GUILT OR INNOCENCE", MAKING THAT ACTION AN "ACQUITTAL" UNDER SCOTT FACTORS

In United States v. Scott, 437 U.S. at 91 and n.11 (1978), the Supreme Court decided that, by contrast to dismissals based on procedural rulings, "acquittals" are substantive rulings which include:

(1) "The evidence is insufficient to convict;"

(2) Facts "establish the criminal defendant's lack of culpability;" and

(3) Any other "rulings which relate to the ultimate question of guilt or innocence." Id.

Three times the government waived the District Court's inquiry: "whether you have any evidence that would support a completed production of child pornography charge;" A-76 @ 19-21; "If you have no evidence to substantiate a production of child pornography count..." A-78 @ 7-10; and "If there is no evidence for this, it seems to me it should be dismissed." @ 21-23; satisfying the first factor under Scott - "evidence is insufficient to convict." Scott at 91 and n.11.

The second factor concerning "culpability" (Id.) was satisified - first, by the digital forensic evidence and metadata proving actual innocence, A-59-60; second, by S.F. recanting her allegation that Petitioner had threatened to harm her little sister unless she produced child pornography for him, A-74-75; 76 @

11-13; and third, by the government conceding to actual innocence in that crime, Isabella I @ n.2. The third factor concerning "rulings which relate to the ultimate question of guilt or innocence," is evident by the actual amendment of the indictment, by changing "Count Two: Production of Child Pornography", A-44, to "Count Two: Attempted Production of Child Pornography", A-49 - (during trial and without consent); see also A-51.

The Supreme Court has been consistent in the application of its authority concerning determinations which end jeopardy, holding:

> "What constitutes an 'acquittal' is not controlled by the form of the judge's action," Martin Linen; "The protection of the Double Jeopardy Clause by its terms applied only if there has been some event, such as an acquittal, which terminates the original jeopardy," Richardson v. United States, 488 U.S. 317, 325 (1984); "A merits based ruling concludes proceedings absolutely." Evans at 319.

In ascertaining whether an acquittal has occurred, "form is not to be exalted over substance." Sanabria v. United States, 437 U.S. 54 (1978). Rather, we ask whether the fact-finder has made "a substantive determination that the prosecution has **failed to carry its burden.**" Smith v. Massechusetts, 543 U.S. 462 (2005).

By affirming the decision below and by denying COA in light of the panel's recognition that the "District Court erred" (believing jeopardy had not yet attached to its dismissal due to insufficienty of the evidence, Isabella II @ n.1/A-6 @ n.1), the Tenth Circuit has departed from its holdings concerning when double jeopardy principles apply.

> "The Tenth Circuit has held that a dismissal with prejudice implicates double jeopardy principles," United States v. Angilau, 717 F.3d 781 (10th Cir. 2012); United States v. Holland, 946 F.2d 990 (10th Cir. 1992) ("Jeopardy attaches to the dismissal with prejudice"); United States v. Rich, 589 F.2d 1025 (10th Cir. 1978) ("The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged.")

The issue is not discretionary. The Supreme Court has foreclosed the issue of whether a District Court's independant finding of guilt or innocence can be

construed as anything other than an acquittal, more recently in Bravo-Fernandez v. United States, 580 U.S. 21 (2016), having decided that, "For double jeopardy purposes, a court's evaluation of the evidence as insufficient to convict is equivalent to an acquittal and therefore bars a second prosecution for the same offense." Id. at §5. See Burns v. United States, 437 U.S. 1 (1978).

D. PETITIONER WAS DENIED HIS VALUED RIGHT TO HAVE THE JURY HE SELECTED (NOT THE JUDGE) DECIDE HIS FATE IN COUNT 2 AS THE GRAND JURY CHARGED IT

With jeopardy attached beforehand (as the habeas panel decided), Petitioner had a "right to insist on a disposition on the merits and may properly object to a dismissal". United States v. Woodring, 311 F.3d 412 (9th Cir. 1963). Defense counsel Gainor argued that it was a "material change in the indictment and we would object to that", when faced with the prospect of dismissal of the substantive Count 2 charge. A-77 @ 10 - 79 @ 3. "So leave it in. They can go into that theory. But to alter it at this late stage of the game is a material alteration of the indictment, and the defendant objects." Id. With jeopardy's attachment clear in the record, the Defendant's objection should have prevented the dismissal "during trial without the defendant's consent" (Rule 48(a)) and absent any "manifest necessity" (Rule 48(b)).

