
EXHIBIT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-3015

September Term, 2024

1:19-cr-00324-BAH-1

Filed On: October 16, 2024

United States of America,

Appellee

v.

Joseph Smith,

Appellant

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges; and Randolph, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-3015

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Filed On: October 16, 2024

United States of America,

Appellee

v.

Joseph Smith,

Appellant

BEFORE: Srinivasan, Chief Judge; Garcia, Circuit Judge; and Randolph, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for panel rehearing filed on September 18, 2024, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

EXHIBIT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-3015

September Term, 2023

FILED ON: JULY 23, 2024

UNITED STATES OF AMERICA,
APPELLEE

v.

JOSEPH SMITH,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cr-00324-1)

Before: SRINIVASAN, *Chief Judge*, GARCIA, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that Smith's convictions be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: July 23, 2024

Opinion for the court filed by Chief Judge Srinivasan.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 7, 2023 Decided July 23, 2024

No. 22-3015

UNITED STATES OF AMERICA,
APPELLEE

v.

JOSEPH SMITH,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cr-00324-1)

Jonathan Zucker, appointed by the court, argued the cause and filed the briefs for appellant.

David B. Goodhand, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Chrisellen R. Kolb* and *John P. Mannarino*, Assistant U.S. Attorneys.

Before: SRINIVASAN, *Chief Judge*, GARCIA, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* SRINIVASAN.

SRINIVASAN, *Chief Judge*: Appellant Joseph Smith was convicted of child sexual abuse and other related offenses after sexually abusing his stepdaughter. In this appeal, Smith brings four challenges to his convictions. First, he contends that an underrepresentation of Black residents in his jury pool violated his Sixth Amendment right to a jury drawn from a fair cross-section of the community. Second, he challenges the district court's denial of his motion to suppress evidence discovered on two cell phones and a personal computer. Third, he asserts that the government's case agent should have been excluded from the courtroom. And fourth, he argues that the case agent improperly testified as an expert at trial. We are unpersuaded by any of those arguments and thus affirm Smith's convictions.

I.

A.

In May 2016, Joseph Smith began sexually abusing A.S., his stepdaughter, when she was twelve years old. For eleven months, Smith forced A.S. to receive oral sex from and perform oral sex on him. Smith also sent A.S. sexually explicit text messages and forced her to send nude photos of herself to him. In April 2017, A.S. and her mother reported Smith's abuse to the police.

Police obtained a warrant to search Smith's residence for evidence of A.S.'s allegations. The affidavit supporting the warrant relied on A.S.'s statements describing her text messages with Smith and the photos she had sent him. The affiant, a detective specializing in child sex abuse, additionally averred based on her experience that child sexual abusers often use their cell phones to take and store pictures of victims and then save the pictures to their personal computers. The affiant explained that those images would be "excellent evidence of

someone who is engaged in committing sexual offenses against children." J.A. 65.

As requested in the affidavit, the warrant authorized a search for, and seizure of:

> Cellular phones, computers, digital storage devices, thumb drives, removable electronic devices such as external hard drives, and the extraction of all electronic data stored inside of them to take place at the residence or a police or court facility, mail matter, any material identifying any resident of the house and to take photographs and sketches of the entire premises, and any items or materials relating to the offense of First Degree Child Sexual Abuse.

J.A. 62.

When executing the warrant, the officers seized three tablets, an Xbox, an air mattress, a personal computer, and twelve cell phones. Police discovered substantial amounts of incriminating evidence on the personal computer and two of the cell phones.

B.

A grand jury indicted Smith on ten counts related to child sexual abuse under federal and D.C. law. Four of Smith's pretrial and trial motions are at issue in this appeal. The district court denied all four motions.

First, Smith moved to dismiss the indictment based on his Sixth Amendment right to a jury drawn from a fair cross-section of the community. He pointed to statistical evidence that Black persons were underrepresented in Washington,

D.C., jury pools relative to the percentage of Black adults in the D.C. population. Smith asserted that the disproportionate impact of the COVID-19 pandemic on racial and ethnic minorities caused the disparity in the jury pool.

Second, Smith moved to suppress the evidence found on the computer and two cell phones. He argued that police had unconstitutionally seized those devices while executing an invalid warrant to search his home, and that any evidence discovered on the devices thus should have been excluded at trial.

Finally, Smith brought two challenges related to the government's case agent, a special agent in the Federal Bureau of Investigation who testified against Smith. Smith first moved to exclude the agent from the courtroom to prevent her from hearing the testimony of other witnesses. Smith also separately objected to a portion of the agent's trial testimony in which she reviewed text message exchanges with A.S. found on Smith's cell phone. The agent explained which messages Smith sent and which he received based on her interpretation of a report from a program called Cellebrite, which is used to extract information from digital devices. Smith moved to strike the agent's testimony as improper expert testimony.

A jury convicted Smith of seven counts of child sexual abuse, as well as one count each of production of child pornography, possession of child pornography, and enticement of a minor. The district court sentenced Smith to two concurrent terms of life imprisonment.

II.

On appeal, Smith challenges the district court's denial of the four motions described above. We reject each of Smith's challenges.

A.

We first consider Smith's Sixth Amendment challenge to the composition of the jury pool. The Sixth Amendment guarantees a criminal defendant the right to a trial "by an impartial jury," U.S. Const. amend. VI, which the Supreme Court has held must be drawn from a "representative cross-section of the community," *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)). Smith claims that his Sixth Amendment fair cross-section right was violated because Black residents were underrepresented in the jury pool from which his jury was drawn.

