No. 25-_____

In the Supreme Court of the United States

DANIEL J. GRIFFIN,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 19, 2026
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QUESTIONS PRESENTED

1. Whether Federal Rule of Criminal Procedure 12(b)(3), requires a defendant to raise pretrial, or show good cause, an "as applied" constitutional Fifth Amendment due process vagueness challenge without consideration of whether the challenge was then reasonably available and could have been determined without a trial on the merits.

2. Whether the Fifth Amendment due process prohibition against "as applied" vagueness required the appellate panel herein to reverse the trial court's denial of a Rule 29 motion for judgment of acquittal at the close of the government's case alleging fraud under 18 U.S.C. § 371, 18 U.S.C. § 666, and 18 U.S.C. § 1343, based on allegations that your petitioner misreported overtime hours where the evidence was insufficient to reveal any federal, state, department, or unit law, regulation, policy, or rule requiring anyone to report federal traffic safety program grant overtime hour-for-hour, and where the traffic safety unit's historical practice and the department's written documents authorized traffic safety program grant overtime and other types of overtime paid in four- and eight-hour minimum blocks.

3. Whether Federal Rule of Criminal Procedure 12(b)(3) requires a defendant to raise pretrial, or show good cause, an "as applied" constitutional Fifth Amendment due process vagueness challenge without consideration of whether the challenge was then reasonably available and could have been determined without a trial on the merits.

PARTIES TO THE PROCEEDING

Petitioner and Defendant-Appellant below

- Daniel J. Griffin

Respondent and Appellee below

- United States of America

Respondent and Defendant-Appellant below

- William W. Robertson

LIST OF PROCEEDINGS

U.S. Court of Appeals for the First Circuit

Nos. 24-1540, 24-1541, consolidated with 24-1475

United States of America, *Appellee,* v.
Daniel J. Griffin et al., *Defendants, Appellants.*

Final Opinion and Judgment: December 19, 2025

U.S. District Court for the District of Massachusetts

No. 1:20-cr-10319-MRG

United States of America, *Appellee,* v.
Daniel J. Griffin, *Defendants, Appellants.*

Final Judgment: May 10, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF CONTENTS (Cont.)

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OTHER DOCUMENT

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

OPINIONS BELOW

Petitioner Daniel J. Griffin herein petitions for the issuance of a Writ of Certiorari to review the Opinion of the U.S. Court of Appeals for the First Circuit, dated December 19, 2025, which is included at App.1a. The Judgment of the U.S. District Court for the District of Massachusetts, dated May 10, 2024, is included at App.87a.

JURISDICTION

The final judgment of the First Circuit was entered on December 19, 2025. (App.1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

JUDICIAL PROCEDURAL RULES

Fed R. Crim. P. 12(B)(3).
Pleadings and Pretrial Motions

(b) Pretrial Motions.

(3) Motions That Must Be Made Before Trial. The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a motion alleging a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment or information; including;

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14; and

(E) discovery under Rule 16.

Fed R. Crim. P. 29.
Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any

offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) *Ruling on the Motion.* If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the

jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) *Motion for a New Trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) *Finality.* The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

STATEMENT OF THE CASE

Your Petitioner joined the Massachusetts State Police ("MSP") in 1986. In 2008, he was promoted to Sergeant of the Traffic Programs Section ("TPS"), a unit under the TPS commander at the time, Lt. Steve Walsh. TPS was the MSP division that applied for annual grants from the U.S. Department of Transportation for various traffic safety initiatives. In 2011, your Petitioner was promoted to Lieutenant and replaced Walsh at TPS, and supervised TPS until 2019. On December 10, 2020, your Petitioner was federally indicted for fraudulently reporting overtime, charged with violating 18 U.S.C. Sections 371, 666, and 1343, and other counts.

At trial, the government asserted that your Petitioner committed "theft" of federal funds primarily by not working hour-for-hour the four--and eight-hour overtime shifts. The government attempted to carry its burden of proving fair notice to your Appellant that the four--and eight-hour overtime shifts had to be worked hour-for-hour by stitching together a collage of different rules and regulations it claimed created such a standard for federally funded overtime shifts. The government relied on small pieces of a Collective Bargaining Agreement ("CBA"), several internal MSP Division Commander Orders ("DCO"), Interdepartmental Service Agreements ("ISA"), internal MSP Rules of Conduct, and a General Order from MSP regarding citations.