Justice Sotomayor in a dissenting opinion in Blueford v. Arkansas, 566 U.S. 599 (2012) considering unwanted mistrials noted:

> "A trial judge may not defeat a defendant's entitlement to 'the verdict of a tribunal he might believe to be favorably disposed to his fate'... Absent a defendant's consent or a 'manifest necessity' to do so." Id. (quoting United States v. Jorn, 400 U.S. 470 (1971))

Absent a defendant's waiver of a jury trial, the "District Court is without power to make any determination regarding the defendant's guilt or innocence". Serfass, 420 U.S. at 377. The fact that the District Court in the present case,

"made a determination" and found Defendant innocent of a charge of indictment, does not change the fact that the "District Court [was] without power" to terminate jeopardy in Count 2 in the face of a defendant who wants the jury (not the judge) to decide his fate.

The District Court's ruling, by terminating jeopardy, served to deny Defendant his "valued right to have his trial completed by a particular tribunal". See Jorn and Downum. That jury would have viewed the evidence showing someone else committing the crime charged in Count 2 and would likely have elected to acquit the entirety of Count 2. The unwanted dismissal rendered that irrefutible evidence useless to remaining counts. But for the improper dismissal during trial without consent, it is more likely than not that the outcome would have been different.

## E. FACTUAL ELEMENTS OF CONVICTION IN COUNT 2 WERE NOT PRESENTED TO THE GRAND JURY OR INCLUDED IN THE INDICTMENT, THUS THE SECOND PROSECUTION OF COUNT 2 AFTER THE EQUIVALENT OF AN ACQUITTAL ON THE CONDUCT AND ELEMENTS CHARGED AMOUNTS TO AN IMPERMISSIBLE VARIANCE, AND JURISTS OF REASON WOULD DEBATE THAT PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENT WERE DENIED

Considering the role of the grand jury, America adopted this product of the crown and incorporated it into the Bill of Rights of the Constitution, providing "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury". U.S. Constitution, Amendment V.

> "Historically, this body [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the acuser and the accused..." Wood v. Georgia, 370 U.S. 375 (1962).

When the prosecutor sought an indictment from the grand jury, the agent testified that he heard minor S.F. tell the interviewer that Petitioner:

> "Had made threatening statements against [S.F.'s] younger sister if she failed to continue the relationship...direct[ing] her to send him images of her performing sexual activity, even directing it so that he could imagine himself as being the one actually being present." A-39 @ 15-21.

The prosecutor presented physical evidence of that crime - "the image that has been identified as [S.F.] from the neck to the knees, [(the "torso pic")]. That image is available for the grand juror' review. It's on the laptop." A-38 @ 1-4. The indictment makes no mention - that Petitioner "requested" a photograph of S.F., that "includes a face" after receiving the previously produced "torso pic", or the request, "pic now", while S.F. contemplates a shower. Doc.#1 (A-44-48) Beyond that, neither of these factual elements were presented to the grand jury to support an alternative attempt theory.

> Decided in 1887, Ex Parte Bain, 121 U.S. 1 (1887) still "stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. Yet the court did permit that in this case...The grand jury which found this indictment was satisfied to charge that [Isabella's] conduct [produced the child pornography found on S.F.'s cellphone]. But neither this nor any court can know that the grand jury would have been willing to charge that [Isabella's] conduct [by requesting a "somewhat naughty photo that includes a face" and a "pic now hahaha!!" while S.F. contemplates taking a shower, was 'for the purpose of producing visual depictions of the lascivious exhibition of the anus, genitals or pubic area. 18 U.S.C. §2551(a).]" Stirone v. United States, 361 U.S. 22 (1960).

The District Court in Isabella permitted the government to amend the indictment to exclude the substantive charge of Production of Child Pornography, and to alter the grand jury's charge to read "Attempted Production of Child Pornography", as presented to the jury. A-49-50. In Ex Parte Bain, "the trial court allowed the government to amend the indictment by striking the reference to the comptroller" as surplusage. Id. The Supreme Court was unanimous in their decision to require habeas relief, with Justice J. Miller asking "how can it be said that, with these words [added], it is the same indictment which was found by the grand jury?" Bain.