In order to establish a prima facie violation of his fair cross-section right, Smith must satisfy all three of the prongs set out by the Supreme Court in *Duren v. Missouri*, 439 U.S. 357, 364–66 (1979). He must show: (i) that the group allegedly excluded (here, Black persons) qualifies as a "'distinctive' group in the community"; (ii) that the representation of the group in jury venires "is not fair and reasonable in relation to" the group's representation in the community; and (iii) that the underrepresentation stems from "systematic exclusion of the group in the jury-selection process." *Id.* at 364.

The district court held that Smith established the first *Duren* prong but not the second or third. We affirm based on the third prong: we conclude that Smith cannot show that the jury-selection process systematically excluded Black residents. We therefore have no need to address the second prong or to resolve how to determine the baseline population or measure underrepresentation for purposes of that prong.

To understand why Smith has failed to demonstrate systematic exclusion of Black residents in the jury-selection

process, it is necessary to outline how that process works for the United States District Court for the District of Columbia. The District's Jury Office initially constructs a master jury wheel from lists of people who: are registered to vote in D.C.; hold a D.C. driver's license, D.C. learner's permit, or other valid D.C. identification card; or pay D.C. income taxes. From the master jury wheel, the Office periodically draws sets of potential jurors for two-week windows of trial start dates. Each of those potential jurors receives a summons and juror-qualification questionnaire in the mail. Some share of those potential jurors responds, and the Office does not follow up with (or take any action against) those who do not respond.

Based on the responses to the questionnaires, the Office filters out people who are disqualified or excused from jury service. The remaining group of eligible jurors is called the qualified two-week jury pool. When there is a trial, the Office instructs a portion of the people in the qualified two-week jury pool to appear at the courthouse for jury selection. From that group, a venire of the size requested by the presiding judge is randomly drawn. Voir dire then occurs, yielding a jury of twelve jurors and two alternates.

Smith contends that, around the time of his trial, Black residents responded to the Jury Office's summonses and questionnaires at lower rates than other groups and thus were underrepresented in the qualified two-week jury pools. In his view, because the jury-selection process allows disparate response rates to affect the composition of the qualified two-week jury pools, the process systematically excludes Black jurors. Smith appears to allege both that the COVID-19 pandemic caused the differential response rate and that the fact of the differential response rate alone suffices regardless of the reason.

Either way, Smith cannot demonstrate the existence of systematic exclusion within the meaning of *Duren*'s third prong. As the Supreme Court explained in *Duren*, the cause of underrepresentation is "systematic" when it is "inherent in the particular jury-selection process utilized." *Id.* at 366. Neither of Smith's theories involves systematic exclusion of that kind.

Smith's first theory involves the COVID-19 pandemic, which of course profoundly affected many aspects of day-to-day life. According to Smith, one of those effects bore on the jury-selection process, in that the pandemic depressed response rates among Black residents, giving rise to nonrepresentative jury pools.

Even assuming the pandemic brought about differential response rates, however, that is not "systematic exclusion" under *Duren*. The pandemic was an exogenous shock rather than something "inherent in the . . . jury-selection process." *Id.* Indeed, Smith acknowledges that the jury-selection process "was carefully calibrated to produce a fair cross-section of the community" and that the COVID-era data "does not resemble" the process's intended results. Defendant's Motion to Dismiss the Indictment at 7, *United States v. Smith*, No. 19-cr-00324 (D.D.C. Oct. 18, 2021).

To the extent Smith's challenge encompasses differential response rates more generally, he still has not shown systematic exclusion in the jury-selection process. Smith alleges that Black residents respond to jury summonses at lower rates than other groups. Even if that is so, the resulting underrepresentation is not "due to [Black residents'] systematic exclusion in the jury-selection process." *Duren*, 439 U.S. at 366. It is instead due to the independent choices of potential jurors—here, choices about whether to respond to a jury

summons. Those sorts of autonomous choices are not "inherent in the particular jury-selection process utilized." *Id.*

In *Duren*, by contrast, the Supreme Court found systematic exclusion of women when the jury-selection process offered certain opportunities to claim exemptions from service only to women and presumed that women (but not men) who failed to respond had claimed exemptions. The resulting underrepresentation was "quite obviously due to the *system* by which juries were selected." *Id.* at 367. That is untrue when underrepresentation results from the independent choices of potential jurors rather than from, as in *Duren*, "the operation of [the jury-selection process's] exemption criteria." *Id.*

Smith also asserts that the Jury Office systematically excludes Black jurors because it fails to follow up on nonresponses or enforce summonses against nonrespondents. But Smith does not explain why Black residents respond at lower rates, why subsequent action by the Office would ameliorate (rather than cement) the disparity, or how many additional steps the Office should be required to take to satisfy the Sixth Amendment. Smith, in other words, has provided insufficient evidence that the Office in fact could remedy the disparities in jury representation by following up on nonresponses or that it would be reasonable to require the Office to do so. In those circumstances, we have no basis to impose an obligation on the Office to take further measures that may or may not mitigate differential response rates or to conclude that the Office's failure to take those measures constitutes systematic exclusion.

For those reasons, we affirm the district court's conclusion that Smith has failed to show a violation of his Sixth Amendment fair cross-section right.

B.

We next consider Smith's challenge to the warrant authorizing the search of his apartment. The Fourth Amendment provides that a warrant must "particularly describ[e] . . . the persons or things to be seized." U.S. Const. amend. IV. The particularity requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). To that end, a warrant with an "indiscriminate sweep" is "constitutionally intolerable." *Stanford v. Texas*, 379 U.S. 476, 486 (1965).

