CASE NO. _____

IN THE

Supreme Court of the United States

BARRY G. CROFT, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Barry G. Croft, Jr. was one of several citizens targeted in 2020 by the FBI and a tightly controlled cohort of paid confidential agents/informants, all working together on a coordinated FBI team to ensnare these citizens in an FBI-promoted "conspiracy" to "kidnap" Michigan's governor, who was in on the hoax and updated regularly, all timed for splashy arrests before the November 3, 2020 election. Petitioner has endured two trials on these charges, with his defense including that he was entrapped by the FBI and its agents/informants involved in the sting.

The jury in Trial 1 acquitted two co-defendants but was unable to reach verdicts as to Petitioner and co-defendant Adam Fox. In Trial 2, the government eked out a conviction but only because the district court arbitrarily barred the defense from using Evid.R. 801(d)(2)(D) to present, as non-hearsay substantive evidence, the numerous vicarious admissions by the FBI agents/informants within the scope of their assignment, unless they qualified under Evid.R. 801(d)(2)(B) or (C) as statements expressly authorized by their FBI bosses as "scripted words." In so doing, the court forced Petitioner to present his entrapment defense without being allowed to use the one evidence rule most suited to it, Evid.R. 801(d)(2)**(D)**. The Sixth Circuit agreed the district court erred, but found it was not a constitutional error because Petitioner could have himself testified about some of the admissions and it held that the error was "harmless" under the government-favorable Kotteakos standard.

Three questions are presented:

1. Did the district court deny Petitioner's constitutional right to present a defense, and thereby commit a trial error of constitutional dimension, when the district court applied the Federal Rules of Evidence in such an arbitrary manner as

to effectively remove Evid.R. 801(d)(2)(D) from the evidence rules which Petitioner was permitted to utilize in presenting his entrapment defense to the government's conspiracy charges?

2. Is the district court's error in removing Evid.R. 801(d)(2)(D) from the evidence rules which Petitioner was permitted to utilize in presenting his entrapment defense subject to the more rigorous Chapman harmless error standard which requires the government to prove that the error was harmless "beyond a reasonable doubt," a standard the government cannot meet in the circumstances of this case?

3. Did the Sixth Circuit impermissibly burden Petitioner's exercise of his Fifth Amendment right not to testify at his trial, and otherwise violate his rights, when—in determining whether the district court's error was harmless or not when it barred Petitioner from presenting the 801(d)(2)(D) statements—the appellate court held that Petitioner's failure to testify in his own defense relegated the district court's error to review for harmlessness under the government-favorable Kotteakos standard and not the more rigorous Chapman standard?

PARTIES TO THE PROCEEDING

Petitioner is Barry G. Croft, Jr., who was one of the Defendants-Appellants in the court below, the U.S. Court of Appeals for the Sixth Circuit. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

The other Defendant-Appellant in the court below, Adam D. Fox, is not joined in this Petition and is not represented by the undersigned counsel for Petitioner Croft.

DIRECTLY RELATED CASES

1. *United States v. Barry G. Croft, Jr.*, Case No. 23-1029, U.S. Court of Appeals, Sixth Circuit, opinion and judgment entered April 1, 2025 (consolidated for argument and decision with Case No. 23-1014, USA v. Fox).

2. *United States v. Adam D. Fox*, Case No. 23-1014, U.S. Court of Appeals, Sixth Circuit, opinion and judgment entered April 1, 2025 (consolidated for argument and decision with Case No. 23-1029, USA v. Croft).

3. *United States v. Barry G. Croft, Jr.,* Case No. 1:20-cr-00183-RJJ-2, U.S. District Court, Western District of Michigan, denying defense motion in limine in relevant part on February 2, 2022 (R. 439), denying renewed motion in limine in part on July 28, 2022 (R. 692), and entering judgment of conviction and sentence against Croft on December 28, 2022 (R. 804).

4. *United States v. Adam D. Fox, et al.,* Case No. 1:20-cr-00183-RJJ, U.S. District Court, Western District of Michigan.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Barry G. Croft, Jr. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit, dated April 1, 2025, in *United States v. Barry G. Croft, Jr.*, Case No. 23-1029, 134 F.4th 348, 2025 U.S. App. LEXIS 7570 (6th Cir. April 1, 2025).

OPINIONS BELOW

The opinion of the Sixth Circuit for which Petitioner seeks a writ of certiorari is reported at *United States v. Barry G. Croft, Jr.*, Case No. 23-1029, 134 F.4th 348, 2025 U.S. App. LEXIS 7570 (6th Cir. April 1, 2025) (*Appx* 001).