One of Justice Sutherland's oft cited statements in Berger v. United States,

295 U.S. 78 (1935) sets the scope of variance of an indictment's terms: "The true inquiry...is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused". Id. "Variance requires reversal of a conviction only when it deprives the defendant of a right to fair notice or leaves him open to risk of double jeopardy." LaFave and Israel, §19.2(h), Crim. P. Hornbook (2nd ed. 1992) (West).

In the present case, the infringement of substantial rights under the Grand Jury Clause through an impermissible amendment of the indictment (during trial and without consent), turns hopeless when the indictment the grand jury did find was premised on the prosecutor's withholding from that grand jury metadata (including the "torso pic") that clearly negated guilt.[*5] While a prosecutor need not "ferret out and present all [exculpatory] evidence,... that does not mean that the prosecutor may mislead the grand jury into believing that there is probable cause to indict by withholding clear evidence to the contrary." United States v. Williams, 504 U.S. 36 (1992) (Stevens dissenting);

> United States Attorney Manual, Title 9, Ch. 11, ¶ 9-11. 233, 88 (1988) ("Substantial evidence which directly negates the guilt of a subject of the investigation...must [be] disclose[d]...to the grand jury before seeking an indictment against such a person."). See also Napue v. Illinois, 360 U.S. 264 (1959); United States v. Farr, 536 F.3d 1174 (10th Cir. 2006) "The prohibition on constructive amendment is grounded not just in the Sixth Amendment's notice requirement but also in the grand jury guarantee of the Fifth Amendment. As the dual source of the rule makes clear, it protects both a defendant's right to be subjected only to charges set by a grand jury and his interests in having sufficient notice...To have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. [] And it provides sufficient basis, standing alone, to compel reversal without any further showing of prejudice." Id. (Internal qutations omitted) (Emphasis in original).

*5 EXIF data (metadata) "in the Camera folder", A-109 @ 3-11; was readily apparent since the start of the investigation, indicating that the "torso pic" image was first taken on "August 9, 2013", A-105 @ 2-11; 40 days prior to the first communication between Petitioner and S.F., A-111 @ 14-19. Had this evidence - clearly negating guilt - been disclosed no reasonable grand juror would have indicted Petitioner in Count 2. See Napue v. Illinois, 360 U.S. at 269 (1959) ("A conviction obtained through the use of false evidence, known to be such by representatives of the state, violates due process.")

II. Due To the "Equivalent Of an Acquittal" In Count 2, the Subsequent Conviction - Also In Count 2 - Under a Lesser Included "Portion" Of That Count, Offends the Fifth Amendment's Double Jeopardy Clause

A. BY PERMITTING CONVICTION UNDER A "DISTINCT AND SEPARATE" LIABILITY IN COUNT 2 FOLLOWING ACQUITTAL IN THAT SAME COUNT, THE DECISION BELOW CONFLICTS WITH THE SUPREME COURT'S "DISCRETE BASES OF LIABILITY" PROHIBITION UNDER SANABRIA V. UNITED STATES AND THE DOUBLE JEOPARDY CLAUSE

Faced with the government conceding to actual innocence and waiving evidence sufficiency in the grand jury's charge at Count 2, jurists of reason would debate that the proper course of action during trial is to file a judgment of acquittal, and may likely disagree with the District Court's action - permitting the government to shift its theory and proceed in prosecuting that same count.

The Supreme Court has addressed this question directly in Sanabria v. United States, 437 U.S. 54 (1978) and decided that it is not "correct to characterize the trial court's action as a 'dismissal' of a discrete portion of the count." Id @ 66.

> The Court: "So I am going to go ahead, then, based on the Government's... oral motion to dismiss the completed...as distinct and seperate from the attempt...just that portion of the count that deals with the actual completed production of child pornography." A-80 @ 1-11.

With jeopardy attached and actual innocence, the District Court's action averted the entering of a judgment of acquittal in Count 2 and improperly placed Petitioner back into jeopardy by severing Count 2 into "distinct and separate" liabilities - permitting conviction in the same count in which it had terminated Petitioner's jeopardy during trial.