The warrant in this case authorized police to search for and seize "[c]ellular phones, computers, digital storage devices, thumb drives, removable electronic devices such as external hard drives, and the extraction of all electronic data stored inside of them to take place at the residence or a police or court facility, mail matter, any material identifying any resident of the house and to take photographs and sketches of the entire premises, and any items or materials relating to the offense of First Degree Child Sexual Abuse." J.A. 62. Smith contends that the warrant was unconstitutionally overbroad in violation of the Fourth Amendment's particularity requirement.

Smith relies largely on our decision in *United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017). In *Griffith*, we held that a warrant "to search for and seize all electronic devices" (including cellular phones and computers) at a residence was insufficiently particular. *Id.* at 1276–77. The circumstances in *Griffith*, though, differed meaningfully from those here.

In *Griffith*, the warrant affidavit gave no reason to suppose that the suspect owned a cell phone (or other electronic device) at all, and there was also a "limited likelihood that any cell

phone discovered in the apartment would contain incriminating evidence of Griffith's suspected crime." *Id.* at 1272–75. In those circumstances, we held that it was impermissible to issue a warrant granting officers unfettered access to every electronic device in the apartment.

Here, by contrast, police had ample cause to believe that multiple devices containing incriminating evidence would be found in Smith's apartment. Smith's suspected conduct included exchanging sexually abusive text messages and photos with A.S., which undoubtedly involved multiple electronic devices: namely, the cell phones A.S. and Smith used to communicate with each other. *Contra id.* at 1272 (noting that there was "no information about anyone having received a cell phone call or text message from" the suspect). A.S. confirmed as much in her statements to investigators, when she identified multiple phones that she said had been used to carry out the alleged offenses. And the affidavit supporting the warrant incorporated the information provided by A.S. to establish probable cause that Smith's cell phone and A.S.'s cell phone would contain evidence of A.S.'s allegations. Moreover, the affiant relied on her experience investigating child sexual abuse to provide a detailed account of why and how a suspected abuser would use his personal computer and cell phone to perpetrate his offense. *See United States v. Cardoza*, 713 F.3d 656, 661 (D.C. Cir. 2013) (finding probable cause based in part on an affiant's statements drawn from his training and experience).

Given that probable cause already existed for multiple electronic devices in Smith's apartment, police had reason to believe that other devices in the apartment might also contain evidence of the suspected offense. Smith could well have transferred evidence of his conduct onto multiple devices. He might have done so in the normal course of cycling through

devices, or he might have wanted to make backup copies of photos or disperse evidence across multiple devices. Viewed in light of Smith's suspected conduct, the warrant's "sweep" did not "far outstrip[] the police's proffered justification for entering the home." *Griffith*, 867 F.3d at 1276. Rather, the warrant reasonably authorized police to seize a broad set of electronic devices.

Smith, pointing to the fact that A.S. had identified specific phones in her statements to investigators, contends that the warrant should have limited the authorized seizure to those particular phones or that police should have conducted a reasonable investigation into which devices likely contained incriminating evidence. We disagree. A.S. was thirteen years old when she gave her statements to investigators, and she may have been unable to accurately remember and describe which particular devices would be relevant. In addition, she would not have known whether Smith transferred stored photos and other incriminating evidence to other devices. We decline to hold that police officers armed with information that Smith stored evidence of his crimes on phones and personal computers were obligated to strictly conform the parameters of their investigation to the precise information recalled and related by A.S.

In all events, the good-faith exception precludes suppression of the evidence recovered in the search. Under that exception, suppression of evidence is appropriate "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *United States v. Leon*, 468 U.S. 897, 926 (1984). To justify suppression, the affidavit must be "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 923.

The affidavit here does not meet that high bar. The affidavit included A.S.'s detailed descriptions of Smith's sexual abuse, how he used electronic devices to carry out that abuse, and what evidence would likely be found on those devices. The affidavit also contained several paragraphs of information from a detective describing how sex offenders tend to use multiple electronic devices to carry out their crimes. There was thus ample cause for police to believe that multiple electronic devices found in Smith's residence could contain evidence of his suspected abuse. The officers' reliance on the warrant was reasonable.

Smith also argues the warrant was overbroad in that it allegedly did not limit the types of data that could be taken from the seized devices. Without deciding the underlying merits of the claim, we hold that the good-faith exception also precludes that argument. Given the information in the affidavit and the fact that incriminating data was likely to exist in many forms—including text messages, photos, and internet activity—a reasonable officer could have concluded that probable cause existed for the scope of the search.

None of this is to say that the warrant in this case was necessarily a model of particularity. And when officers can draft affidavits with greater particularity, they presumably would do so to avoid a challenge like the one in this case. That challenge fails here because the warrant was constitutionally sufficient.

C.

Finally, we consider Smith's challenges to the courtroom presence and trial testimony of the government's case agent.

We begin with Smith's challenge to the district court's ruling permitting the case agent to remain in the courtroom

during the trial. Because Smith did not preserve his argument that the district court failed to recognize its own inherent authority to exclude the agent, we review for plain error. A legal error is plain only if it is "clear or obvious, rather than subject to reasonable dispute"; "affected the appellant's substantial rights, which in the ordinary case means . . . that it 'affected the outcome of the district court proceedings'"; and "'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (alteration omitted) (quoting *United States v. Olano*, 507 U.S. 725, 734, 736 (1993)).