The opinions of the U.S. District Court for the Western District of Michigan, which denied the defense motion in limine in relevant part on February 2, 2022 (R. 439), and denied renewal of that motion in limine on July 28, 2022 (R. 692), are unreported. (*Appx* 045, *Appx* 072).

The judgment of conviction and sentence in Petitioner's criminal case, as entered in the Western District of Michigan on December 28, 2022 (R. 804), is unreported. (*Appx* 075).

JURISDICTION

The Sixth Circuit issued its opinion and judgment on April 1, 2025. (*Appx* 001.) The time for filing Petitioner's petition for a writ of certiorari was extended by the Honorable Brett Kavanaugh, Associate Justice of this Court and Circuit Justice for the Sixth Circuit, to July 30, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment, which provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment, which provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Rule 801(d)(2) of the Federal Rules of Evidence, which provides:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
> . . . .
> (2) An Opposing Party's Statement. The statement is offered against an opposing party and:
>
> (A) was made by the party in an individual or representative capacity;
> (B) is one the party manifested that it adopted or believed to be true;
> (C) was made by a person whom the party authorized to make a statement on the subject;
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
> (E) was made by the party's coconspirator during and in furtherance of the conspiracy.
>
> The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or

participation in it under (E).

> If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

STATEMENT OF CASE

A. Introduction and summary of case.

Croft's case involves charges that, during the Covid pandemic in 2020, he was part of a "conspiracy" to kidnap the governor of Michigan in violation of 18 U.S.C. 1201(a), and to use a "weapon of mass destruction" in violation of 2332a(a)(2). Much of the case was founded on Croft having a big mouth, being a showoff who loudly spouted anti-government sentiments, and talking a lot of nonsense to likeminded people who were likewise disgusted by the Covid lockdowns, the glaring hypocrisy of elected officials about Covid restrictions, and the violent "mostly peaceful" George Floyd-inspired riots which then dominated the news and so many people's emotions.

No one was injured or endangered by Croft's alleged crimes, which were the result of an orchestrated government hoax which targeted Croft and others. Croft did not, for example, actually *commit* acts of violence. That distinguishes him from the hundreds if not thousands of people who engaged in violence, committed assaults, torched police and other property, and burned buildings, all as memorably characterized the traumatic Summer of 2020. Croft only talked a big game, and, unluckily for him, did so unwittingly into government microphones of the confidential agents/informants whose assignment from the FBI was to rile him up and secretly record his rantings for later prosecution, landing him in prison for 235 months.

It was Croft's angry talk with men like Adam Fox which got them on the FBI's radar, allegedly because it raised concerns of domestic terrorism and thus supposedly warranted a "terrorism enterprise investigation," or "TEI," the highest level within the FBI. The "TEI" designation enabled law enforcement's use of virtually unlimited resources against these fellow citizens. Leading this TEI against Croft, Fox, and others were FBI Special Agents Jayson Chambers and his colleague Henrik Impola. SA's Chambers and Impola put together a large team of FBI agents/employees for their TEI. This included FBI undercover agent Tim Bates, known as "Red," who went undercover, pretending to be a "bomb maker"; and undercover agent Mark Schweers, who pretended to be "Mark Woods" and recruited Fox to join a Michigan militia group.

SA's Chambers and Impola also assembled and supervised, as part of their TEI, a group of several paid confidential agents/informants—not *employees* of the FBI, per se, but informants who worked directly for Chambers and Impola and under their supervision. Their job for the FBI, like that of Schweers, was to befriend these confused and angry men and infiltrate their activities, become involved in their daily lives, suggest crazy things for them to do and how and when to do it, encourage them to say incriminating things about their "plans," and all the while secretly record what they've said and pass it along to Chambers and Impola who were, for most recorded activities, *also* listening in "real time" to the work product of their informants.

Among the most active of the confidential agents/informants in this case were Dan Chappel, Jennifer Plunk, and Steve Robeson. Chappel, for example, sent hundreds of texts to Fox during the period from March 2020 until October 2020, when

the arrests were made, with at least 400 each in August and September 2020. During this same period, Chappel texted with FBI's Chambers, for instructions and to report back, some 3,236 times, an average of 16 messages a day. Plunk, from Tennessee, was dispatched by FBI to Croft's Delaware home to be sure he attended one of the "field training exercises" ("FTX") which the FBI had helped organize and arrange, and she thus rode with Croft and his three young daughters to the FTX in Cambria, Wisconsin, staying with them in their hotel room. (TT2, PageID#14857-62, 15427-28.) Robeson, already a felon, was used by the FBI to promote a "free money" scam that was to make credit cards available, with $5,000 limits, to lure the FBI's targets. Robeson was eventually terminated as an agent/informant in November 2020, after these arrests, due to his commission of still more felonies during the TEI. (TT2, PageID#14690-92, 15537-38, 15811-20; R.396, USA Opp. at 9-10 (PageID#2728-29).)