In Sanabria, the government charged a "single gambling business" within a single count of indictment, in violation of 18 U.S.C. §1955, which prohibits managing or conducting an "illegal gambling business". Id. at 56. Recognizing

that the wrong Massechusetts statute was entered into the indictment's predicate offense particularity, the defendant moved for a judgment of acquittal after the government rested its case. Evidence invalidated one of the government's two theories of offense: "Numbers betting was not prohibited" by the statute within the indictment, while arguing that there is "no evidence of his connection with horse-betting activities." Id. @ 59. The Court granted the motion and entered a judgment of acquittal on the count,

> "Conceeding that there could be no review of the District Court's ruling that there was insufficient evidence of [defendant's] involvement with horse betting, the government sought a new trial on the portion of the indictment relating to numbers betting." 61. "The Court of Appeals for the First Circuit held first that it had jurisdiction of the appeal." Id.

The jurisdiction statute was interpreted such that the word "count" may "refer to any discrete basis for the imposition of criminal liability." Id.

> "Viewing the horse-betting and numbers allegations as 'discrete bas[es] of criminal liability' duplicitously joined in a single count, the court characterized the District Court's action as a 'dismissal' of the numbers 'charge' and an acquittal for insufficient evidence of the horse-betting charge". Id.

Because the defendant had "voluntarily terminated the proceedings on the numbers portion of the count", the court construed it as a "dismissal" without regard to "criminal liability as such". 62. The Circuit Court decided that "the District Court had erred in 'dismissing'" the original (numbers) theory, and vacated the judgment of acquittal, on remand for re-trial on the numbers "portion of the indictment". Id.

The Supreme Court granted certiorari and reversed. Id. The Sanabria Court decided that it is not "correct to characterize the trial court's action as a 'dismissal' of a discrete portion of the count". Id. @ 66. Having determined that the government's evidence was insufficient to prove that the defendant had engaged in an "illegal gambling business", as charged by the indictment's terms; the District Court's acquittal action terminated jeopardy

in the entire count, the Supreme Court decided. "That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count." @ 69.

The Sanabria court's holding is especially applicable to the present case, stating that "even if...the District Court 'dismissed' the numbers allegation, in our view a retrial on that theory would subject petitioner to a second trial on the 'same offense' of which he has been acquitted." Id. The Tenth Circuit has previously held that an acquittal prevents further prosecution of the same offense or for "the same conduct, even if based on a different theory..." See United States v. Hunt, 212 F.3d at 547 (10th Cir. 2000). "When a District Court has made a factual finding adverse to the government on an essential element of the offense, legal rulings related to that decision are not separately appealable." Id. at 544.

> In United States v. Genser, 710 F.2d 1426 (10th Cir. 1983), "The government charged the defendant with knowingly and intentionally 'dispensing' a controlled substance in violation of 21 U.S.C. §841(a). Id. at 1427. That statute makes it unlawful to both 'distribute or dispense' a controlled substance. Only a 'practitioner', however, can 'dispense' a controlled substance under the statute." Hunt at 545

The defendant moved to dismiss on the basis that the government could not prove him to be a "practitioner". Id. With its original theory invalidated, the government shifted to a theory of "distribution", but "the trial court disagreed and dismissed the case. [Genser] at 1427." Hunt at 546. When the government sought a new indictment under that "alternative theory", the Tenth Circuit decided that the District Court's action amounted to an acquittal and "prevented retrial on the same charge." Id.

> The Hunt court decided that the District Court's acquittal action on a "charge of theft from the mail would prohibit second prosecution for the same theft on a different theory." United States v. Miles, 328 Fed.App'x 810 (10th Cir. 2009) (concluding that "Hunt correctly followed the holding of Sanabria. From precedent it is clear that the shift to a new theory is impermissible as a basis for avoiding the protection of the Double Jeopardy Clause.").

The Hunt Court recognized that "the Court in Sanabria held that even if the District Court's ruling were viewed as a dismissal of the indictment, rather than as an evidentiary ruling, double jeopardy still barred the appeal." Hunt at 547. The Court found that the "District Court's allegedly erroneous interpretation of the indictment is not somehow separable from the District Court's factual finding of innocence on the crime as charged in the indictment."