The district court did not clearly or obviously err in allowing the agent to remain in the courtroom. The district court relied on Federal Rule of Evidence 615, which generally requires courts to exclude witnesses from the courtroom at a party's request. Fed. R. Evid. 615 (Dec. 1, 2011) (amended Dec. 1, 2023). (Although Rule 615 was recently amended, we interpret the version in effect during Smith's trial.) But the Rule "does not authorize excluding" "an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney." *Id.* 615(b) (now located at Rule 615(a)(2)). Accordingly, the government designated the agent as its representative at trial and the court allowed her to remain in the courtroom.

A government case agent fits squarely within the text of Rule 615(b): she is an "officer or employee" of the government, which is "not a natural person." *Id.*; *see* S. Rep. No. 93-1277, at 26 (1974) ("[I]nvestigative agents are within the group specified under the second exception made in the rule . . . ."). Our sister circuits uniformly agree that the government's case agent in a criminal case falls within Rule 615(b)'s exception. *See, e.g.*, *United States v. Dennison*, 73 F.4th 70, 73 (1st Cir. 2023); *United States v. Rivera*, 971 F.2d

876, 889 (2d Cir. 1992); *United States v. Gonzalez*, 918 F.2d 1129, 1137–38 (3d Cir. 1990); *United States v. Parodi*, 703 F.2d 768, 773 (4th Cir. 1983); *United States v. Robles-Pantoja*, 887 F.2d 1250, 1256–57 (5th Cir. 1989); *United States v. Pulley*, 922 F.2d 1283, 1285 (6th Cir. 1991); *United States v. Edwards*, 34 F.4th 570, 585 (7th Cir. 2022); *United States v. Sykes*, 977 F.2d 1242, 1245 (8th Cir. 1992); *United States v. Valencia-Riascos*, 696 F.3d 938, 941 (9th Cir. 2012); *United States v. Avalos*, 506 F.3d 972, 978 (10th Cir. 2007), *vacated on other grounds*, 555 U.S. 1132 (2009); *United States v. Butera*, 677 F.2d 1376, 1380–81 (11th Cir. 1982). And our court has already recognized that Rule 615's exception for designated representatives "appears to cover" the government's case agents. *United States v. Cooper*, 949 F.3d 744, 749 n.4 (D.C. Cir. 2020).

It is true that, while Rule 615(b) "does not authorize excluding" a party's representative, it also does not expressly prohibit courts from excluding the representative. It appears to be an open question in this court whether district courts have discretion to exclude under a source of authority other than Rule 615. *See, e.g.*, *Bradshaw v. Perdue*, 319 F. Supp. 3d 286, 288–89 (D.D.C. 2018) (collecting authorities). Because no binding precedent squarely resolves that question, the district court did not plainly err in allowing the agent to remain in the courtroom. *See United States v. Vizcaino*, 202 F.3d 345, 348 (D.C. Cir. 2000).

Smith also objects to a portion of the agent's testimony at trial. In that testimony, the agent interpreted a report from the program Cellebrite to explain an exchange between A.S. and Smith that police had discovered on Smith's cell phone. After a previous expert witness testified that A.S. sent all the messages in the conversation, the agent sought to clarify which text messages were sent to her and which were sent by her.

Smith contends that the agent was not qualified as an expert and improperly gave that testimony based on specialized knowledge.

Because Smith failed to preserve his argument that the government laid an inadequate foundation for the case agent's expertise, we need not address whether the district court erred in allowing the agent's testimony. No such error would have "affected the outcome of the district court proceedings" in light of the overwhelming evidence against Smith. *See Puckett*, 556 U.S. at 135 (quoting *Olano*, 507 U.S. at 734). If Smith had successfully blocked the agent from testifying based on her knowledge of Cellebrite, he would have prevented only an explanation of who sent and received a handful of text messages. In those messages, A.S. and Smith discussed A.S.'s feeling ill, whether she could leave school early, and her journey home. Regardless of that exchange, there was a vast amount of incriminating evidence of Smith's conduct, including sexually explicit text messages and photos exchanged with A.S. What is more, the messages about A.S.'s illness had already been introduced into evidence by the previous expert witness's testimony; the agent simply added an explanation of which messages were sent by A.S. There thus was no plain error in allowing the government's case agent to testify based on her knowledge of Cellebrite.

* * * * *

For the foregoing reasons, we affirm Smith's convictions.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-3015

September Term, 2023

1:19-cr-00324-BAH-1

Filed On: July 23, 2024 [2065934]

United States of America,

Appellee

v.

Joseph Smith,

Appellant

ORDER

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

EXHIBIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 22-3015.

United States of America,
(Appellee).

V.

Joseph Smith,
(Appellant).

PETITION FOR REHEARING
WITH A SUGGESTION TO
REHEARING EN BANC

Joseph Smith (#70566-007).
United States Penitentiary.
P.O. BOX 24550.
Tucson, AZ. 85734.
(Proceeding in Pro Se).

Related Criminal Case No.: 19-CR-324(BAH).

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Certificate of Interested Persons and disclosure statement.

Pursuant to D.C. Circuit Rule 28(a)(1) Petitioner States:

Parties and Amici.

The parties to this appeal are Appellant- Joseph Smith and appellee the united States of America.

Rulings under Review.

This appeal proceeded from two unpublished orders by the Hon. Beryl A. Howell, United States District Judge, denying Petitioner motion to dismiss the indictment and to suppress evidence. Petitioner also challenged the denial of his motion to exclude government's case agent from the Court room under Fed. R. Evid. Rule 615 and the admission of the agent's lay-opinion, testimony under Fed. R. Evid. Rule 701.

