No. 23 - 5935

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL RAY THOMAS – PETITIONER

vs.

ADAM DOUGLAS, WARDEN – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL RAY THOMAS

SRF #823403

9625 PIERCE RD.

FREELAND, MI 48623

QUESTIONS PRESENTED

After a United States District Judge orders the appointment of counsel sua sponte "in the interest of justice," may a United States court of appeals subsequently, while leaving intact the district court's Order, force the Petitioner to proceed on appeal without the assistance of counsel, or does this action depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

When a federal court of appeals upholds a State court conviction that is based on an existing court record so devoid of any evidence to support the conviction, that a federal district court TWICE erroneously concluded that the Petitioner was convicted of an entirely different crime, did the court of appeal's action depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

In United States v. Agurs, 427 US 97 (1976), this Court concluded that "the knowing use of perjured testimony by a prosecutor generally requires that the conviction be set aside." In Napue v. Illinois, 360 U.S. 264 (1959) this Court decided that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." In deciding the case at hand, the Sixth Circuit Court of Appeals determined that the prosecutor's constitutional responsibilities outlined in Agurs and Napue were limited to only witnesses called by the government. Should this Court settle the important federal question of whether or not the Fourteenth Amendment protections outlined in Agurs and Napue extend to all witnesses who offer testimony known by the prosecutor to be false?

The Sixth Circuit Court of Appeals concluded that when the Petitioner allegedly told another person that he had previously committed a crime, his words were "an implied solicitation." Recognizing that this Court has previously determined that the free speech clause of the First Amendment protects an individual's right to fabricate a story about being something as prestigious as being a military hero, see U.S. v. Alvarez, 567 U.S. 709 (2012), which invalidated the Stolen Valor Act, should this Court also decide whether or not the free speech clause of the First Amendment protects an individual's right to fabricate a story about previously committing a heinous crime?

We live in an age where an overwhelming majority of individuals utilize some type of computerized device, such as a computer, smartphone or tablet on a daily basis, with many family, friends and coworkers even sharing devices. Yet, as it relates to crimes involving the possession of illicit material being found on shared computers, there is an absence of unanimity across the United States courts of appeals as to what satisfies sufficiency of the evidence claims raised under Jackson v. Virginia, 433 U.S. 307 (1979). Because the Sixth Circuit issued a decision in this case that is in direct conflict with the holding of several other United States court of appeals on this very important matter, should this Court should settle this important federal question?

LIST OF PARTIES

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

[X] 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:

THE PEOPLE OF THE STATE OF MICHIGAN

RELATED CASES

People v. Thomas, No. 329750, 2017 Mich. App. LEXIS 766 (May 11, 2017)

People v. Thomas, No. 156028, 501 Mich. 981, 907 N.W. 2d 565 (March 5, 2018)

Thomas v. Miniard, No. 2:18-cv-13829, 2022 U.S. Dist. LEXIS 73202 (April 21, 2022)

Thomas v. Douglas, No. 22-2121, 2023 U.S. App. LEXIS 9542 (April 20, 2023)

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STATUTES AND RULES

OTHER

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

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

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

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

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

The date on which the United States Court of Appeals decided my case was April 12, 2023.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 18, 2023, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for writ of certiorari was granted to and including _____ on _____ 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 writ of certiorari was granted to and including _____ on _____ in Application No. __A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. I

18 U.S.C. 3006(A)(2)(B)

STATEMENT OF THE CASE

The Petitioner in this case, an honorably discharged disabled Army Veteran, used the skills he acquired in the military to start his own business in 2007. His company, Integrated Safety & Security Group, LLC, provided electronic safety and security products to customers throughout the state of Michigan. By 2013 the company was reporting annual sales and services of approximately $850,000.00. At any given time, the company, that was operated out of the Petitioner's home that he shared with his girlfriend, employed between 6 and 8 fulltime employees, including a fulltime office manager.

In November, 2012, law enforcement executed a search warrant on the Petitioner's home/business where they seized all computers and electronic devices, including the wireless router, digital cameras, laptops and tablets. Eighteen months later the Petitioner was arrested and charged with: 1) Possession of child sexually abusive material (CSAM); 2) Use of a computer to commit possession of CSAM; and 3) Use of the internet to solicit another person to commit child sexually abusive activity (CSAA). Petitioner has maintained his claim of absolute innocence from the beginning.

Prosecution's Case

McNeil was the first witness called by the prosecutor. He testified that he had been communicating with an unknown person that he had met on Craig's List, and that the unknown person had indicated that he and his wife had previously involved their children in sexual activity with other adults. He testified that he did not know the identity of the person he was communicating with because the person never identified them self. He also testified that the unknown person had requested "preferably nude" photos of his children. He failed to offer a single statement about being

solicited by the unknown person to commit CSAA. However, he did go to the police because he believed the unknown person was sexually abusing his own children.