In these and other ways, the TEI's instigation of its kidnapping "plot" against Governor Whitmer was audacious in its production and planning. So much of it, at its core, was stridently, disturbingly, and imperiously un-American. That includes:

- The FBI team's targeting and spinning up of angry citizens, during the already traumatic Covid/Floyd time, with nearly constant surveillance and recording.

- The FBI team's use of subterfuge by FBI agents pretending, for example, to be "bomb makers," and the FBI creating "bomb" videos to elicit the targeted men's recorded reactions to the FBI's hoaxed-up work.

- The FBI itself organizing and orchestrating *all* key events, such as the FTX's and the two drive-by viewings of Gov. Whitmer's Michigan cottage where the "kidnapping" would supposedly occur, all at times/dates convenient for her and when she would be away, because she was in on this hoax and never in danger.

- The FBI team conducting the arrests in early October 2020, just in time for a big pre-election political splash which was the apparent motivation all along.

There were two trials against Croft and co-defendants on this indictment in the Western District of Michigan. The first was in March/April 2022, against Croft, Fox, Daniel Harris, and Brandon Caserta, shortly after co-defendant Kaleb Franks pleaded guilty (he later got 48 months). (Co-defendant Ty Garbin had earlier pleaded guilty). That first trial resulted in the acquittals of Harris and Caserta; but the jury was unable to reach verdicts as to Croft and Fox. The second trial was on August 9-23, 2022. Croft and Fox were convicted on all counts. Croft was sentenced to 235 months; Fox got 192 months.

Croft wanted to defend principally on the basis of entrapment by the FBI and its agents/informants. The district court's application of the evidence rules shut much of that down, as addressed next.

B. The district court's adverse ruling on the evidence of the statements by the FBI's agents/informants.

Believing he had been unwittingly ensnared by such overwhelming government resources directed *at him*, Croft (and Fox) sought to defend in part by demonstrating the oppressive government inducement and a lack of predisposition for the "conspiracy" scam the FBI and its agents pushed. Croft wanted to present, for example, numerous relevant texts, recorded statements, and other communications by and between Chambers, Impola, Schweers, Bates/"Red," Chappel, Robeson, and/or Plunk, and likewise between these agents/informants and the alleged "conspirators," all as admissions of the government and for truth under Evid.R. 801(d)(2)(D). The trial court shut down much of that evidence.

Many of the relevant communications—texts and audio-recorded statements—

which were barred to the defense as substantive evidence under 801(d)(2)(D) by the district court's ruling were identified by the defense in a spreadsheet that was included with pretrial motions they filed before Trial 1. That spreadsheet included some 258 entries of relevant communications. (R. 383-1, PageID#2575-262.)

In its order before Trial 1, the district court recognized the reasons the defense wanted to present to the jury, as party admissions, the communications in the spreadsheet:

> [In order to] advance [defendants'] case, both on the entrapment theory and in otherwise defending against the conspiracy charged, the defense seeks to admit approximately two hundred fifty-eight out-of-court statements. (ECF No. 383). The statements are taken from proposed transcriptions of recorded conversations and originate either from the defendants themselves, federal agents, or confidential human sources (CHSs).

(R. 439, Order, PageID#2996-97.)

The defense sought to admit most of these statements as non-hearsay substantive evidence of admissions by a party opponent under Rule 801(d)(2)(D). That rule provides that a statement is not hearsay where it is "offered against an opposing party" and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Id.

The district court denied admission of the statements as non-hearsay substantive evidence, ruling that:

> … Rule 801(d)(2)(D) covers only those situations where an informant's words and actions are directly and expressly authorized by a government agent. Thus, where the informant's statement merely regurgitates words that were fed by a government agent, then (provided the offering party can establish relevance) the statement might be admissible.