However, the evidence at trial demonstrated that the MSP had a longstanding practice of being paid in

blocks of time whether or not the full amount of time was actually worked. The CBA set forth at least three categories of assignment that paid in four-hour minimum block regardless of the amount of time worked: (1) court appearances; (2) recall to duty, and (3) paid details (voluntary, off-duty extra assignments). In addition, four of the government witnesses testified that it was a longstanding practice of the TPS that once grant objectives had been accomplished, the shift ended, regardless of the amount of time actually worked at that point.

At the close of the government's case, your Petitioner moved for a judgment of acquittal, based in part on a constitutional "as applied" vagueness challenge that he did not have fair notice that the government would consider the longstanding TPS practice of reporting overtime in four--and eight-hour minimum blocks a crime of fraud. The court denied his motion. He renewed his motion at the close of all of the evidence. It was denied.

The jury found your Appellant guilty on each count submitted to the jury, all of which involved TPS overtime billing (your Appellant had previously pled guilty to the remaining counts). Your Petitioner renewed his motion for a judgment of acquittal, and it was denied. The district court gave no explanation as to the basis of its denials of his constitutional "as applied" vagueness challenges.

REASONS FOR GRANTING THE PETITION

I. The Appellate Panel Herein Entered a Decision in Conflict with the Decisions of Other United States Court of Appeals Decisions or the United States Supreme Court on the Same Important Matter

A. The Appellate Panel Ruled That Fed. R. Crim. P. 12(B)(3) Required Your Petitioner to Raise His Constitutional as Applied Vagueness Challenge in a Pretrial Motion, or Show Good Cause, in Order to Preserve the Issue on Appeal, Without First Considering If Your Petitioner's Challenge Was Then Reasonably Available and Could Be Determined Without a Trial on the Merits

The appellate panel refused to consider the merits of your Petitioner's Fifth Amendment Due Process constitutional as applied vagueness claim, denying it solely on procedural grounds. The panel's decision states that your Petitioner argued that he did not have "fair notice that billing four—and eight-hour blocks (rather than hour-by-hour) was fraud under the wire fraud and federal program theft fraud statutes . . . " (App.14a). It concluded, "But we don't need to tarry long over this argument because, as the government correctly points out, [your Petitioner lost his] chance to pursue this constitutional claim by raising it too late. . . . [The constitutional challenge] didn't surface until mid-trial at the close of the government's case." App.14a.

The panel reasoned,

> According the government, Federal Rule of Criminal Procedure 12(b)(3) tells us how to think about this one. . . . So we first ask, does [the Petitioner's] vagueness argument fall within the purview of Rule 12(b)(3)? There are some reasons to think that it does, though the First Circuit has not had occasion to squarely address [your Petitioner's] particular challenge. *See United States v. Seuss*, 474 F.2d 385, 387 n.2 (1st Cir. 1973) (explaining that an unconstitutional vagueness claim constitutes a "defense of failure of an indictment to charge an offense" under an older version of Rule 12).

Appellate Panel Opinion at App.14a-15a.

Without any discussion of either of Rule 12(b)(3)'s two preconditions (if his challenge was then reasonably available and can be determined without a trial on the merits), the appellate panel concluded, "that Rule 12(b)(3) applies to" your Petitioner's constitutional as applied vagueness challenge. It cited *Seuss*, *supra.*, *United States v. Cardona,* 88 F. 4th 69, 77 n.6 (1st Cir. 2023), and *United States v. Turner*, 124 F.4th 69, 77 (1st Cir. 2024). It further reasoned that, because your Petitioner did not file a reply brief contesting the government's position, Rule 12(b)(3) required his challenge to have been made pretrial. The only authority it cited to support this notion was *Cardona*, *supra.* (noting that Cardona didn't dispute Rule 12(b)(3)'s application, and therefore your Petitioner had likewise waived his claim). However, Cardona had conceded Rule 12(b)(3)'s application due to Cardona's vagueness claim being a facial claim, not an "as applied" claim). The appellate

panel's decision should have discussed this crucial fact. App. 12/19/25 Opinion, App.16a-17a.

B. Appellate Courts in Two Other Circuits Have Rendered Similar Decisions: the Fourth and the Tenth Circuits

See United States v. Pittman, 126 F.4th 527, 2025 U.S. App. LEXIS 656 at *5-6; 2025 LX 171779 (4th Cir. 2024); and *United States v. Herrera*, 51 F. 4th 1226; 2022 U.S. App LEXIS 29999 at *105-107 (10th Cir. 2022) (ironically, it is the Tenth Circuit, in *United States v. Pope*, 613 F.3d 1255; 2010 U.S. App LEXIS 15236 at *8-15 (10th Cir. 2010) that provides one of the best rationales in support of an "as applied" vagueness challenge not being appropriate for a pretrial motion.)