B. BECAUSE ATTEMPT TO COMMIT IS LESSER INCLUDED OF THE SUBSTANTIVE OFFENSE, A SINGLE INDIVISIBLE OFFENSE WAS CHARGED IN COUNT 2

While attempt to commit is not defined within the statutes, long-standing doctrines guide jurists in determining its relationship with the completed commission of a charged offense; universally accepted requirements include:

> "(1) An intent to engage in criminal conduct; and (2) conduct constituting a 'substantial step' towards the commission of the substantive offense which strongly corroborates the defendant's criminal intent." American Law Institute's Model Penal Code §5.01(1) (1985).

Dissenting in United States v. Resendiz-Ponce, 549 U.S. 102 (2007), Justice Scalia explains that, "attempt to commit a crime is simply a lesser included offense. **A Grand Jury finding that the accused committed the crime is necessarily a finding that he attempted to commit the crime**, and therefore attempt need not be separately charged". Id. (Scalia dissenting). In the Grand Jury proceedings this beared out. The A.U.S.A. relied on the "torso pic" - "To review the image in terms of the lascivious exhibition definition. I will remind you that this also charges production of child pornography and attempted production of child pornography." See A-38 @1-15. There was no "distinct and separate" presentation of evidence, neither was the Grand Jury asked to decide whether to charge two different production crimes involving minor S.F., nor to charge attempted production under a separate count.

The Tenth Circuit also agrees that the substantial step requirement is

not a "distinct and separate" actus reus than is required under a completed offense, but instead is "an appreciable fragment" of that same charged offense. See United States v. Monholland, 607 F.2d 1318 (10th Cir. 1979) (The "nature of the completed offense...need[s] to be the object of any attempt conviction."). There is simply no dividing attempt to commit from intent to complete.

Congress expressly proscribed attempt at 18 U.S.C. §2251(e) to be fully dependent upon the elements of any one of the preceding substantive proscriptions at §2251(a); (b), (c), or (d). 18 U.S.C. §2251(a) - (e)/A-24-25. This expedient applies §2251(e)'s "attempts or conspires" modality equally to §2251(a), (b), (c), and (d) - without adding any elemental requirement. Id. Consequently, there is no violation for bald attempt to commit at §2251(e). Congress could have proscribed such an offense apart from its substantive counterpart, but elected not to do so.

> "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299 (1932).

As such, attempt at §2251(e) does not require proof of any fact, which is not required at §2251(a). Under a Blockburger analysis, attempted production at §2251(e) is fully dependant upon the elements of the substantive offense at §2251(a) with no additional requirement - and so is the same offense. Conversely, no reasonable juror could find Petitioner guilty of attempted production, without finding evidence of the same specific intent element that proves the substantive offense beyond a reasonable doubt. See Jury Instruction 18 at A-51;

> "As the text indicates, §2251(a) contains a specific intent element: the government was required to prove that production of a visual depiction was a purpose of engaging in the sexually explicit conduct." United States v. Palomino-Coronado, 805 F.3d 127 (4th Cir. 2015).

Because 18 U.S.C. §2551(e) is fully reliant upon §2251(a) for its

elemental requirement, no elements differentiated the substantive and attempt charges of indictment in Count 2. A-45. Likewise, no factual elements were included in the indictment that might inform Petitioner of a "distinct and separate" offense in Count 2. A-80 @ 5. It was error to divide Count 2 into "distinct and separate" liabilities - especially following the equivalent of an acquittal on the merits. Jurists of reason, therefore, would likely debate that the District Court's action was an abuse of its discretion under Supreme Court precedent. 18 U.S.C. §2251(a) and (e) are a single crime as a matter of law, and so "are not severable in order to avoid the Double Jeopardy Clause's bar of retrials for the 'same offense'." Sanabria at 73.

In order to convict Petitioner of attempted production, it was necessary to cause him to be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Constitution, Amendment V.

This is the essence of "the denial of a constitutional right" of which Petitioner has made a "substantial showing". 28 U.S.C. §2253(c)(2).