(R. 439, Order, PageID#3013 (*Appx* 062).) The district court concluded its ruling by noting that ***"[S]cripted words…, which are directly authorized and closely supervised by government agents fairly fall within the party-opponent exception."*** (Id., PageID#3014 (*Appx* 063).) This was the court's rubric which it adopted by analogy from the movie "The Truman Show." (Id.; R. 487, Trans. 1/18/22 at 54-55, PageID#3706-07.) The court sometimes referred to the rule as the "Christof rule," from the film's character, "Christof" (played by Ed Harris). Christof was the "director" of the live reality TV show in which Truman (played by Jim Carey), was—unbeknownst to Truman as he lived what he believed was his ordinary life—the main character for the global audience who were addicted to the show.

The issue was litigated again before Trial 2, with incorporation of many of the same filings including the spreadsheet. Unpersuaded again, the district court made the same ruling as in Trial 1, and it applied the ruling in Trial 2 the same way as it had done in Trial 1. (See R. 692, Order 07/28/22 (PageID#8686-88) (*Appx* 072); R. 696, FPT at 12-15 (PageID#8721-24).)

As such, the effect of the district court's ruling and its associated "Truman Show" rubric, was that the court eliminated 801(d)(2)**(D)** from the trial as an evidence rule which could be used to benefit Croft and Fox. Instead, the court collapsed 801(d)(2)(D) into 801(d)(2)**(B)** and **(C)**, such that Croft and Fox would get the benefit of Evid.R. 801(d)(2) *only* for statements which they sought to present against the government which were *expressly authorized*—even dictated by—the FBI agents in charge of the investigation (Chambers and/or Impola), in a manner like Christof as

he fed lines to the characters in the Truman Show.

The Sixth Circuit below, after oral argument, requested supplemental briefing from all parties on the issue of the excluded admissions and the impact on the trial. In that brief, Croft presented the following chart to summarize some of the key topics on which the defense wanted to develop, with these party admissions, to help demonstrate the entrapment:

Topics which the defense wanted to develop to help demonstrate entrapment	Item Numbers of relevant evidence
• **Chambers, Robeson, Chappel, et al.,** organized the Cambria and Luther FTXs and promoted them to the group, and they recruited attendance by Croft	2, 19, 41, 45, 85, 87-89, 143
• **Chambers, Robeson, Chappel** and other agents promoted and ran the Peebles event	92, 93, 94, 96-100
• **Chambers, Chappel**, **Robeson**, and other government agents engaged in a persistent and continuous push for "conspirators" to come up with a "plan" or "objective," and they pushed a plan	11, 25-26, 29, 32, 34, 36, 46, 48, 58, 73-76, 81, 83, 89, 92, 98, 99, 100, 101, 118, 122-24, 132
• **Chambers, Chappel**, **Robeson**, **Plunk**, and other agents engaged in continuous efforts to lead and guide thinking of "conspirators" about activities & goals, persuade them to be involved & vouching for Fox and/or his ideas	7, 17, 21-22, 24-28, 39-41, 52, 57, 73-76, 80, 81-85, 89, 92, 96, 99-100, 104-14, 116-17, 119-20, 129, 131, 146, 157-61
• **Chambers, Robeson**, **Chappel**, and other informants promoted availability of "free" money to help "fund" the group's goals	20, 23, 24, 45, 55, 67, 90, 101, 103, 115, 118, 121
• **Chambers, Chappel**, **Robeson**, **Chambers**, **Plunk** knew that other "conspirators" did not like/trust Croft and/or believed he was not interested	8, 15
• **Chambers** and **Chappel** planned, organized, promoted, and conducted the 8/29/20 drive-by of the governor's cottage and trip to Bull Tavern	30, 31, 112-13, 115, 117-18, 129-30, 133, 228-33

• **Chambers** and **Chappel** planned, organized, promoted, and conducted the 9/12/20 nighttime drive-by and the trip to the bridge	1-5, 16, 32, 50-51, 53, 130, 135-43, 147-54, 161, 234-39, 241
• **Chambers**, **Bates/Red**, **Chappel** etc. promoted the use of explosives including the FBI's "bomb" video	27, 113-14, 119, 127, 128, 155-57, 158, 162-67
• **Chambers, Chappel** pushed for action before "spring," and wanted events "sooner"	45, 144
• **Chambers**, **Chappel**, and **Bates/Red** planned, organized, promoted, and conducted the Ypsilanti ruse trip on 10/7/20	56, 162-67

The district court's limitation on the use of the government's 801(d)(2)(D) admissions was most dramatic with Steve Robeson and Jennifer Plunk, both of whom did not testify and, in Robeson's case, invoked his Fifth Amendment right not to do so. (TT2, PageID#14737, 15537-38, 15811, 15820-21.) As such, the defense was denied the ability to use most of the party admissions of Robeson and Plunk, as made to the alleged "conspirators" as part of Robeson and/or Plunk's efforts on behalf of the government to develop a "trusting relationship" with defendants. The defense was likewise denied use of the admissions as revealed in communications between Plunk and/or Robeson, on the one hand, and the FBI employee-agents (Chambers, Impola, Schweers, etc.), on the other, who provided them with their directions.