C. Appellate Courts in Four Other Circuits Have Rendered Decisions in Conflict with the Appellate Panel's Decision: the Sixth, Seventh, Eighth, and Ninth Circuits

In *United States v. Hofstetter*, 31 F.4th 396; 2022 U.S. App. LEXIS 9621 at *11; 2022 FED App. 0071P (6th Cir. 2022), despite the fact that the defendant did not raise the challenge before the district court, the appellate court considered the merits of the defendant's constitutional as applied vagueness challenge, and held, "There is no as-applied vagueness when a statute furnishes fair notice that a defendant's conduct, if proven at trial, is proscribed. . . . Here, the jury concluded that the defendants knowingly used the clinic to distribute controlled substances illegally, and there was sufficient evidence to support that conclusion."

In *United States v. Rathburn*, 771 Fed. Appx. 614; 2019 U.S. App. LEXIS 13752 at *15 and n. 8; 2019 FED

App. 0247N (6th Cir. 2019), the court found that Rule 12(b)(3) did not create a waiver where the defendant did not raise his constitutional as applied vagueness claim pretrial, and stated that the Sixth Circuit reviews "de novo whether a criminal statute is unconstitutionally vague."

In the Sixth Circuit, consistent with its appellate decisions, in *United States v. Pascoe*, 3:22-CR-88-DJH; 2025 U.S. Dist. LEXIS 26170, at *27-28; 2025 LX 168513 (W.D. Ky. Feb. 13, 2025), the court declined to decide a pretrial constitutional as applied vagueness challenge, finding that it was premature. It stated, "To properly determine whether the technical-data licensing requirements were unconstitutionally vague as applied to the Defendants, the Court must consider the evidence to be presented at trial. . . . *United States v. Kettles*, No. CR 3:16-00163-1, 2017 U.S. Dist. LEXIS 73592, 2017 WL 2080181, at *3 (M.D. Tenn. May 15, 2017)(explaining that the challenge was premature because "the court cannot determine the nature and extent of [the defendant's] conduct in this case and, therefore, also cannot determine whether [the law] is void for vagueness as applied to that conduct"); *United States v. Carpenter*, No. 3:21-CR-38-KAC-DCP, 2022 U.S. Dist. LEXIS 220562, 2022 WL 17834330, at *12 (E.D. Tenn. Aug. 25, 2022), report and recommendation adopted, No. 3:21-CR-38-KAC-DCP, 2022 U.S. Dist. LEXIS 219628, 2022 WL 17450713 (E.D. Tenn. Dec. 6, 2022)(collecting cases); *United States v. United Mem. Hosp.*, No. 1:01CR238, 2002 U.S. Dist. LEXIS 13713, 2002 WL 33001119, at *4 (W.D. Mich. July 23, 2002)(holding that a "pre-trial challenge to the vagueness of the federal statutes at issue is premature and

should be raised, if at all, under Federal Rule of Criminal Procedure 29")."

In *United States v. Yasak*, 884 F.2d 996; 1989 U.S. App. LEXIS *n. 3 (7th Cir. 1989, the court stated that the defendant's pretrial motion was premature because it involved factual questions on the ultimate issue in the case, and that it shouldn't be determined "without trial of the general issue." It further stated, "A defense generally is capable of determination before trial if it involves questions of law rather than fact. If the pretrial claim is substantially intertwined with the evidence concerning the alleged offense" it should not be determined pretrial (citing *United States v. Covington*, 395 U.S. 57, 60, 23 L. Ed. 2d 94, 89 S. Ct. 1559 (1969)).

In the Seventh Circuit, consistent with its appellate decisions, in *United States v. Collins*, 625 F. Supp. 3d 774, 2022 U.S. Dist. LEXIS 159579 (N.D. Ill. Sept. 4. 2022), the court held that the issue of whether an issue can be determined without a trial on the merits is a "high bar: an issue is only "capable of determination [by a pretrial motion] if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining" the issue." [citing *Covington, supra.*]."

In *United States v. Turner*, 842 F.3d 602, 604; 2016 U.S. App. LEXIS 20913 (8th Cir. 2016), the court ruled, "Here, the district court could not rule on *Turner*'s as applied constitutional challenge without resolving factual issues related to his alleged offense . . . therefore the court should have deferred ruling until trial. The court's premature ruling prejudiced *Turner*'s ability to obtain appellate review of his constitutional [as applied vagueness] challenge . . ."