## III. In Light Of the Tenth Circuit's Correction Of the Record On a Material Issue, the Petition Should Be Granted In the Public Interest, Or a Certificate Should Issue To Make Fundamental Determinations Concerning the Consequences Of the Clear Error - Both At Trial By Denials Of Guaranteed Rights Of Protection, And In Habeas Proceedings To Review Erroneous Conclusions Of Law

### A. DETERMINATIONS MUST BE MADE CONCERNING THE CONSEQUENCES OF THE DISTRICT COURT'S ERROR CONCERNING WHETHER CONSTITUTIONALLY GUARANTEED RIGHTS WERE AVERTED BY THE MANIFEST ERROR CAUSING TRIAL TO BE UNFAIR

Since first filing his habeas (§2255) pleading, Petitioner has consistently maintained that jeopardy had attached prior to the District Court's "dismissal" in Count 2, e.g. the opening sentence of his motion for reconsideration of habeas claims states:

> "The government's claim that the dismissal in Count 2 had occurred at ' the pre-trial conference [] on September 14, 2016' is false. (Doc. #338, p.11)... The Court granted the government's 'oral motion to dismiss the completed' offense on September 22, 2016 during a 'trial conference after trial had begun. (Doc. #341-1, p. 5). See Doc. #291, Tr. 'Day 2' p. 286 @4 - 290 @5. No dismissal was contemplated on September 14, 2016. Trial began when the jury was impaneled and sworn on September 19th, 2016, (Doc. #290) - three days before the September 22 dismissal. Id." Doc. #350, pg. 3 (internal qutations omitted)

The District Court did not review the record regarding its order denying motion to alter or amend judgment (Doc. #350), pursuant Rule 59(e). United States v. Isabella, 2022 Dist. LEXIS 402 (D. Colo. January 3, 2022)/ Vol. A 8-9. The District Court recognizes Petitioner's claim that "the Court incorrectly relied on several false procedural facts...in denying the habeas motion, but noted that it sees no manifest errors." Id.

But after reviewing the trial record, the Tenth Circuit disagreed with the District Court's assessment of the facts, finding:

> "Mr. Isabella is correct that in a jury trial, jeopardy attaches when a jury is empaneled and sworn. See Serfass v. United States, 420 U.S. 377 [] (1975). Here, the jury-instruction conference occurred after the jury was empaneled and sworn. It therefore appears that the District Court erred in stating that the government's request to proceed only on the attempt aspect of Count 2 came before trial." Isabella II at 8-9.

Citing Crist, the Supreme Court in Martinez recognized that "the conclusion that jeopardy has attached, however, begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial". Id. at 841. And, as in Martinez, the District Court's error concerning when jeopardy attached in a jury trial did not occur in a vacuum, but rather had consequences. "The Illinois Supreme Court's error was consequential, for it introduced confusion into what we have consistently treated as a bright-line rule..." Id at 840.

Habeas Claim 1 A-63 to 70 (Doc. #341-1, pg. 4-8)

Petitioner claimed that appellate counsel was ineffective assistance for failing to raise the more meritorious issue, that the dismissal "during trial without the defendant's consent" violated Fed.R.Crim.P. Rule 48(a) and abused the District Court's explicitly limited discretion (when jeopardy is attached). Id. The Fifth Circuit, when faced with the government's infringement of Rule 48(a) to gain a strategic advantage at trial "had no choice but to vindicate the purpose of Rule 48(a) to protect the defendant's rights" by reversing the conviction. See United States v Salinas, 693 F.2d 348 (5th Cir. 1982). But for counsel's failure to raise the claim, the outcome would likely be different.

Because the error was clear in the record and the District Court overruled Petitioner's objection to the dismissal during trial on Constitutional grounds under the Grand Jury and Double Jeopardy Clauses, appellate review would have required the more favorable standard under Chapman v. California, 386 U.S. 18 (1967) ("The burden [is] on the beneficiary of the error to prove there was no injury or to suffer reversal of his erroneously obtained judgment.") A-68, ¶5. Demonstrating debateability, the habeas panel disagreed with the application of a Chapman standard of review, instead deciding:

(1) "Mr. Isabella has failed to demonstrate a reasonable probability that this court would have reversed his convictions"; and
(2) "He does not suggest any meaningful way in which omitting the completed aspect of Count 2 harmed him." Isabella II at 9.