The same limitation was also very significant as to many of the substantive-evidence non-hearsay admissions by Dan Chappel even though Chappel *did* testify, and especially his texts and other communications with the alleged "conspirators" and his *responsive* texts and other communications with Chambers and Impola.

C. The trial evidence nonetheless suggested a strong case for Croft's acquittal; the barred evidence would have made the difference in his favor.

The trial evidence underscores the extent of the inducement and oppressive involvement by the FBI and its agents/informants in all aspects of this hoax. Like a Broadway show, government agents served as producer, director, script writer, choreographer, photographer, principal actors, and dancers. Even the supposed "victim" was in on the act. It is not necessary, nor is there space, to detail all the evidence here. Nonetheless, a summary of the several key events which allegedly reflected the "conspiracy" confirms the degree to which this was a *government operation*, not an organic "conspiracy." Of these key events, Croft only attended four: (1) Dublin, Ohio, (2) Peebles, Ohio, (3) Cambria, Wisconsin, and (4) Luther, Michigan.

1. Dublin, Ohio

Fox and Croft might have never met in person, except for the FBI's orchestration of a meeting in Dublin, Ohio on June 6, 2020. Robeson had made himself president of the "national board" for III% Patriot Militia and was promoting Dublin as a national meeting. FBI agent Kris Long drove from Baltimore to Ohio to instruct Robeson on how to record the meeting, which Robeson did.

Fox and Croft were among the attendees who engaged in stoned/drunken trash talk, including about taking a governor in exchange for a capitol building. Robeson ran the meeting and, to incite attendees, he did a lot of talking (much barred by the court's rulings). He told them they needed a plan. (TT2, PageID#14574-78, 14751-75, 14793, 14822-24, 14855-56, 15219-20; GX 35 (audio).) But there was only talk at Dublin. No plans.

2. Vac Shack meetings on June 20 and July 3, 2020

Fox, in his 30's, resided in Grand Rapids in the basement of a vacuum store (the "Vac Shack"). Shortly after Dublin, Fox asked members of the Michigan militia group, the Wolverine Watchmen, to visit him at the Vac Shack on June 20, 2020. The handful of attendees included Garbin and FBI informant Chappel, who had become the Watchmen's XO, and was ordered by FBI's Chambers to maintain ongoing recorded contact with Fox. Chappel drove them to the Vac Shack on the FBI's dime; he also wore a live wire to broadcast back to Chambers/Impola in real time.

This was the first time Chappel met Fox. (TT2, PageID#14621, 15081-85, 15402-04.) Fox discussed an idea to assault the Michigan Capitol with 200 individuals and execute the governor. There was also talk of firebombing Michigan police cars. Their ideas were ridiculous and were going nowhere. Nonetheless, as Robeson had done in Dublin, Chappel pushed Fox to come up with an objective. (Id., PageID#15229-30.) But, still, there was only big talk at the Vac Shack. Croft wasn't involved; he wasn't at the Vac Shack meeting.

Lamenting that it was only talk, Chambers, after the meeting, texted Chappel that he had to get Fox "focused" on expressing specific plans. (Id., PageID#15230-32; DX 1008-09.) What good is a TEI if the FBI can't get its targets to act like the "terrorists" the FBI is inciting?

Chappel thus began communicating incessantly with Fox at the FBI's direction, with dogged persistence, and at least daily. Most of Chappel's communications were on live wires to Chambers/Impola and secretly recorded to boot;

Chappel also exchanged hundreds if not thousands of text messages with Fox, which were also real-timed back to Chambers. (TT2, PageID#15226-29.) Many of these communications were barred at trial by the judge's rulings.

Chappel and Chambers' relentless snooping on Fox wasn't enough for the FBI's sharks looking to create "conspiracies." In late June, they deployed undercover agent Mark Schweers. Pretending to be "Mark Woods," Schweers approached Fox to be the third member of Michigan III%. Like Chappel, Schweers made a pilgrimage to the Vac Shack, on July 3, and secretly recorded Fox ranting about his idea to attack Michigan's capitol building. (TT2, PageID#14907-12, 14952-58.)