In *United States v. Kirst*, 54 F.4th 610; 2022 U.S. App. LEXIS 32220 at *45-49 (9th Cir. 2022), the court stated, "The particular rule that the government invokes here is Rule 12(b)(3), which states that a "defect in the indictment" on grounds of "failure to state an offense" must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits. . . . This rule has no application here, because *Kirst* is not asserting, or seeking relief for, any defect in the indictment. Rather, he is asserting that, at his criminal trial, the government failed to present sufficient evidence to establish each element of [charge] for which he was tried. . . . [The loss of the right] to challenge a "defect in the indictment" does not somehow mean that the defendant is deprived of other rights conferred by the federal rules or the Constitution . . . [T]he Constitution . . . unsurprisingly give[s] a defendant multiple opportunities to contest [not merely by pretrial motion]."

In the Ninth Circuit, consistent with its appellate decisions, in *United States v. Kaneshiro*, CR. NO. 22-00048; 2023 U.S. Dist. LEXIS 77538 at *16 (D. Hawaii May 2, 2023), the court declined to decide a constitutional as applied vagueness challenge pretrial "[b]ecause factual determinations made at trial may inform the court's decision on whether [the charged statute] is unconstitutionally vague as applied to" the defendant.

D. The United States Supreme Court's Decision Contain Several Principles in Conflict with the Appellate Panel's Decision Herein

In *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. ___, 200 L. Ed. 549, 2018 U.S. LEXIS 2497 at *14-15

(2018), this Court stated, ""The prohibition of vagueness in criminal statutes," our decision in *Johnson* explained, is an "essential" of due process, required by both "ordinary notions of fair play and the settled rules of law." 576 U.S. at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 291, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have "fair notice" of the conduct a statute proscribes."

The appellate panel's decision does not respect ordinary notions of fair play and fair notice. It did not consider whether or not an ordinary person would know that "fraud" in the charged statutes would apply to the conduct of your Petitioner. It did not consider whether or not a determination of a vagueness challenge could be made without a trial on the merits. The evidence at trial revealed that your Petitioner's conduct was a product of decades long accepted practice within the Traffic Programs Section unit, that the outgoing unit commander trained your Petitioner to manage the unit's overtime labor in four—and eight-hour minimum blocks, and that statewide department practices included four—and eight-hour minimum overtime blocks for other types of work (*e.g.* court appearances).

In *Papachristou v. Jacksonville*, 405 U.S. 156, 31 L. Ed. 2d 110, 115, 92 S.Ct. 839 (1972), this Court quoted from *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 83 L. Ed. 888, 890, 59 S.Ct. 618 (1939), stating, "Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids.""

The appellate panel's decision refuses to consider the merits of a vagueness claim based on this supposition. One cannot know what the government considers "fraud" in every situation. In order for one's conduct to conform to the law, one must know what the law "commands or forbids." Your Petitioner had no way of knowing that decades-old unit overtime billing practices were forbidden as criminal fraud. There were no statutes, regulations, policies, or rules published at any time during his tenure with the Massachusetts State Police that would have informed him or anyone else that widely accepted overtime billing practices in four—and eight-hour minimum blocks amounted to criminal fraud.

Also notable is this Court's statement in *United States v. Covington*, 395 U.S. 57, 23 L.Ed 2d 94, 102, 89 S.Ct. 1559 (1972), "[Rule]12(b)(1) states that: "Any defense . . . which is capable of determination without the trial of the general issue may be raised before trial by motion." A defense is thus "capable of determination" if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense."

II. The Appellate Panel Herein Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Supervisory Power

A. The Appellate Panel Has Completely Ignored the Two Preconditions Contained in Rule 12(B)(3) That Require Matters to Be Raised by Pretrial Motion Only "If the Basis for the Motion Is Then Reasonably Available and the Motion Can Be Determined Without a Trial on the Merits"

In a document that reads more like a manuscript for a drama than a well-reasoned judicial opinion, the appellate panel's decision entirely failed to consider the application of either of the two preconditions contained in Rule 12(b)(3). It did not ask or answer the question of whether or not your Petitioner's as applied vagueness challenge was reasonably available pretrial, nor whether or not such a challenge could be determined without a trial on the merits. First Circuit Opinion, App.14a-17a.

Instead, the appellate panel focused on *Seuss*, *supra.*, *Cardona*, *supra*, and *Turner*, *supra*, to find that Rule 12(b)(3)'s phrase "failure of an indictment to charge an offense" included "an unconstitutional vagueness claim" as well as other "constitutional (but not jurisdictional) attacks," and to find that your Petitioner's election to forego his option of filing a Reply Brief (thus not responding to the government's spurious argument that Rule 12(b)(3) barred a decision on the merits on appeal without any consideration of either of its two preconditions) allowed the appellate panel

to "assume" that your Petitioner's constitutional as applied vagueness claim "is covered by [Rule 12(b)(3)]." First Circuit Opinion, App.16a.