Detective Moore testified that he needed to see the original emails to determine the I.P. address of the original sender. He testified that the dates of the emails were September 18-19, 2012. He testified that McNeil came to the police station two or three times, and that he had been able to log into McNeil's email account to review all of the communications that had taken place. He also testified that there was no way for him to know who was actually sitting in front of the computer at any given time.

The prosecutor then called Detective Liposky, a computer forensic expert. She testified that there was no way for her or her forensic software to know who was sitting at any of the computers at a given time. She also testified that she found evidence of Malware on the seized computers. She further testified that she found "115 items regarding child sexually abusive material, whether verbiage or pictures." However, only a single image was offered into evidence during the trial. She went on to explain that the items were found in the "thumb drive cache, some were in the Frostwire folder, some were in the temporary internet files and the unallocated space."

Liposky went on to testify that "temporary internet files is a general folder, so you're going to have access dates and creation dates that the computer itself creates, not specific to a specific picture." She further explained that "cache files are the same as temporary internet files, and neither contain information related to their creation or accessed dates." She testified that "items found in the unallocated space fail to include any pointers that would allow a user to see, find, or even search for them," and that "those items fail to include any forensic evidence as to who, how, or when the items were viewed, downloaded, or deleted."

Liposky also testified that the only account on the computers that could be directly linked to the Petitioner failed to include any evidence of CSAM or CSAM related searches. She stated that "one possible CSAM file was found in the USB thumb drive cache, but there was no photo attached to it." She explained that a normal computer might have anywhere from 5,000 to 100,000 files on it, and that a typical user would have no way of knowing about everything on their computer. She finished her testimony by stating that when she used the peer-to-peer program found on the computer, downloaded items were automatically saved to "Theresa's account." She offered no forensic testimony pertaining to historical artifacts that might have demonstrated who was likely using the computers at a given time.

Detective Blackburn testified that the Petitioner operated a commercial safety and security business out of his home, and that he had voluntarily provided additional computers to the police on the day he was arrested.

Detective Penwell, from the Franklin County, Ohio, Sheriff Department, testified that he had communicated with an unknown person between January 24, 2012, and February 2, 2012, who was using the same email address that was used to communicate with McNeil. He further testified that he had executed a search warrant on that email account, and as part of that return he had received a log from Google that listed every I.P. address that had logged into the account during the time of the communications. *(This log, which failed to include the Petitioner's I.P. address on it, was not turned over to the defense until after the trial. It has yet to be reviewed by a court.)* Penwell admitted that he had no way of knowing the identity of the person he was communicating with.

Defense Case

Maria Dinkins testified that she had used the Petitioner's WiFi from her home across the street for several years, and that it was the type of neighborhood where everyone had each other's garage door codes. She also testified that on several occasions she had seen unknown automobiles parked outside Petitioner's home with no one ever exiting the vehicles.

Charlie Stahura testified that he had worked for the Petitioner since 2010. He also testified that the Wi-Fi was accessible from outside of the home, and that the Wi-Fi had been left unsecure due to technical issues with the employee's wireless tablets. Stahura further testified that all of the employees used the computers in the home, and routinely accessed them remotely from their homes and customer locations through the use of a program called LogMeIn.

Alexander Waschull testified that although he had no reason to dislike the Petitioner, he had created an entire website devoted to the Petitioner's case. The website also displayed other details related to Petitioner's business and a previous conviction for DUI. Waschull also admitted to making several calls to Petitioner's previous probation officer. He admitted to sending multiple text messages prior the Petitioner's arrest that included specific details about the involvement of Franklin County, Ohio. He also failed to explain how it was that he was able to send a text message including specific information that was only contained within the forensic report that was not released until several months later. He could not explain how it was that he knew so many specific details about the investigation. He also admitted that eighteen months after the seizure of the evidence in this case, on the EXACT same day the prosecutor signed the arrest warrant, he sent a text message that said "that's my teaser for you today. It's amazing what a man can do with a solid year of planning." He also testified that at the EXACT same time the police were at the Petitioner's

home arresting him, he sent a text message that said "Do you know if you get an IPad while you're in jail or not. I'm just curious?" When asked seven different times if he had spoken to anyone on the prosecutor's office about this case, he replied "no" each time.

Karen Cipriano testified that Waschull was her former boyfriend, and the father of her son. She testified that when she left Waschull and moved in with the Petitioner, Waschull's behavior had become so erratic that her family law attorney had recommended she install an app on her phone to save all of the incoming and outgoing text messages. She then testified that she had not taken the charges in this case seriously because "everyone is on the computers in that house."