3. FTX in Cambria, WI

FTX's are traditional events of military/militia units, from ROTC to National Guard, and they often mix field training with weekend fun, and did here. Croft attended the FTX in Cambria, Wisconsin during the weekend of July 10-12, 2020. The Cambria FTX was organized by the FBI, via Robeson, who had been promoting it since Dublin's event. Chappel drove Watchmen members Garbin, Harris, Franks, and Caserta to Cambria, and back, all on the FBI's tab. (TT2, PageID#15255-57.)

This was the FTX for which the FBI deployed Plunk to Delaware to be sure Croft showed up. When the FBI is producing and directing a scammed-up "conspiracy," it can't have the targets failing to show up to be incited and entrapped. Thus, Plunk went to Delaware as instructed and travelled with Croft to Wisconsin.

As typically, FBI's Robeson led the FTX and addressed the group at the beginning. Some attendees participated in military exercises which included the use

of a plywood-constructed "shoot house," a routine aspect of militia training and used in prior FTX's run by Robeson. (TT2, PageID#14864-66.) Most of the FTX, though, was devoted to sunshine, cookouts, and family fun. (Id., PageID#14863-65, 15088-89, 15251-59, 16020-23.) Croft took a day trip with his three young daughters.

Croft enjoys tinkering with fireworks to make small explosives. He spent one of the afternoons with ex-Marine Harris—who was acquitted in Trial 1—trying to make a small explosive with a firework. But it didn't work. (GX 97.)

After a day of sunshine on Cambria's Saturday, many attendees went to dinner at a local restaurant. Croft is heard on one of the FBI's hidden recorders talking about wanting to arrest the governor and put her on trial for treason. (GX 93/106 (audio).) He talked ridiculously about "shoot[ing] down every air ship that breaches the f***ing airspace" and "chop[ping] trees down at every f***ing road that crosses from Ohio and Indiana into Michigan." (GX 106 (audio).) Nonsensical talk; stoned out of his mind. Despite the FBI's best efforts, there was no plan at Cambria to do anything.

4. Peebles, Ohio

The next event—also promoted by the FBI—was on July 18 in Peebles, Ohio. It lasted a few hours. Once again, Robeson ran the meeting; its purpose was for the FBI's assets to try to solidify a "plan" before the election.

As ordered by Chambers, Chappel challenged the Peebles attendees that FTX's, while fun, are not enough: ***the group must get a direction!*** (TT2, PageID#15260-66, 15435-36.) But, lo and behold, Chambers' crime-instigators were disappointed once again. Predictably, Croft raged about storming state capitols and

blowing up police cars, blah, blah, blah, which was a yawner to the FBI's assets who knew it was nonsensical talk. (TT2, PageID#15512-14, 15703-04.) The trash talking by Croft and others went nowhere because, as Chappel admitted, the group was aimless and had no direction by conclusion of the Peebles event. (Id., PageID#15435.)

This "TEI" was going nowhere. Chambers/Chappel and their team thus accelerated their efforts to justify their TEI.

5. July through September 2020: chats, texts, and other activities, but not with Croft

After Peebles on July 18, 2020, Croft had little to do with Chappel, Robeson, Schweers, Fox, or the Watchmen for almost two months. Had the FBI not persisted in creating "conspiracies," the blustery relationship between Croft and Michigan's militia members, including Fox, would have . . . . . faded . . . . . away . . . . . .

One of the FBI's problems was that Fox and the Watchmen despised Croft and were happy he remained in Delaware. For example, when the Watchmen conducted their fun-filled FTX's in Munith in June, Fowlerville in July, and Munith, Michigan again in August 2020, Croft was not present at, or invited to, any of those or similar Watchmen activities. (TT2, PageID#14703-08, 15392-421, 15590-92, 15610, 15655-59, 15746-78.) *The FBI* was at them, but not Croft. Nor was Croft involved in the incessant texting/"chatting," including during July-September 2020, which occurred by and between Chappel, Schweers, Robeson, Plunk, Fox, the Watchmen (e.g., Harris, Caserta, Garbin and/or Franks), and others.

Unknown to Croft, therefore, Chambers, Schweers, and Chappel were inciting Fox in July/August 2020 to express his wild ideas for FBI-involved chat rooms and

recordings. (TT2, PageID#14610, 15319-20.) In one, on August 1, Fox told Schweers that he'd like to do a recon of Whitmer's locations in Lansing, Traverse City, and Mackinaw; Schweers agreed to check it out. (TT2, PageID#14925-27, 14991-97.)