This Petition requests a rehearing of the Panel's decision entered on 07/23/24 and include a Suggestion to Rehearing En Banc.

APPELLANT'S COMBINED REHEARING AND EN BANC STATEMENT

In compliance with Rule 35 and 40 of the Federal Rules of Appellate Procedure, the undersigned expresses a belief, based on a reasoned and studied judgment, that the decision dated 07/23/24 -- attached hereto as Exhibit-'A' , herein after referred to as 'Opinion' -- should be vacated.

A Rehearing is necessary in this case :

(a) To secure uniformity in applying Federal Rules of Evidence Rule 615, 701, and 702 without handing advantage to a party. Because the Panel here has considered them in isolation, which then tilts the scale in Appellee's favor.

(b) Because the Panel has incorrectly applied Standard of Review to Issue III, In case at bar, Fed. R. Crim. P. Rule 51(b) in conjunction with Fed. R. Evid 103 controls not Plain error review under Fed. R. Crim. P. Rule 52.

(c) Finally, in reviewing issue II, the opinion has allowed the law enforcement to reinvent the probable cause while executing the warrant instead of limiting it the scope of the issued warrant.

Apart from the issues above, the appeal here involves questions of such exceptional importance, not just to interested parties, but to the overall trial practice, balancing the adversarial system, and administration of criminal justice in this Circuit, that it is appropriate for the entire court to sit En Banc and decide the issues.

I. Concise statement of issue that merits rehearing or rehearing En Banc.

1. There are three issues that detain issuing the mandate of the Opinion issued by the Panel. They are

(a). During the execution of a search warrant of a dwelling -- where apart from the person of interest, it houses other persons, -- should the scope of warrant remain readily viable for enlargement?

(b). Should a party be allowed to glorify a witness' credibility by first designating him or her as its representative ; allow the witness to learn, acquire, and sharpen the testimony ; and then offer the developed testimony as lay or expert opinion?

(c). When a trial court affirmatively settles a evidentiary dispute raised by a party's trial motion, without further discussion, is the issue preserved by the appeal, or the party is obligated to object seriatim?

II. Course of the proceedings and disposition of the case.

2. On April 19, 2017, then thirteen year old Angelica[1] alleged that Petitioner sexually abused her. App. 207. On April 21, 2017, Metropolitan Police Department Officer, Jenny Alvarenga, applied for a warrant, to search the Petitioner's home. The affidavit in support thereof, recounted Angelica's statements to the forensic interviewer at the Child Advocacy Center in which she recounted the abuse. App. 63-65. The affidavit stated Petitioner's exchange of text and visual depictions exchanges with Angelica. App. 63-64. It provided general characteristics of individuals who engage in child exploitation such as hoarding visuals on their electronic devices.

3. On the same day, DC Superior Court Judge issued the Warrant to search Petitioner's Home and broadly seizing every electronic device known and used by today's citizenry. App: 62. Around 5:25 p.m. the same day, the law-enforcement executed the search warrant. when no one was in the home and seized various electronic devices, gadgets, and including a mattress. App:62. Without further aid of the search warrant, the Department of Forensic Services (DFS) searched the devices and reported the result of its examination on or about May 10, 2017. App:92-94. More than two years later, on May 10, 2019, Petitioner was arrested and charged in the Superior Court of the District of Columbia with one count of First Degree Sexual Abuse and four counts of Misdemeanor Sexual Abuse.

4. Around the same time in the year 2019, out of "abundance of caution" Officer Alvarenga applied for a warrant to search two of the cellular phones that were seized in 2017, a black Motorola and the White and Pink IPhone 6S. App:69, 72-73 at ¶18. However, in comparison to the 3-page affidavit she supported the Warrant back in 2017, this time the warrant application was supported by 18 page detailed affidavit. Comp. App:68-69 with App:63-65. On May 6, 2019 the DC. Superior Court Judge issued the warrant App:67. Executing the warrant resulted in recovery of incriminating text messages and visuals. On 06/17/2019, the grand jury returned a 19 count indictment alleging various Federal and State Child Exploitation Laws. App:5,8.

5. In 2021, forensic examiner Daniel Ogden examined Petitioners Lenovo devices data extracted. There, Iphone's backup were found. App:167, 168-171. Ogden also reviewed text messages and visual depictions on Motorola cellular phone. App:179-80. Each of these evidences were incriminating and the Appellee's intended to present them at trial. Petitioner moved to suppress all of these evidences seized in the 2017 and its resultant extractions in the subsequent two years time frame. Petitioner argued that the warrant was insufficiently particular as to the items to be seized and was overly broad. App:48-58. By a Memorandum Order dated 07/15/2021, the Court denied the Motion. App:101-128. That denial is subject of the underlying appeal and of this Petition.

6. During the trial, Petitioner moved to exclude all the witnesses including the FBI Case Agent Danielle Schnur to prevent learning others testimony and sharpening her own to offer later. App:129-132. A hearing was requested to adequately develop the matter. Without further discussion, in a Minute Order dated 10/9/2021, the trial court denied the Motion based on the exemption found in Fed. R. Evid. 615(b). App:31. This, is also the subject of the underlying appeal and a concern of this Petition.

7. The trial followed and Petitioner was convicted of 10 counts; 9 counts were dismissed. The instant appeal followed where the Petitioner advanced four issues.