Petitioner testified that he had no knowledge of any CSAM on the computers, and that the remote access control program, LogMeIn, had been used by his company since the day it was started. He described how the software worked while his attorney demonstrated it to the jury. He also testified about the professional surveillance video system that had been installed at his home for several years. Petitioner presented a date and time stamped video of himself and his office manager that corresponded to the EXACT date and time that the prosecutor said the Petitioner was logging into the email account that was used in the communications with McNeil and Penwell. The date and time on the video was confirmed through the presentation of a store receipt and credit card statement. Neither individual in the video is seen using any type of electronic device. A second video was presented that corresponded to the date of the emails with McNeil. That video showed a truck pull into Petitioner's driveway after dark, where is sat for eight minutes with its lights off and no one exiting before it pulled out and left.

Petitioner was ultimately found guilty of all three charges and sentenced to 12 – 20 years imprisonment.

REASONS FOR GRANTING THE PETITION

FAILURE TO UPHOLD THE INTEREST OF JUSTICE

After reading Petitioner's pro se Application for Writ of Habeas Corpus and Traverse, Federal District Judge, Arthur J. Tarnow, citing 18 U.S.C. 3006A(a)(2)(B), appointed counsel sua sponte after concluding that "[t]he Court finds the interest of justice require the appointment of counsel in this matter." The Court's Order further stated "[s]uch representation shall continue unless terminated by (1) order of the court; (2) appointment of substitute counsel; or (3) appearance of retained counsel." (See Order of District Court Appointing Counsel at Appendix D) (*Judge Tarnow passed away prior to issuing an Opinion in this case.) So when this matter moved to the Sixth Circuit Court of Appeals, and the appointed attorney refused to continue to represent Petitioner because she was "too busy", Petitioner immediately moved the Sixth Circuit Court for the appointment of substitute counsel. (See General Docket at Appendix H). After two months had passed without the Court responding to Petitioner's motion, because Petitioner was concerned that the Court would decide his appeal without any input at all from him, Petitioner filed a pro se Motion for Certificate of Appealability. Two months later the Court denied Petitioner's Motion for Certificate of Appealability (COA) and dismissed his Motion for Appointment of Substitute Counsel as moot.

Petitioner argues that because his claim of innocence was so strong, but his ability to adequately represent himself was so weak, the Court determined that "the interest of justice" required the appointment of counsel in this case. Yet, in the first sentence of its Order denying Petitioner's COA, the Sixth Circuit Court referred to Petitioner as "Michael Ray Thomas, a pro se Michigan prisoner."(See Order of Court of Appeals Denying Certificate of Appealability at Appendix

A) Petitioner asserts that when the Court made that determination, it not only failed to uphold the interest of justice, but that the Court's action departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Sixth Circuit Opinion Contradicts Every Other Circuit On What Constitutes A "Solicitation"

Petitioner in this case was convicted of: 1) Possession of child sexually abusive material (CSAM); 2) Use of a computer to commit possession of CSAM; and 3) Use of the internet to solicit another person to commit child sexually abusive activity (CSAA). It is in relation to the conviction for the solicitation of another person to commit *child sexually abusive activity (CSAA),* that the Petitioner seeks Certiorari. Petitioner seeks this extreme remedy because the Sixth Circuit Court of Appeals decision in this instance is in such direct conflict with the other Courts of Appeals on this important matter as to call for an exercise of this Court's supervisory power.

While states are free to create criminal statutes, this Court has previously concluded that "the minimum amount of evidence that the Due Process requires to prove an offense is purely a matter of federal law" Coleman v. Johnson, 566 U.S. 650 (2012), and a prosecution for solicitation must always start with the actual words used by the alleged solicitor. United States v. Doggart, 2017 U.S. Dist. LEXIS 84549.

Petitioner was convicted of violating MCL 750.145d. That statute does not provide any special definition for the term "solicitation," therefore, in interpreting and applying the statute, courts give the words their plain and commonly understood meaning, consulting a dictionary if necessary.

> The Michigan Legislature gave the word "solicit" a special meaning in the solicitation statute, MCL 750.157b(1), defining it as "to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation." However, the Legislature specified that that definition applied only for the purposes of that section meaning the solicitation statute. Therefore, there is no reason to believe that definition in the solicitation statute, rather than the common meaning of the word "solicits," should apply in context of [MCL 750.145d].

People v. Pfaffle, 246 Mich. App. 282 at HN8; 632 N.W.2d 162 (2001)

"When a Legislature has unambiguously conveyed its intent in a statute, ... the proper role of the court is simply to apply the terms of the statute to the circumstances in a particular case." People v. McIntire, 461 Mich. 147, 153; 599 N.W.2d 102 (1999) In interpreting and applying the statute, we give the words their plain and commonly understood meaning, People v. Morey, 461 Mich. 325, 330; 603 N.W.2d 250 (1999), consulting a dictionary as necessary. People v. Gould, 225 Mich. App. 79, 84; 570 N.W.2d 140 (1997).