In the first item, the panel performed an extensive review of the merits on Habeas Claim 1 Id. However, in determining whether to grant a Certificate of Appealability, the "threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims'." Buck v. Davis, 580 U.S. 100 (2016) (quoting Miller-El v. Cockrell, 537 U.S. 322 (2003)). In Buck v. Davis, the Fifth Circuit "inverted the statutory order of operations by deciding the merits of an appeal and then denying COA based on adjudication of the actual merits." Id. By the Supreme Court rule concerning the COA threshold inquiry, the habeas panel's extensive analysis on the merits in Claim 1 "exceeded the limited scope of the COA analysis." Id. "The Court holds that the COA statute sets forth a two-step process: an initial determination whether a claim is reasonably debateable, and, if so, an appeal in the normal course. 28 U.S.C. §2253." Id. Demanding that Petitioner "demonstrate a reasonable probability that the court **would have reversed**" (Isabella II @9) has "placed too heavy a burden on the prisoner at the COA stage". Buck v Davis.

In the second item, the habeas panel has inverted the burden from the Chapman standard to the Kotteakos standard of review. See Isabella II / A-1 - 7 at LEXIS 5-11. Instead of the government, the beneficiary of the constitutional error, proving the error to be "harmless beyond a reasonable doubt", the panel inverted the burden to the Petitioner to prove how the District Court's error "harmed him". Id. This added to the "too heavy" burden for COA. Buck v Davis.

> See Hicks v United States, 582 U.S. (2017) (GVR appropriate "where we think there's a reasonable probability" that "curing the error will yield a different outcome") (Gorsuch, J. concurring).

B. IN LIGHT OF THE HABEAS PANEL'S CORRECTION OF THE RECORD, SHOWING JEOPARDY HAD ATTACHED PRIOR TO THE DISMISSAL WITH PREJUDICE, RECONSIDERATION OF HABEAS CLAIMS IS NECESSARY BEFORE A FINAL ORDER OF JUDGMENT IS ENTERED

The Tenth Circuit's finding that the District Court was under a mistaken belief concerning when jeopardy attached in the jury trial opens the question: What were the consequences of that erroneous belief? In addition to the denials of double jeopardy principles at trial discussed in the previous section, denials of habeas relief directly attributable to that erroneous belief must be re-visited before entering a final judgment in this case.

The District Court's reasoning for denying habeas claims 1, 2, 3, 5, and 6 relies on its mistaken belief that jeopardy had not attached to the dismissal, e.g. "[t]he Court has already rejected Mr. Isabella's mistaken premise that he was 'acquitted' of production of child pornography [in Count 2]." A-16 ¶5.

The Tenth Circuit review of the denial of §2255 claims related to jeopardy having attached before the "dismissal" for actual innocence cites:

> "Claims 2, 3, 5, and 6 also rest on the theory that having been acquitted of the completed aspect of Count 2 . . . [b]ecause Claims 2, 3, 5, and 6 rely on Mr. Isabella's incorrect theory, no reasonable jurist would debate the rejection of these claims. We deny a COA on Claims 2, 3, 5, and 6." Isabella II (A-5) at #3 / LEXIS 11-12.

Thus, the habeas panel has applied the same reasoning as the District Court for the denial of COA, without attributing that reasoning to the District Court's belief that jeopardy had not attached to its "dismissal" for insufficiency of the evidence - corrected by the same habeas panel at footnote 1. Id. (A-6) @n.1.

The "confusion" introduced by "the District Court['s] err[or]" is therefore perpetuated by the habeas panel's decision not to address the consequences of that error. Sanabria; A-4. Where Rule 52(b) establishes that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court," the decision to correct that error should be exercised when "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." United States v Olano, 507 U.S. @732 (1993)(quotations omitted).

C. JURISTS OF REASON WOULD FIND THE ERROR DEBATEABLE AND THAT PETITIONER HAS MET HIS THRESHOLD OF MAKING A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT

"The Court has already rejected Mr. Isabella's mistaken premise that he was 'acquitted' of Production of Child Pornography" A-16 ¶5. Jurists of reason would find the bases for the District Court's rejections to be unreasonable or debateable in light of the habeas panel's finding of error - clear in the record and of Constitutional interests.

In sum, the Supreme Court should grant the petition and make determinations consistent with established precedent:

- Under Martinez v. Illinois - that a "bright-line" non-functional point at which jeopardy attaches;
- Under Evans v. Michigan - recognizing that the Double Jeopardy Clause's principles apply to "any ruling" which finds that the government has failed in their burden to prove the charged offense;
- Under Blockburger v. United States, which confirms by §2251(a)'s specific intent element required under both the completion and attempt theories, that "attempt is simply a lesser included offense" (Resendiz-Ponce v. United States, Scalia dissenting); and
- Under Sanabria v. United States, holding that when the government's original theory of offense is invalidated due to insufficiency of the evidence, a count of indictment cannot be severed into "discrete bases of liability" to avoid applying Double Jeopardy principles.