6. Daytime drive-by of the Michigan cottage on August 29, 2020

Chappel and Schweers' idea to do a recon of the governor's cottage was front-and-center for Chambers' TEI for most of August 2020. Croft had nothing to do with that "recon" and was not even aware of it. It was an FBI operation with Fox as patsy.

Chambers ordered Chappel to start hounding people to get it lined up and he directed Chappel whom to invite. Nearly everyone Chappel asked—e.g., Harris, Caserta, Garbin—begged off. It wound up being only Chappel, Fox, and one other (Eric Molitor). (TT2, PageID#15314-35; DX 1019-28 (6th Cir. Appx. 0143-0152).)

FBI's Chambers and Chappel set the date. Chambers coordinated with the governor and her staff so that the date and time were convenient. (TT2, PageID#14626-27, 14642, 15116-139, 15320-30.) Thus, on Saturday afternoon, August 29, Chappel drove Fox and Molitor, on the FBI's dime, for a viewing that went past the governor's cottage in Elk Rapids. (TT2, PageID#15116-20, 15320-30, 15415-16.) FBI surveillance teams took pictures; pole cameras were in place. Even the pretend "victim"-governor and her "detail" were in on this "overt act," but not Croft.

After the drive-by, Chappel bought lunch for Fox and Molitor, at the aptly named Bull Tavern. During lunch Chappel gave Fox a pen and paper and told Fox to draw a map of where they'd been, all while the FBI photographed Fox from another booth so they could use it against Fox at trial. (PageID#15329-41; GX187, DX1055.)

After lunch, Chappel drove Fox and Molitor to the boat launch—a small concrete slab—across Birch Lake from the cottage. There, Fox smoked pot and enjoyed the afternoon with a young woman he met there. Meanwhile, Chappel connived to take photos of Fox to be used against Fox when he was prosecuted for the FBI-orchestrated hoax. (TT2, PageID#15335-36, 15440-41; DX 1058-59.)

The very next day, Chappel texted one of the purported "conspirators" (Garbin) to push the idea that they might want to get some explosives to "blow up" the bridge on I-31 in Elk Rapids, not far from the cottage; this would supposedly delay police response. (TT2, PageID#15340-43, 15594-97.) This was a genesis of the ridiculous "weapons of mass destruction" charge manufactured against two guys—Fox and Croft—who couldn't "blow up" a cardboard target if their lives depended on it, much less a concrete interstate bridge. (GX 232.)

And with eyes likely on the election calendar, Chambers in August directed Chappel to start promoting with Fox the FBI's planned nighttime drive-by of the cottage. Chambers wanted this "overt act" to occur during the FBI's long-planned FTX in Luther, Michigan on September 11-13, 2020. (TT2, PageID#15342-46; DX 1031-32.) Chappel told Fox to invite Croft, all as part of Chambers/Chappel/Plunk's efforts to overcome the group's distrust of Croft.

7. FTX in Luther, MI

The Luther FTX was on September 11-13, 2020. (TT2, PageID#15520, 15709.) It was planned back in July by Robeson and Chappel, during Robeson's Cambria FTX. (Id., PageID#15443-44.) Croft drove from Delaware with his girlfriend for another

weekend of family fun and harmless militia training.

There were at least five of the FBI's scammers at Luther to egg on the FBI's floundering kidnapping plot against its cooperating pretend "victim." This included Chappel, Robeson, Schweers, Plunk, and the "bomber," Bates/"Red." (TT2, PageID#14928-30, 15148, 15776-77, 15829-31.)

As during Cambria weekend, Croft enjoyed making a small explosive from a firework, adding pennies to act like shrapnel. (TT2, PageID#14745-46, 15926-29.) It went "boom," with green and purple, like a firework. (Id., PageID#15184, 15654-55, 15728-29.) Demonstrating Croft's hobbyist purpose—but inept technique—the pennies were later found, by FBI experts, to have travelled 2-3 *feet* from the small boom's center. (Id., PageID#15928.) "Weapons of mass destruction." What a farce!

The FBI undercover agent Bates, pretending to be Chappel's friend "Red," let the attendees know he could supply explosives. To lure Fox into the FBI's "WMD" hoax, Chambers et al. made a snazzy promo video for Bates/"Red" which showed a small improvised explosive device (IED) blowing up a car. (TT2, PageID#15854-55, 15884-85; GX 224-25 (video).) No one had asked Bates to do so, but he insisted on showing a group of attendees, including Croft, this FBI-made video on his cellphone. Robeson and Plunk loudly raved about it as per their instructions to lure their targets to talk for the secret recordings. Croft was described as "excited" to see the video.