Your Petitioner can find no authority to support an appellate court making a reasoned judicial decision by assumption.

Finally, after assuming that Rule 12(b)(3) applied to bar appellate review of the merits of your Petitioner's constitutional claim, the appellate panel discussed the "good cause" provision in Rule 12. It found that your Petitioner had not made a showing of good cause. Of course, a good cause analysis is only applicable where a matter was required to be raised pretrial in the first place. Without addressing the two preconditions in Rule 12(b)(3), the appellate panel ended up with a seriously flawed decision on its analysis of your Petitioner's constitutional as applied vagueness challenge.

Other decisions by the appellate court in the First Circuit also fail to consider the application of either of the two preconditions contained in Rule 12.

Seuss, *supra*, does not discuss either precondition. The appellate panel only used it to support the conclusion that the phrase "failure of an indictment to charge an offense" included "the claim that the statute apparently creating the offense is unconstitutional. 8 Moore's Federal Practice para. 12.03[2]." *Seuss*, *supra*, n. 2.

The court, in *Cardona*, *supra*, at *11 and n. 6, considered a constitutional facial vagueness challenge ("Cardona admits that his constitutional attack is a facial attack.") The court noted, "*Cardona* does not dispute that Rule 12(b)(3) applies to his vagueness claim, and so we assume that his motion is covered by

that provision." The appellate panel herein chose to use this quote from *Cardona, supra*, without making mention that Cardona had admitted that his challenge was a facial attack on the constitutionality of the statute of conviction.

A majority of courts routinely rule that a constitutional facial attack can be resolved by pretrial motion while an "as applied" challenge generally cannot. *See, e.g., United States v. Bagayoko*, 2025 U.S. Dist. LEXIS 64503; 2025 LX 28446 at * 9-10 (D. Md. Apr. 4, 2025); *United States v. Bell*, 2017 U.S. Dist. LEXIS 62616 at *11-14 (D. Ks. Apr. 25, 2017).

The court in *Turner, supra*, at *9-10 and n. 4, considered a constitutional Second Amendment challenge to 18 U.S.C. Section 922(g)(1). The court noted that Turner first raised his constitutional challenge at sentencing after entering his guilty plea. It discussed whether or not his constitutional challenge fell within the scope of the phrase "failure to state an offense," and it mentioned the two preconditions of Rule 12(b)(3) in relation to *United States v. Crooker*, 688 F.3d 1, 10 (1st Cir. 2012), but failed to discuss whether either precondition applied to *Turner*. It's discussion turned on resolving the question of whether or not *Turner*'s challenge was jurisdictional (falling within the scope of Rule 12(b)(2)) or not. It is notable that Turner did not raise his constitutional challenge under Rule 29 at any time in the proceedings. It appears that Turner made an "as applied" challenge, and that the court refused to consider the merits of his challenge, citing *Cardona, supra*, at 77-78, and *Herrera, supra*, at 1282-85" (applying Rule 12(b)(3) to facial and as-applied challenges . . .)"

The court in *United States v. Zhen Zhou Wu*, 711 F.3d 1; 2013 U.S. App. LEXIS 5417 at *24; 92 A.L.R. Fed. 2d 765 (1st Cir. 2013), stated, "Outside the First Amendment context, we consider "whether a statute is vague as applied to the particular facts at issue . . ."

In the Second, Third, Fifth, and Eleventh Circuits, the district court opinions that address this question side with the majority of the Circuit appellate decisions (those in the Sixth, Seventh, Eighth, and Ninth).

In the Second Circuit, in *United States v. Pereira-Bueno*, 2025 U.S. Dist. LEXIS 140333, 2025 LX 216203 (S.D.N.Y. July 23, 2025), the district court declined to determine a constitutional as applied vagueness challenge pretrial, stating, "While courts do occasionally find the application of a statute to particular facts unconstitutionally vague, such analysis is generally undertaken after the factual record is developed. "Given the focus on factual specificity, a defendant's vagueness-as-applied challenge is often premature at the indictment stage." *United States v. Eisenberg*, No. 23-CR-10, 2024 U.S. Dist. LEXIS 225952, 2023 WL 8720295, at *6 (S.D.N.Y. Dec. 18, 2023)." (cleaned up).