The question that must be answered when interpreting this statute is what the Legislature meant when it used the word "solicit." The Michigan Court of Appeals answered this exact question in Pfaffle, 246 Mich. App. at 282. "'Solicit' does not require any commitment or action by the [person] being solicited, rather it merely requires the solicitor 'to try to obtain by earnest plea or application' or 'to entreat; petition.' In more simple terms, to solicit means to ask." Id. at 298.

Recognizing that the Michigan Legislature relied on the simple everyday meaning of the word "solicit" in the solicitation of another person to commit CSAA statute, we now turn to "the minimum amount of evidence that the Due Process requires to prove [the] offense." Coleman, 566 U.S. 650 (2012).

This Court recently issued a decision that included a very in depth historical review of cases involving claims of solicitation. This Court held that "[c]riminal solicitation is the intentional encouragement of an unlawful act." See United States v. Hansen, 143 S. Ct. 1932; 216 L. Ed. 2d 693; 2023 U.S. LEXIS 2638.

In United States v. Talley, 164 F.3d 989 (1999), the Sixth Circuit Court of Appeals acknowledged that it had never addressed the issue or articulated the guidelines to be used in solicitation cases. In that decision the Court determined that:

> [a]s for the intent element of the crime, the Third Circuit has noted that in order to establish that the defendant engaged in [solicitation], 'the government must prove by *strongly corroborative circumstances* that the defendant had the intent that another person engage in conduct constituting a crime ... and that the defendant *actually* commanded, induced, or otherwise endeavored to persuade the other person to commit the felony', United States v. McNeil, 887 F.2d 448, 450 (3rd Cir. 1989). One factor strongly corroborative of intent, is 'the fact that the defendant offered or promised payment or some other benefit to the person solicited if he would commit the offense.' United States v. Gabriel, 810 F.2d 627, 635 (7th Cir. 1987) (quoting S. Rep. No. 309, 97th Cong. 1st Sess. 183 (1982)). In addition, 'the government can usually establish the strong corroborative circumstances by showing that the defendant: (1) offered or promised payment or some other benefit to the person solicited; (2) threatening to punish or hard the solicitee for not committing the offense; (3) repeatedly soliciting the committing of the offense; (4) knew that the solicitee had committed a similar crime before; or (5) acquired weapons, tools, or information, or made other preparation, suited for use by the solicitee." United States v. White, 698 F.3d 1005 (7th Cir. 2012).

In its report on the bill that became the federal statute criminalizing the solicitation of another person to commit a crime, 18 U.S.C. 373, the Senate Judiciary Committee explained how the statute should be applied in order to avoid First Amendment concerns. First, the government would have to establish the intent of the defendant to have another person commit a violent crime. The report then went on to list some "strongly corroborative circumstances" that would satisfy the intent element of the crime. Second, the government would have to establish that the defendant

commanded, entreated, induced or otherwise endeavored to persuade the other person to commit the crime of violence. **Congress specifically rejected words such as "counsels," "encourages" or "requests" because they suggest equivocation too close to casual remarks.** See S. Rep. 97-307 at 182.

What is extremely clear from all case law surrounding this issue is that the accused must both intend that another person commit a felony and that the defendant must *actually* solicit another person to commit the felony. See United States v. Dvorkin, 799 F.3d 876 (7th Cir. 2015); United States v. Rahman, 189 F.3d 88 (2nd Cir. 1999); United States v. Thompson, 130 F.3d 676, 688 (5th Cir. 1997).

Petitioner has claimed from the onset of this case that he was factually innocent of all charges. However, as it relates to this specific charge, he asserts that the existing court record is entirely devoid of **ANY** evidence that would have allowed a reasonable jurist to have found him guilty of soliciting another person to commit CSAA. Substantiating Petitioner's claim, and thereby requiring the exercise of this Court's supervisory power to correct this manifest injustice, is the undeniable fact that the existing record is so lacking of evidence to support the conviction, that the Federal District Court issued two previous Opinions incorrectly holding that the Petitioner had been convicted of "Use of the internet to solicit another person to commit *child sexually abusive material (CSAM)"* as opposed to *"... child sexually abusive activity (CSAA)."* (See District Court Opinions at Appendix D & G) Although the difference may seem minor in detail, the difference is actually 13 years, as the CSAM statute carried a maximum of 7 years, while the CSAA statute carried a maximum of 20 years.