Jurists of reason would likely agree that at trial, Petitioner was denied his right of protection under the principles of the **Double Jeopardy Clause**, due to the District Court's erroneous characterization of its action as being "pre-trial", and that the **Grand Jury Clause** did not protect him from the District Court overruling his objections to dismiss a charge of indictment without his consent - the placing him back into jeopardy under the lesser included theory of attempt in the same count in whcih he was functionally acquitted.

Finally, jurists of reason would further debate erroneous conclusions of law: By denying habeas claims under the express reasoning that jeopardy had not yet attached when the Tenth Circuit has decided that it had attached to

the "dismissal"; because that "dismissal" due to the District Court's finding of insufficiency of the evidence and the government conceding to actual innocence in Count 2 was actually an acquittal on the merits; the Due Process Clause has failed to prevent erroneous conclusions of law from reaching final orders in spite of the incarcerated pro se Petitioner's diligence. Because that manifest error is Constitutional, jurists of reason would likely further debate that such error requires correction before the habeas order is final to prevent a manifest miscarriage of justice from occurring.

## D. INTERVENING AUTHORITY / CONFLICT

**The D.C. Circuit Court of Appeals Expressly Disagrees With The Decision Below**

Concluding an extensive analysis of five Supreme Court cases, the D.C. Circuit under United States v. Hillie, 14 F.fth 677 Amended at 454 U.S. App. D.C. 294 (D.C. Cir. 2021):

(1) Has identified a "hard-core" component required by the definition of "sexually explicit conduct" at 18 U.S.C. §2256(2);
(2) Has rejected the commonly used "factors" for deciding whether an image is the "lascivious exhibition of the genitals" under United States v. Dost, 636 F.Supp. 828, 832 (S.D. Cal. 1986), because it so broadens that definition as to make it unconstitutional; and
(3) Has expressly disagreed with decisions resting on Dost factors, specifically citing "United States v. Isabella, 918 F.3d 916 (10th Cir. 2019).

The D.C. Circuit decided that, where §2251(a) "prohibits creating a depiction of sexually explicit conduct performed by a minor or by an adult with a minor", the sixth Dost factor "stray[s] too far" by "allowing a depiction that portrays sexually implicit conduct in the mind of the viewer." 454 U.S. App. D.C. at 308. The D.C. Circuit opinion expressed conflict with circuits

"that follow the Dost factors,...rather than Miller [v. California, 413 U.S. 15 (1973)] and its progeny," expressly disagreeing with the Tenth Circuit's decision under United States v. Isabella. Id @308-09

The D.C. Circuit Court of Appeals recognizes that the decision hereunder was decided by permitting the jury to rely on Dost factors for deciding whether Defendant had intent to produce visual depictions which were sexually explicit. See A-52. Because no sexually explicit conduct was engaged in by a minor, the Sixth Dost factor was relied upon to prove that the previously produced "torso pic" must include a "lascivious exhibition of the anus, genitals or pubic area" (§2256(2)(A)(v)) because "it is clearly a picture that is designed to elicit a sexual response in the viewer". A-119 @ 13-18. The sixth Dost factor encourages a trier of fact to rely on their finding that "the visual depiction is designed to elicit a sexual response in the viewer" A-52 @ #6. In this case, the inquiry was extended to include Petitioner's intent based on a photograph that someone else had previously "designed to elicit a sexual response in the viewer", and this, in an attempt to commit. Thus, Petitioner's conviction under attempted production of child pornography at 18 U.S.C. §2251(a), rests squarely on his subjective intent - and affirmed by "sufficient circumstantial evidence of a substantial step" in that attempt. Isabella, 916 F.3d @836.

## E. CONCLUSION

Petitioner prays that the Honorable Circuit Justice will recommend the petition to the entire Supreme Court and that the panel will grant certiorari on the question, or, in the alternative, that the Honorable Circuit Justice will issue a Certificate of Appealability to permit Petitioner to proceed further in light of the Panel's acknowledgement of error and the consequences thereof.

Respectfully submitted,