In the Second Circuit, in *United States v. Schwartzman, et al.*, 722 F. Sup. 3d 276; 2024 U.S. Dist. LEXIS 50597 (S.D.N.Y. Mar. 20, 2024), the district court stated that had the defendant brought his as applied vagueness challenge pretrial, "the Court would have denied it as premature. An implicit requirement of the vagueness test is that is must be clear what the defendant did. Consequently, the "Court requires full factual development at trial before it can determine whether the relevant statutes failed to provide Defendant fair warning that his conduct was prohibited by law, as required by the Due Process Clause." *United States v.*

Phillips, 690 F. Sup. 3d 268, 2023 U.S. Dist.. LEXIS 155436, 2023 WL 5671227, at *13 (S.D.N.Y. Sept. 1, 2023). *See also . . . United States v. Hoskins*, 73 F. Sup. 3d 154, 166-167 (D. Conn. 2014); *United States v. Milani*, 739 F. Sup. 216, 217 (S.D.N.Y. 1990)("In the absence of a plenary trial record this Court is unable to rule on whether the statute is impermissibly vague as applied to defendant")." (cleaned up)

In the Third Circuit, in *United States v. Willis*, 2015 U.S. Dist. LEXIS 77474; 66 V.I. 754 (D.V.I. June, 15, 2015), the district court considered the merits of an applied vagueness challenge raised in the defendant's Rule 29 motion.

In the Fifth Circuit, in *United States v. Bennett*, 2024 U.S. Dist. LEXIS 4403 (E.D. Tx. Jan. 9, 2024), the district court considered the defendant's constitutional as applied vagueness challenge post-trial on the merits without mention of Rule 12(b)(3).

In the Eleventh Circuit, in *United States v. Moulton*, 24-cr-14031; 2024 U.S. Dist. LEXIS 227035 at *9-10; 2024 LX 84401 (S.D. Fla. Nov. 13, 2024), the district court stated, "As applied challenges to unconstitutional vagueness should not be brought by way of a motion to dismiss. *See United States v. Ferguson*, 142 F. Supp. 2d 1350, 1355 (S.D. Fla. 2000)(rejecting as-applied challenge as premature at the motion-to-dismiss stage). Rather, such challenges "should properly be raised through a Rule 29 motion for judgment of acquittal, when the Court can assess whether a reasonable person would have understood that the conduct adduced to prove the offenses was prohibited by [the statute]." *id.*; *see also United States v. Woods*, 730 F. Sup. 2d 1354, 1364, n. 3 (S.D. Ga. 2010)("Rather, such a challenge is more appropriately brought at trial by way of a Rule

29 motion for judgment of acquittal (after the government has presented its case-in-chief or after close of all of the evidence)") . . . The Motion should therefore be denied as premature."

B. The Appellate Panel Herein Ruled That It "Need Not Resolve the Question Definitively Today Given That . . . [Your Petitioner] Chose Not to File a Reply Brief . . . [Contesting] the Government's Position, Expressly Raised in Its Appellee Brief, That Rule 12(B)(3) Applies to [the Constitutional Claim Being Raised by Your Petitioner]"

The appellate panel decided that it "need not resolve the question definitively" because your Petitioner "chose not to file a reply brief" contesting the argument first raised in the proceedings by the government in its Appellee Brief on appeal, "that Rule 12(b)(3) applies to" the constitutional as applied vagueness challenge raised by your Petitioner in his Rule 29 motion for judgment of acquittal after the close of the government's case.

The appellate panel cited only one authority as the basis for this portion of its decision: "*See [United States v.] Cardona*, 88 F. 4th [69] at 77-78 ("Cardona does not dispute that Rule 12(b)(3) applies to his vagueness claim, and so we assume that his motion is covered by that provision." (collecting cases)); [*United States v.] Turner*, 124 F. 4th [69] at 77. But *Cardona* had agreed that Rule 12(b)(3) applied to his vagueness claim, and made that concession because his vagueness claim was facial, not "as applied." *See Cardona*, 88 F. 4th at 77.

A majority of courts routinely rule that a constitutional facial attack can be resolved by pretrial motion, while an "as applied" challenge generally cannot. *See, e.g., Bagayoko, supra.; Bell, supra.*

Your Petitioner cannot find any authority to support this portion of the appellate panel's decision. Rule 28(c) clearly states that a Reply Brief is not required, and the "assume" rule the appellate panel adopted is unsupported by the law.

Your Petitioner has found several authority in conflict with the appellate panel's decision on this point. The Tenth Circuit, for example, in *United States v. Jenkins*, 819 Fed. Appx. 651; 2020 U.S. App. LEXIS 21390 at *26 (10th Cir. 2020), stated, "Jenkins chose not to file a reply brief. Thus, *Jenkins* was waived any nonobvious responses to the government's . . . analysis, and we see no obvious flaws in the government's reasoning. Likewise, we see no obvious rejoinders to or errors in the government's [other] analysis."