This Court should also be aware that prior to the Sixth Circuit Court of Appeals offering its opinion in an Order stating that "the words amounted to an implied solicitation" (See Order of Court of Appeals Denying Certificate of Appealability, Appendix A at 9), no other court had opined on Petitioner's sufficiency of the evidence claim related to this specific charge. And when the Sixth Circuit concluded that the Michigan Court of Appeals had addressed the issue, a simple cursory review of the Michigan Court of Appeals Opinion (Decision of State Court of Appeals at Appendix F) demonstrates that the Court was referring to only the CSAM related charges.

Recognizing that "a prosecution for solicitation must always start with the actual words used by the alleged solicitor," Doggart, 2017 U.S. Dist. LEXIS 84549, this Court should look to the existing record to evaluate those words and for any "strongly corroborative circumstances" that might relate to the charge of soliciting another person to commit CSAA.

On the first day of trial the prosecutor stated:

> In September of 2012, Paul McNeil, who will be testifying in this case, was on Craig's List. And he will be candid with you ... he received a text message from an unknown subject. And in that message, that unknown subject described himself and his wife as, as being, having sexual contact with their thirteen year old daughter and eleven year old son. *And he invited Mr. McNeil to, to join in the sexual contact with, with the sender's children.*

(Prosecutor's Opening Statement, Trial Tr. 8/12/15 at 7-8)

Then, during his closing argument, the prosecutor doubled-down on Mr. McNeil's testimony by stating:

> In Count 1, it refers to the Defendant communicating with another person or soliciting another person to commit child sexually abusive activities. And, that Count refers to the communications with Mr. McNeil ... in those communications that you heard Mr. McNeil testify to, *he indicated that he was asked to involve himself in sexual activity with the Defendant, with the person he was speaking with, and his children,* and that he requested

sexually explicit pictures of Mr. McNeil's children in return. *That's what Count 1 refers to, communications with Mr. McNeil to engage Mr. McNeil or to solicit him to engage in child sexually abusive activity.*

(Prosecutor's Closing Statement, Trial Tr. 8/14/15 at 25-26)

What is clear by the prosecutor's statements to the jury, both before and after McNeil's testimony, is that McNeil would, and did testify that he "was asked to involve himself in sexual activity with the ... person he was speaking with, and his children." This Petitioner wholeheartedly concedes to the fact that if the record demonstrates that McNeil offered such testimony, Petitioner's request for relief on this issue must fail as a matter of law.

However, Mr. McNeil's entire testimony, which spans only 10 pages of transcripts (See Testimony of Paul McNeil at Appendix I), fails to include a single statement about being solicited to involve himself sexually with anyone's children. To be more precise, here is the pertinent portion of McNeil's testimony:

Q: What was the nature of the response that you received?
A: I really do not recall, but I believe it was about him and his wife meeting me and my wife.
Q: Okay. That was the initial response?
A: Yes
Q: Okay. Did you learn anything more about that individual in, during those communications?
A: Yes, I did.
Q: And specifically what did you learn, sir?
A: That the individual was interested in children.
Q: Specifically in, in how?
A: He had mentioned that him and his wife had two children, that they liked to invite other people over to have, engage in sexual activity with.
Q: Did he make any inquiry or, during your discussions with that individual online, did you discuss whether you had children?
A: Yes
Q: Okay. And what did you tell him about that?
A: I did tell him that I did have children, that I had a boy and a girl.
Q: And did he make any requests of you?

A: Yes
Q: And what, specifically, what was the request he made?
A: Pictures
Q: And what type of pictures?
A: Nude preferably was his response.
.....
Q: Did you, any how many, over how long of a period of time did these communications take place?
A: Just a couple of hours.
.....

It should be clear to this Court that McNeil's testimony failed to include a single statement about being asked to do anything other than to send nude photos of his own children. Petitioner argues that it was this portion of McNeil's testimony, the statements about the photos, which caused the Federal District Court to **twice** erroneously conclude that the Petitioner had been convicted of soliciting another person to commit CSAM, as opposed to ... CSAA. Even the Sixth Circuit's Order denying a COA stated "In 2012, Paul McNeil reported to the police that he had received an email containing child pornography *and soliciting him to provide the sender with nude pictures of his children.*" (See Order of Court of Appeals Denying Certificate of Appealability, Appendix A at 1).

The undeniable fact is that the record in this case fails to contain any "actual words used by the alleged solicitor" that might have even been misconstrued as a solicitation for McNeil to engage in CSAA. The record also fails to include a single piece of "evidence strongly corroborative of the [Petitioner's] intent" for McNeil to engage in CSAA. When the Sixth Circuit concluded that "the words amounted to an implied solicitation," it violated Petitioner's right to Due Process by lowering the standard of proof needed to satisfy the reasonable doubt standard of what constitutes a criminal solicitation. The Sixth Circuit's decision is also in direct contradiction to the other Courts of

Appeal who have all decided that in a case involving a charge of solicitation, there must be evidence that the alleged solicitor "actually solicited" someone.