(a) Underrepresented Black residents in the jury pool violated the Sixth Amendment ;

(b) Challenge the trial courts denial of his motion to suppress, that violated his Fourth Amendment ;

(c). Trial Court abused its discretion when it denied to exclude case agent from the court room prior to the proffered testimony ; and

(d). The case agent improperly testified as an expert during the trial ;

After the briefing of all parties, on 07/23/2024, an esteemed Panel of this Court affirmed the Petitioner's conviction in accordance with the opinion stating they were not persuaded.

III. Rehearing is required to secure uniformity and to maintain consistent and balanced trial practice.

8. This Petition for rehearing including a suggestion to rehear En Banc submits that the Panel's Opinion was short sighted in several aspects. There is a broader principle that lies beneath the embers of the issues presented and decided by the Panel;. Those principles affect the trial practice, appellate reviews, and administration of the Criminal Justice in this Circuit. These are of such character as to justify the Court to sua sponte rehear in order to secure and maintain uniformity across the Circuit.

A. The Panel has not only overlooked the breadth of Search Warrant but contradicts itself.

i) Overbreadth of the Warrant. is overlooked.

9. When Jenny Alvarenga drafted the search warrant affidavit in support of searching the premise, She surmised that there is sufficient probable cause that a First degree Child Sexual Abuse has been committed in violation of DC-code 22-3008 ; and that the evidence of the crime could be found in the Premise. However, to commit a First degree Child Abuse, a suspect generally do not use modern cellular or electronic devices. The DC-code 22-3008 states in part, " whoever, being at least four years older than a child, engages in a sexual act with that child or causes that child to engage in sexual act shall be imprisoned for ....".

10. Sexual Act is defined in 22-3001, subsection (8). The sub parts (A) through (D) does not include visual depictions of the act, use of cellular devices or any instruments of interstate or foreign commerce that dominate the Federal Child sexual Exploitation Laws. They are far too attenuated to the DC code § 22-3008. It appears as though Alvarenga is servicing Federal laws in the Dc court. The issued warrant authorizes seizing all the electronic devices at the Premise and their searches, Irrespective of who it belongs to. If hypothetically, the home is cohabitated by, either a congressman, Senator, national Security Advisory to the President, Intelligence Agency Personnel, U.S. District Judge, Prosecutor, Federal Public Defender, or others, the warrant could allow search and seizure of those persons electronic devices inflicting a far serious damage in the due course

11. There is no doubt that during the appeal, Petitioner largely relied on the decision in United States v. Griffith 867 F.3d 1265 (D.C. Cir. 2017). Griffith involved gang violence, homicide, and possession of firearm by convicted felon. The Court found that the warrant affidavit gave no reason to suppose that the suspect owned a cellphone or other electronic devices at all. As that there is a "likelihood that any phones discovered in the apartment would contain incriminating evidence of Griffith's suspected crime." Id at 1272-75. In those circumstances, the Griffith Court held that it was impossible to issue a warrant granting officers unfettered access to every electronic device in the apartment.

12. As a result, the Opinion here, distinguished Griffith by considering that the "Police had ample cause to believe that multiple devices containing incriminating evidence would be found in" Petitioner's home See Opinion at 10. However, that is myopic view of the subject matter under the Fourth Amendment. Whether, Petitioner exchanged in sexually charged text messages; created visual depictions of that conduct; in doing so, created cellphone backups, stored them on numerous other devices; those that are routinely used by Professionals, everyday citizens, and Criminals alike is irrelevant to the offense of First Degree Child Sexual Abuse. The numerous innocent and unrelated Persons the warrant nets in the due course is even more concerning.

ii) The Opinion contradicts itself

13. In reviewing Specificity prong of the Warrant, the Opinion Contradicts in two places, which needs reevaluation. First, the Opinion Conveniently credits the childs recall that "she identified multiple phones that she said had been used to carry out the alleged offenses." See Opinion at 10. Later, in deciding the Petitioner's argument as to the breadth of the warrant that sought and authorizes Seizing all electronic devices instead of devices the child identified, the Opinion downplays the childs recollection by observing that the child, "was thirteen years old when she gave her statements to investigators, and she may have been unable to accurately remember and describe which particular device would be relevant." See Opinion at 11. In doing so, the Opinion rationalizes like to a broader geo fenced warrant, within a dwelling. It could become dangerous exercise of Police power.

14. Second, in the very next observation, the Opinion doubles down again. If the child "would not have known whether [Petitioner] transferred stored photos and other incriminating evidence to other devices", it is unclear how, "the police officers [were] armed with information that [the Petitioner] stored evidences of his crimes on phones and personal computers." Opinion at 11. There is no indication that Petitioner had storage devices. If any thing, the police made those conjectures as to "how sex offenders tend to use multiple electronic devices to carry out their crime[]." Id at 12. These are within the meaning of Federal Child Sexual Exploitation laws and not certainly related to DC code § 22-3008. These police tactics squarely and comfortably fit within the "silver platter" doctrine, which the Opinion did not take into account.

15. These contradictions do not serve the challenges of "particularity" aspect of the Fourth Amendment. Granted that these arguments were not advanced in the principal brief, but there is a specific reason why this Court should rehear this argument. In Byars v. United States, a Federal Prohibition officer accompanied local police to search the suspects home. There, the Federal officer found stamps in the suspects home and subsequently, Byars was convicted, despite challenging the validity of search. On the review, the Supreme Court found, a search executed in compliance with State laws does not automatically make it valid under the federal law, in a proceeding in Federal Courts, under Federal Law. 273 U.S. 28, (1927).