The difference between the approach of the Tenth Circuit and the approach taken by the appellate panel herein is striking. The Tenth Circuit reasoned that the appellant's election to not file a reply brief only "waived any nonobvious responses" to the government's arguments made in its appellate brief. It then considered whether there were any obvious responses, obvious flaws, obvious rejoinders, or obvious errors, before agreeing with the government's arguments. The appellate panel herein, however, quoted from *Cardona, supra*, out of context (failing to note that Cardona had conceded that Rule 12(b)(3) applies to his facial attack), and adopted the word "assume" from the opinion in *Cardona, supra*, as if it were black letter law. The appellate panel herein made no effort to consider

whether or not there were any obvious responses, flaws, rejoinders, or errors in the government's Rule 12(b)(3) argument that it had never raised in the trial court below. Had the appellate panel made an effort to consider the obvious responses, flaws, rejoinders, and errors in the government's Rule 12(b)(3) argument, it would have given reasoned consideration to whether or not either precondition within Rule 12(b)(3) may apply to your Petitioner's constitutional as applied vagueness challenge. This, especially in light of the fact that a majority of courts considering this question generally find it premature to consider the merits of an as applied vagueness challenge pretrial because, in most cases, it "cannot Be Determined Without a Trial on the Merits."

III. The Appellate Panel Herein Has Decided an Important Question of Federal Law That Has Not Been, but Should Be Settled by This Court

1. The appellate panel has decided that the phrase "failure to state an offense" in Rule 12(b)(3) includes constitutional challenges, and therefore includes an "as applied" constitutional Fifth Amendment Due Process vagueness challenge.

2. The appellate panel has decided that an "as applied" constitutional Fifth Amendment Due Process vagueness challenge must be made pretrial without first considering if the challenge was reasonably available pre-trial and that it could not be determined without a trial on the merits.

3. The appellate panel has decided that when an appellant chooses not to file a Reply Brief and therefore not argue against a claim that Fed. R. of Crim. P.

12(b)(3) barred the appellate court from considering a constitutional as applied vagueness challenge on the merits (a claim that was first raised on appeal in the appellee's brief), that the appellant thereby assented to the argument and therefore the court assumed that the Rule 12(b)(3) claim was valid, without first considering whether there were obvious problems with the application of 12(b)(3) to the challenge.

A. Whether the Fifth Amendment Due Process Prohibition Against "as Applied" Vagueness Required the Appellate Panel Herein to Reverse the Trial Court's Denial of a Rule 29 Motion for Judgment of acquittal at the Close of the Government's Case Alleging Fraud Under 18 U.S.C. Sections 371, 666, and 1343, Based on Allegations That Your Petitioner Misreported Overtime Hours Where the Evidence Was Insufficient to Reveal Any Federal, State, Department, or Unit Law, Regulation, Policy, or Rule Requiring Anyone to Report Federal Traffic Safety Program Grant Traffic Overtime Hour-for-Hour, and Where the Traffic Safety Unit's Historical Practice and the Department's Written Documents Authorized Traffic Safety Program Overtime and Other Types of Overtime Paid in Four--and Eight-Hour Minimum Blocks.

B. the Appellate Panel Herein Has Decided an Important Question of Federal Law That Has Not Been but Should Be Settled by This Court: Whether the Fraud Prohibitions in 18 U.S.C. Sections 371, 666, and 1343 Are Unconstitutionally Vague Pursuant to Fifth Amendment Due Process as Applied to the Evidence

in This Case of the Petitioner's Conduct and Lack of Notice That His Conduct Would Be Considered Criminal Fraud.

C. The Appellate Panel Should Have Reversed the Trial Court's Denial of Your Appellant's Rule 29 Motion for acquittal at the Close of the Government's Case.

1. 18 U.S.C. Sections 371, 666, and 1343, the statutes of conviction, do not define "fraud."

2. There are no federal, state, or department regulations, policies, or rules that define "fraud" as it relates to the traffic safety initiatives federal grant program at issue in this case.

3. The evidence at trial revealed that the applicable traffic safety initiatives federal program grants left its governance to the grant recipient and any state laws, regulations, policies, rules, or oversight that may apply. Trial Transcript, pp. 5-10 through 5-30.

4. The evidence at trial revealed no state, department, or unit regulations, policies, or rules that required the overtime labor for federal program grant traffic safety initiatives to be paid hour-for-hour. Trial Transcript, pp. 11-90 through 11-98.

5. The evidence at trial revealed that your Petitioner trained under the federal program grant traffic safety initiatives

unit commander, Walsh. (Your Petitioner served as one of Walsh's subordinates in the unit for three years before taking over the unit command, and learned from Walsh how to report overtime in four- and eight-hour minimum blocks). Trial Transcript, p. 6-114.