The First Amendment Protects Even Repulsive Lies

The Petitioner in this matter was convicted for allegedly telling an unknown person on the internet that "him and his wife had two children, that they liked to invite other people over to have, engage in sexual activity with." While that alleged statement is offensive, disgusting and unconscionable, that doesn't change the fact that it is protected under the freedom of speech clause of the First Amendment of the United States Constitution. "The Nation well knows that one of the costs of the First Amendment is that it protects the speech the United States Supreme Court detests as well as the speech it embraces." See United States v. Alvarez, 567 U.S. 709; 132 S. Ct. 2537 at HN24 (2012).

In the past this Court has routinely held that the First Amendment protects even offensive expressions. See e.g., R A V v City of St Paul, 505 U.S. 377; 112 S. Ct. 2538 (1992). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities. FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it"). "The fact that protected speech may be offensive to some does not justify its suppression." Carey v. Population Services Int'l, 431 U.S. 678, 701 (1977).

Petitioner concedes that the Government has the absolute right to ban speech that solicits another person to commit a crime. However, the speech allegedly used by the Petitioner in this instance did not do that. The statute, MCL 750.145d, as applied in this case, punished the Petitioner

for allegedly telling someone else that he and his wife had committed a crime in the past. And while that alleged statement *may* have satisfied the extremely low standard of probable cause needed for the issuance of a search warrant, it most certainly did not satisfy the beyond a reasonable doubt standard required for a conviction under the Due Process clause of the U.S. Constitution.

As the existing record clearly demonstrates in this matter, the words allegedly used by the Petitioner did not ask, entreat, petition, invite, encourage or even abstractly advocate for McNeil to get involved with the crime of CSAA. While the purported statement was repulsive, that doesn't take the statement outside of the protections of the First Amendment. This Court has previously explained that even the "abstract advocacy" of child pornography – including the phrase "I encourage you to obtain child pornography" qualifies as protected speech , even though the "recommendation of a particular piece of purported child pornography with the intent of initiating a transfer" is properly proscribed by federal statute. See United States v. Williams, 553 U.S. 285, 298-300, 128 S. Ct. 1830 (2008). Petitioner argues that based on this Court's opinion in Williams, id., even if he had allegedly made the statement "I encourage you to commit CSAA," that statement would qualify as protected speech, as it is "abstract advocacy" as opposed to a solicitation or proposal to engage in the illegal conduct.

"The government may suppress speech for advocating the use of force or violation of law only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' Brandenburg v Ohio, 395 U.S. 444, 447 (1969) There is here no attempt, incitement, solicitation or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more dire connection, the Government may not prohibit

speech on the ground that it may encourage pedophiles to engage in illegal conduct." Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

"To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct." Ashcroft, 535 U.S. 234 (2002). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." Hess v Indiana, 414 U.S. 105, 108 (1973). "To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality." United States v. Williams, 553 U.S. 285 (2008). The statement allegedly made by the Petitioner was certainly not a "proposal to engage in illegal activity." At most, if true, the statement was a confession. If not true, the statement was nothing more than a hideous lie.

If the alleged statement was a confession, it clearly can't be a solicitation as the illegal conduct had already occurred. A person may not be solicited to commit a crime that has already taken place. For instance, if an individual was to tell someone "I like to rob banks," or "I like to use cocaine," under no circumstances could those statement be viewed as a solicitation – at most, they could possibly be viewed as confessions. Either way, the statements themselves would be protected under the First Amendment, ***UNLESS*** there was additional "strongly corroborative evidence" that the individual was *actually* trying to solicit the other person to rob a bank or use cocaine.

If the alleged statement was a lie, whether the Government likes it or not, this Court has concluded that most lies are still afforded constitutional protections. See Alvarez, 567 U.S. 70 at HN9. ("Regulations on false speech that courts generally have found permissible, such as the criminal prohibition of a false statement made to a Government official, 18 U.S.C.S, 1001; laws punishing perjury; and prohibitions on the false representation that one is speaking as a

Government official or on behalf of the Government, do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.") In Alvarez, id., this Court stated that it "ha[d] never endorsed the categorical rule that false statements receive no First Amendment protection. The Court's prior decisions have not confronted a measure, like the Stolen Valor Act, 18 U.S.C.S. 704(b), that targets falsity and nothing more." Alvarez, 567 U.S. 709 at HN6. That Court went on to overturn the Stolen Valor Act finding that it violated the First Amendment. The court held that absent the few historic and traditional categories long familiar to the bar where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. Id., at HN5. The Court specifically "reject[ed] the notion that false speech should be in a general category that is presumptively unprotected." Id. at 722.