16. It advised, a search prosecuted in violation of the Constitution is not made lawful by what it brings to light. Id at 29-30. The Court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. As the Supreme Court has advised, the guarantee of the Fourth Amendment "are to be liberally construed to prevent impairment of the protections extended." Grau v United States 287 U.S. 124, (1932) and cases cited at 128. The Court here is also reminded of the provisions of Bill of Rights and are to be broadly construed and protected against gradual encroachments that seeks to deprive them of their effectiveness. And it is in this relation, with the circumstances discussed above, that the Fourth Amendment's principle of overbreadth, and specificity, particularity, should be emphatically held down. See Grau v. United States, 287 U.S. 124 (1932).

17. The Opinion does not take into account these principles that are heavily implicated here in instant appeal. In as much as the Constitution itself does not provide for the Law-enforcement executing the warrant to reinvent the probable cause, -- beyond the exception of judicial doctrines like exigent circumstances and inevitable discovery, -- the good faith exceptions similarly does not allow the Law-enforcement to resuscitate a non-existent probable cause for Federal law while executing search for State law violations. Undoubtedly, there did not exist good-faith-exception in the minds of framers when the Fourth Amendment was adopted.

18. May be the facts here are obnoxiously repulsive. But the Court here is directed to the unconstitutional practice that should get first purchase, considering even a slightest deviation from lawful practice will mutate new transgressions. A close and literal construction deprives the Fourth Amendment of its efficacy. The Panel's reluctance to adhere to these principles will lead to gradual deprecation, as if it is consistent, more in sound than in substance. In this Petition, the Court is respectfully advised of its duty "to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. [It's] motto should be obsta principiis." Counselman V. Hitchcock 142 U.S. 547, 562 (1892) (citations omitted). It is requested to do so, Sua Sponte whether or not, the Parties in the appeal have advanced such arguments, for it is concerned with upholding the Substance of the United States Constitution.

B. The Panel reads Sequestration under the Rule in isolation.

19. That view is lopsided and does not balance the interests of parties involved. The Third circuit's detailed discussion of authority under the Fed.R.Evid. Rule 615 is relevent here. See Government of Virgin Island V. Edinborough 625 F.2d 472, 476 (3rd Cir 1980). But it does not cover the depth of issues that persists here. However, the substance of its finding and standard of review is. Even though the mandatory language of the rule has changed the prior practice, the trial Court continues to have discretion to determine

whether a witness should be excluded. See Id at 474, 0.4. The Panel's opinion endorses an alternate view and thus, a rehearing with a broader concensus in the form of En Banc setting is appropriate to restore the trial Courts authority.

20. The Panel interprets Rule 615 in isolation, without its substantive interaction with Rules 701 et seq or others. There are two primary school of thought on this interplay. At one extreme, is "broad", and at the other end its "narrow". The proponents of broad view believe that trial court apply Rule 615 overriding any other or even superior to other rules to the exclusion of government's case agent from sequestration. The narrow view demands the trial court to sequester so as to satisfy the primary principle i.e. preventing the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion.

21. As the Panel's Opinion recognises, it is "an open question in this Court whether district courts have discretion to exclude [a witness] under a source of authority other than Rule 615" Opinion at 14 (quoting Broadshaw v. Purdue 319 F.Supp. 3d 286, 288-89 (D.D.C 2018)). On that basis, the Opinion determined that, "[b]ecause no binding precedent squarely resolves that question, the district court did not plainly err in allowing the agent to remain in the Court room." Opinion at 14 (Citations Omitted). It reached that determination rather prematurely, allowing the gaping hole in the trial practice to persist.

22. This Petition proposes that the trial court should take a moderate view on Rule 615 and decide sequestration after common issues have been dealt with in treating the witness's designation in relation to other rules. Such as Rule 701, 702 et seq are implicated here including that of impeachment purposes. Because, trial "Courts have broad discretion to achieve [the goals of sequestration and may make whatever provisions [they deem] necessary to manage trials in the interest of justice ... including the sequestration of witness before, during, and after testimony." Broadshaw 319 F.Supp at 288. These are inherent authority to manage trials. Congress may enact rules, but it may not "infringe -- or authorize judicial councils to infringe -- upon Judge's trial management authority in any manner it sees fit" McBride v.

Comm. 264 F.3d 52, 79 (2001 D.C. Cir).

23. The Panel's view aligns with the broader view that allows one party exalting needs to manage its case against impeaching interests of the other Prosecutors call witnesses including lay opinions to prove their cases all the time to help convince the jury that the defendant is guilty as charged or that the evidence is reliable Thus, it must follow, that there must be some limitation on the sort of "help" a government witness must provide. The vital interest is to prevent the witness from usurping the jury's fact-finding function by summarizing or describing not only what is in the evidence but also what inferences should be drawn from the evidence. At the other end, the court must guard against the danger that the jury will treat the testimony itself as additional evidence or as corroborative of the truth. The witness testimony at issue here, has blurred all these lines.

24. While making the sequestration the trial court should be guided by the appearance of bias, neutrality, and credibility interplayed with witness' ability to taylor the testimony accordingly when time comes to testify. When the government has abundant pool of officers to manage their case presentation, or to choose the "help" from, why should an advantage be granted that it designate such witness whom it has chosen to also designate as expert, lay, or summary witness? Doing so will disadvantage the defense in attempts to impeach, or exacting flaws in the government's case. These issues or concerns did not feature in the Panel's opinion. Because, there is a larger principle lurking behind the trial court decision, that has not seen the light. The appropriate standard of Review intertwined with inability to object or create factual record for.

C. The Panel has applied incorrect Standard of Review on an incomplete record.

i) The burden shared by parties in sequestration cases.