6. The evidence at trial revealed that it was a longstanding practice for the federal program grant traffic safety initiatives unit to pay overtime in four--and eight-hour minimum blocks. Trial Transcript, pp. 6-111 through 6-114 and 2-220.

7. The evidence at trial revealed that the department also paid overtime in four--and eight-hour minimum blocks for other types of overtime (*e.g.* court appearances). Trial Transcript, p. 2-222.

8. government witnesses with proffer deals testified that although it was a long-standing practice to report overtime in four- and eight-hour minimum blocks, they knew it was wrong. However, without any state or department policy to back that up, these statements are meaningless. It was either administratively approved conduct, or it wasn't. Trial Transcript, pp. 6-111 through 6-114 and 2-220.

D. The Appellate Panel's Decision Included a Statement That Even If It Were to Consider the Merits of Your Petitioner's Fifth Amendment Due Process Constitutional "as Applied"

Challenge, It Would Rule Against Your Petitioner Due to the Fact That He Must Have "Knew It Was Wrong" Based on the Fact That He'd "Tried to Hide His Conduct.

1. The appellate panel's statement regarding your Petitioner's scienter as allegedly revealed by his attempts to hide his conduct mentioned the allegation made at trial that he had used "code words" to conceal that he was ending an overtime shift "early." It argued that your Appellant had radioed "moving to another location" when he really meant that the federal grant program traffic safety initiative shift was ending "early." But this longstanding practice was not an attempt to hide criminal conduct, but to guard against the public picking up open radio transmissions that traffic enforcement initiatives were ending. The appellate panel's conclusion that members of the state police force would use an open channel on their radios to communicate in code to hide criminal conduct doesn't make any sense. Criminals would not use open channels, or radios. Rather, it makes sense that law enforcement officers would not want to broadcast to the public (some of whom are listening to police frequencies on their scanner smart phone apps and spreading the new on social media) that a sobriety checkpoint is closing down, or

that a click-it-or-ticket location is terminating.

2. There were also allegations that his co-defendant, Robinson, had destroyed documents in an attempt to hide wrongdoing, but the evidence revealed that Robinson did this on his own and while your Appellant was out on medical leave for thirteen months.

3. The appellate panel also wrongly concluded that your Petitioner "knew that paying overtime" in four-hour blocks was "a crime." The evidence at trial does not support this conclusion. A government witness, Special Agent Schwader, with the Department of Transportation, Office of the Inspector General, testified that he and another auditor spoke with your Petitioner in April of 2012. He claimed to have taken handwritten notes but they were not produced in discovery and were not produced at trial. He testified that he had created a report from his notes for a file at his office and testified from it. He claimed that both auditors had met with your Petitioner, and that your Petitioner had admitted to them that the four-hour overtime shifts were required to be paid hour-for-hour. He testified that your Petitioner had told them: "troopers must work the entire four hours of a mobilization [of a federal program grant traffic safety initiative]. . . . [That] "troopers are told by

their supervisors that they have to work all four hours of a mobilization." Trial Transcript, p. 9-68, lns. 12-23. But another government witness, Mr. Kiely, after testifying that he was employed at the Traffic Programs Section unit in April of 2012 and that he was present when the two Inspector General auditors visited the unit in April of 2012, admitted on cross-examination that there were no overtime four-hour enforcement initiatives conducted by the Petitioner or their Traffic Programs Section unit in 2012. On direct examination, he'd testified under oath that there had been four-hour minimum overtime blocks being paid by their unit in 2012. *See* Trial Transcript 6-107, lns 18-21.

C. The Petitioner's Constitutional as Applied Vagueness Challenge Is an Important Question of Federal Law Especially in Light of the Harsh Consequences of His Convictions for Conduct That He Was Unaware Was Criminal.

1. The Petitioner's conduct was in accordance with a longstanding practice within the Massachusetts State Police.

2. His conduct was consistent with other overtime billing practices by the State Police (*e.g.* overtime for court appearances were billed in four--and eight-hour minimum blocks).

3. His conduct was consistent with what he'd been trained to do by the outgoing unit commander when your Petitioner was transferred into the Traffic Programs Section unit.
4. He was convicted of fraud when he believed that he was simply following department policy.
5. He was sentenced to 60 months in federal prison.
6. He was ordered to pay restitution in the amount of $199,572.42 and ordered to forfeit $177,600, a total of $377,572.42.
7. He lost his state pension worth about $2,784,944.00. *See* Tr. Doc. 206, p. 30.

CONCLUSION

For the reasons stated above, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Daniel J. Griffin

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March 19, 2026