It is extremely important for this Court to realize that the abhorrent statement allegedly made by the Petitioner in this case was never even investigated by law enforcement. The Petitioner wasn't married, and his children, who lived in Texas with their mother, were never even interviewed. This is due to the fact that law enforcement never suspected the Petitioner of involving his children is CSAA. Again, the Sixth Circuit's own Opinion states that "[i]n 2012, Paul McNeil reported to the police that he had received an email containing child pornography *and soliciting him to provide the sender with nude pictures of his children."* (See Order of Court of Appeals Denying Certificate of Appealability, Appendix A at 1).

In cases raising First Amendment issues, an appellate court is obligated to independently review the entire record to ensure that the lower court's judgment ""does not constitute a forbidden intrusion of the field of free expression."" See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1038; 111 S. Ct. 2720 (1991), quoting Bose Corp v. Consumers Union of United States, Inc, 466 U.S. 485, 499 (1984), quoting New York Times Co v Sullivan, 376 U.S. 254, 258 (1964). In this instance

a "review of the entire record" demonstrates that there was absolutely no evidence presented at trial to support the Petitioner's conviction of soliciting another person to commit CSAA. Again, McNeil testified that the only request made of him was to send nude photos of his children, and the Sixth Circuit Court opined that "[i]n 2012, Paul McNeil reported to the police that he had received an email containing child pornography *and soliciting him to provide the sender with nude pictures of his children.*" (See Order of Court of Appeals Denying Certificate of Appealability, Appendix A at 1). ***That is the extent of the evidence in this case.***

The District Court never opined on this claim, and the Sixth Circuit concluded that "the words amounted to an implied solicitation." Petitioner asserts that the only alleged "words" in the record related to a solicitation pertained to photos, and the alleged "words" related to CSAA were not only not a solicitation, but that they were protected under the First Amendment. It is for this reason Petitioners asks this Court to decide whether a not the First Amendment protects an individual's right to lie to a non-governmental person and say that he or she has previously committed a crime.

Testimony Known To Be False By The Prosecutor

The Sixth Circuit Court of Appeals concluded that "[Petitioner] does not cite any Supreme Court authority that requires the prosecution to correct false testimony elicited by the defense." (See Order of Court of Appeals Denying Certificate of Appealability, Appendix A at 9).

Alex Waschull was the former boyfriend of the Petitioner's girlfriend; he was called to testify by the defense. At trial Waschull admitted on the stand that eighteen months after the seizure of the evidence in this case, on the EXACT same on the day the prosecutor signed the arrest warrant for the Petitioner, he, Waschull, had sent a text message to the Petitioner's girlfriend that said

"that's my teaser for you today. It's amazing what a man can do with a solid year of planning." Waschull also testified that at the EXACT same time the police were at the Petitioner's home arresting him, he had sent a text message that said "Do you know if you get an IPad while you're in jail or not. I'm just curious?"

Because Waschull seemed to possess intimate details of the case, details that even the Petitioner and his attorney were unaware of at the time, while he was on the stand testifying under oath, Waschull was asked seven different times "have you ever spoken to anyone from the prosecutor's office about this case?" Each time he responded "no." However, at the time of trial, defense counsel had in his possession a certified text message from Waschull that said "the prosecutor told me everything so FAWWWWWWK you!" Defense counsel also had a civil lawsuit in his possession at the time of trial in which Waschull had sued Petitioner and his company because Waschull's son had fallen at the Petitioner's home and injured his lip. In that lawsuit, a third-party attorney appointed by the Court, a guardian ad-litem, made the statement that both Waschull and the Prosecutor in this case had admitted to her that they had spoken on "several occasions" about this case. And finally, at the time of trial, defense counsel also had in his possession a CPS report that had been created by a neutral investigator in relation to this case. The investigator in that case also determined that Waschull and the Prosecutor in this matter had spoken on multiple occasions specifically about this case. Petitioner has been denied every request for a hearing to present these documents that prove the prosecutor knew Waschull was lying under oath.

In United States v. Agurs, 427 US 97 (1976), this Court concluded that "the knowing use of perjured testimony by a prosecutor generally requires that the conviction be set aside." In Napue v. Illinois, 360 U.S. 264 (1959) this Court decided that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."

On page twenty-nine of the Petitioner's Brief in Support of Motion for Certificate of Appealability, Petitioner had pointed directly to Agurs and Napue when he argued that the Prosecutor knowingly allowed Waschull's false testimony to go uncorrected. Therefore, it was an error for the Sixth Circuit to conclude that "[Petitioner] does not cite any Supreme Court authority that requires the prosecution to correct false testimony elicited by the defense."

However, more importantly, the Sixth Circuit erroneously concluded that this Court had left an exception in Napue that would allow prosecutors to leave intact the known false testimony of defense witnesses. In Napue the Court concluded that it was a Fourteenth Amendment violation for the government to use known false testimony, "and the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected." The Court went on to say that "a lie is a lie, no matter what the subject, and the district attorney has the responsibility and duty to correct what he knows to be false."