25. To recapitulate, under Fed. R. Evid Rule 615, the prior practice and sequestration is granted upon request. First, the party desiring sequestration should be given an opportunity to show why sequestration is needed. A party who believes that the presence of the witness is "essential" must bear the burden of supporting that assertion and showing why the policy of the rule in favor of automatic sequestration is inapplicable in that situation. The prosecution here, may not simply point to Rule 615 (a)(2) to satisfy the burden. It must overcome the assumption that the possibility of case agent shaping the testimony to match that given by other witnesses at trial, does not exist. the proponent of the sequestration should be afforded an opportunity to rebut the opponents burden. Based upon these demonstrations, finally, the trial court should explicate the factors it if sequestration is denied this record, is then appropriate for the reviewing court to assess whether or not the trial court abused its discretion. That, did not occur in the court below.

26. The issue comes to this Court based on an abbreviated, rather a barren record of denial in a minute order. This Court has no way of knowing ; who exercised what burdens and was that sufficient ; did the presence allow the prosecution to cogently cure its deficiency ; did the presence affect defense's ability to impeach the witness or poke holes in the government case ; or, was the jury swayed one way or the other, due to the unfairness. Simply put, the record is incomplete as to the burden discharged by the parties and the reasons for trial courts denial, except pointing at specific provision under Rule 615.

ii) Under the Circumstances, abuse of Discretion under Rule 51(b) is the proper Standard of Review.

27. The Supreme Court has held that at least in civil context, challenges to evidentiary rulings are governed by both Rules of Evidence 103 and Fed. R. Civ. P. 46. The civil rule directly corresponds to Fed. R. Crim. P. Rule 51, which likewise requires a party objecting to a ruling to state the grounds for the said objection. See Beech Aircraft Corp. v. Rainey 488 U.S 153, 177, n. 22 (1988). There is no reason why the standard should be any different in criminal context See Fed. R. Crim. P. 51 advisory comm. notes (1944) ("The rule is practically identical with Rule 46 of the Federal Rules of Civil Procedure . . . It relates to a matter of trial practice which should be same in civil and criminal cases in the interest of avoiding confusion.")

28. Petitioner properly preserved the issue for appeal by making a pre-trial motion to sequester the case agent, prevent expert testimony of the case agent and for inadequate foundation during trial. He obtained a definitive ruling as to the admissibility of the evidence and to an exception for sequestration. See Rule 51(b), and Fed. R. Evid. 103(a), (b). Once the Court ruled on that matter, defence counsel was not obligated to lodge seriatim or post ruling objections to preserve the issue for appeal. See Fed. R. Crim. P. 51(b). More significantly, Petitioner had no other opportunity to object to the decision. Rule 51(b) is abundantly clear in that aspect, "if a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party". A ruling or order that admits or excludes evidence is governed by Fed. R. Evid. 103." See Fed. R. Crim. P. Rule 51(b).

29. The law is explained in this Circuit in United States v. Locke 664 F.3d 353 (D.C. Cir. 2011). A "more demanding plain error standard of review applies where a defendant fails to raise a claim at hearing, unless the defendant was given no opportunity to object." Id at 357. The Opinion has applied incorrectly apprehended the facts in question here and applied an incorrect standard. In the alternate, it does not provide what more the Petitioner should have

done to properly preserve the error for appeal. Under the circumstances, the Panel's Opinion Creates needless conflicts and confusions to prevail in the trial practice and of review on the Appeal thus, satisfies the needs for rehearing at this time.

IV. Conclusion.

30. There must remain no doubt that a prisoner, untrained in law proceeding pro se, is any match to a formally trained professional. This hand drafted Petition with spelling and gramatical errors is one example that apart, just because a prisoner has set forth issues, does not, in itself makes their issues, any less, frivolous, or even frivolous. The issues set forth here will bear critical impact on the fairness, public trust in trial judicial proceedings, and uniformity in the Circuit. Absent express consideration by this Court, they will blossom into unfair adversary settings and the Protections Offered by the bill of right will ring hollow. This court has the authority to, and is respectfully requested to exercise it. The Opinion should be vacated, and the issues overlooked be reheard anew with the invitation of the entire court.

V. Timeliness of the Petition.

31. The Panel entered its decision on the 07/23/24. The mandate is set to issue on the 45th day i.e. 09/06/2024, if a timely petition to rehearing is not filed, See FRAP 41. As indicated on the Certificate of Service, this Petition mailed under the Prison Mailbox Rule, is deemed as filed timely.

VI. Record on Motion.

32. This Petition is based on: (i) This document; (ii) the Certificate of Service; (iii) the attached exhibit; (iv) All the papers already on the record; and (v) Any other record developed during the hearing of this Petition.

Respectfully Submitted,

Joseph Smith

Date Executed: 09/04/2024. By: Joseph Smith.

Certificate of Compliance

With the tools available at my disposal, I hereby certify that I have reasonably and in good faith discharged my duties, and this petition is compliant with Fed. R. App. P. 35(b)(2)(B) and 40(b)(2).

Certificate of Service

On the 5th day of September, 2024, I deposited the foregoing motion, under the Prison Mailbox Rule, for it to be delivered to the clerk of court.

When the clerk docketh the motion, all the interested parties will be served by the notification of CM/ECF system.

I SWEAR, AFFIRM, and CERTIFY, that the foregoing is true and correct to the best of my knowledge and is provided under the penalty of perjury according to the laws of United States See 28 U.S.C. § 1746.

Joseph Smith

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