As the Sixth Circuit decision in this case is in direct conflict to this Court's holdings in both Napue and Agurs, Petitioner would respectfully ask this Court to grant the writ for further briefing.

Sixth Circuit Creates New Standard Of "Possession"

Petitioner was convicted of "knowingly possessing child sexually abusive material (CSAM)." Although there were "115 instances of *possible* CSAM – whether verbiage or pictures" found on the computers that were shared by 8 to 10 people, only a single photo was offered into evidence at trial. The Prosecutor's own expert testified that she could not say who, how, or even when that photo was received, viewed, downloaded, or deleted. The only thing she could testify to was the fact that the photo had been on the computer "at some point in the past." The Prosecutor also

stated that "the items were deleted and found in an area of the computer that it took a professionally trained expert with special forensic software to locate them." Yet, in direct contradiction of what most other Federal Courts of Appeals have decided is necessary to satisfy the beyond a reasonable doubt standard in cases involving the alleged possession of illicit material found on shared computers, the Sixth Circuit concluded that simply because the photo had been on the computer at some point in the past, reasonable jurists could have concluded that the Petitioner must have known it was on there.

Detective Blackburn testified that Petitioner operated a commercial business out of his home where the computers were located. Officer Moore testified that it was the Petitioner's office manager who answered the door on the day the search warrant was executed. The State's expert testified that the questionable actions on the computers were found under "Theresa's account," and the only account found on the computers that could be directly linked to the Petitioner failed to contain any evidence of CSAM. She also testified that because of where the items were located, a normal user of the computers would not have been able to search for or access them Cipriano testified that "everyone is on the computers in that house." Stahura, the company supervisor, testified that every employee used the computers and even accessed them remotely from off sight. To validate Stahura's testimony, defense counsel presented a third party website showing when each of the computers had been accessed remotely. And in his closing statement the Prosecutor conceded that ALL the evidence in this case was found in areas of the computer that could only be accessed by a specially trained expert with special forensic software.

Petitioner argues that had the Sixth Circuit reviewed this case under the Jackson standard outlined in Jackson v. Virginia, 433 U.S. 307 (1979), his conviction would have been reversed.

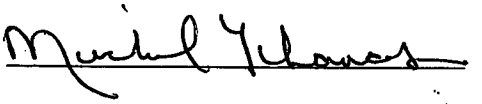
Other Federal Courts of Appeals have previously decided cases with facts that mirror the case now before this Court. Those facts being: (1) shared computers; (2) no password protected accounts or programs; (3) illicit material found in deleted areas of the computer where an innocent user would not have encountered them; (4) no pattern of activity offered for the dates in question to narrow the field of possible users; and (5) accused had no special training or forensic software. See United States v. Pothier, 919 F.3d 143, 149 (1st Cir. 2019) ("[w]e are left with a surprisingly incomplete record. It generates hunches, but it provides no tools for rationally confirming any one of the hunches beyond a reasonable doubt."); See also United States v. Kuchinski, 469 F.3d 853, 863 (9th Cir. 2006) (holding that sentence enhancement was erroneous without proof defendant knew about or controlled CSAM found in the cache of the computer); See also United States v. Moreland, 665 F.3d 137 (5th Cir. 2011) (reversing conviction in light of evidence that the government presented insufficient evidence of knowledge of possession of CSAM where the computers were shared by three users and the images were saved in the unallocated space as opposed to folders associated with a particular user); See also United States v. Schafer, 501 F.3d 1197 (10th Cir 2017) (reversed because the government offered no evidence that the defendant knew the computer contained the images or that he could control them. The Governmental also failed to offer any evidence that the possession occurred during the time period charged.) See also United States v. Flyer, 633 F.3d 911, (9th Cir. 2011) ("[o]ur precedent relating to cache files suggest that a user must have knowledge of and access to the files to exercise dominion and control over them" and "the government presented no evidence Flyer had the forensic software required to see or access the files.") See also United States v. Dobbs, 629 F.3d 1199 (10th Cir. 2011) ("Consequently, we conclude that the presence of child pornography files in the cache of Mr. Dobbs computer does not alone demonstrate – circumstantially or otherwise – his knowing [possession].")

Petitioner believes that because of the computer age we live in, an age where many individuals use and even share computers and computerized devices such as smartphones on a daily basis, this Court should make a determination as to what evidence is required to prove "possession" in cases involving illicit material being found on shared computers. Petitioner seeks this relief because according to the Sixth Circuit decision in this matter, courts are no longer limited to "actual" and "constructive" possession, there is now "because it was once there" possession.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: September 27, 2023