Nonetheless, the video showed a small IED for enflaming a car. It would be useless against the concrete I-31 bridge suggested by Chappel.

8. Nighttime drive-by of the Michigan cottage on September 12, 2020

One of Chambers' goals for Luther weekend was to conduct the FBI's second preplanned drive-by of the governor's cottage, this one at night. Chappel and Chambers had been planning it since before the FBI's first drive-by on August 29. (TT2, PageID#15342-46, 15890-91.) As on August 29, Chambers would have again coordinated with the pretend "victim" and her "detail."

Not wanting such a sparse turnout as August 29, the FBI arranged for *three* cars to participate this time, all driven by FBI assets or their associates. Chappel lined people up to go. (TT2, PageID#15046-48, 15524-27, 15602.) It took place at 10 p.m. on 9/12/20. The FBI's assets drove 45 minutes south from Luther to pick up Croft at his hotel and bring him back north for the excursion to Elk Ridge. All three people in the car which fetched Croft were FBI plotters: Chappel, Bates/"Red," Robeson.

The three cars met up at a VFW, where each was given a task. The car driven by Chappel was to go to the boat launch; the one driven by Brian Higgins (Robeson's right-hand from Wisconsin) was to drive past the governor's cottage; the one driven by Schweers was to drive around the area. (TT2, PageID#14931-33, 15047-49, 15148-56, 15363-69, 15443-47.) For his part, Croft was shuffled into the back seat of Chappel's car with Robeson and Fox; Bates was in the front seat with driver Chappel. As per the FBI's plan, Chappel stopped at the I-31 bridge, where Bates led Fox down a tourist walkway to the bridge's underside. Bates told Fox to bring his phone so he could take a photo, to later use against Fox at trial; they were there for a minute.

Croft never left the car's backseat as Chappel circled the block to pick up Bates and Fox. (TT2, PageID#15150-51, 15444-47.)

The car with Higgins, Garbin, and Franks tried to find the cottage, but they had the wrong address and never did. That made the trip a "waste of time." (TT2, PageID#15526-31, 15719.)

The next day, back at the Luther FTX, Fox spoke with some of the group about perhaps getting an explosive, of undetermined type, from "Red"/Bates whose cost, "Red" promoted, might be $4,000. (TT2, PageID#14697-98, 15160-63, 15874-76.) Croft made no commitment, suggested his eyes were "poppin" at the cost, and never provided so much as a dime. (TT2, PageID#14710-12, 15602-05, 15899-901.)

Some of the FBI's agents/informants, Fox, and others—but not Croft, whom they thought was a "fed"—talked about having another FTX in November 2020. They disagreed about whether that would be before or after the election. (TT2, PageID#15162-64.) Later in September/October 2020, they continued those discussions in their texts/chats. But Croft was never part of those chats.

9. The FBI's ruse to get free gear enables the October 2020 arrests

Following the failure of the September 12th "drive by," Chappel and Chambers enhanced the pressure to avoid collapse of their incipient "kidnapping" scheme, as exemplified to them by apathetic and distracted Croft. Croft was back home in Delaware. Summer's over, his daughters were back in school, and he was driving his Amazon truck. He had no plans to be in Michigan again, much less to "kidnap" anyone. (TT2, PageID#15163-71.) *If* there were any communications with Croft by

any alleged "conspirator" or FBI scammer, after Luther, they were trivial.

Thus, by the end of September 2020, with the air rushing out of the FBI's plan, FBI's Chambers instructed FBI's Chappel to have Fox meet soon with FBI's Bates/"Red" in Ypsilanti, Michigan, with the hope Fox would bring Bates a small "good faith" deposit for the explosive Bates had promoted at Luther. To lure Fox to Ypsilanti, Chappel told Fox that Bates/"Red" would provide free tactical gear for the men and they'd get free lunch/beers at BW3. (TT2, PageID#15455-57.)

On October 7, 2020, Chappel drove Fox (and Garbin, Franks, Harris) to Ypsilanti to collect the free gear. Instead of free gear and chicken wings, Fox, Garbin, Franks, and Harris were all arrested. (TT2, PageID#15168-71, 15460-62, 15558-60.)

Croft was not part of this ruse Michigan trip and knew nothing about it. He was arrested the next day in New Jersey at a Wawa gas station. (Id., PageID#14710-12, 14746, 14893.)

The day after the arrests, the politicians bragged about the trap they'd set for these Americans. The FBI's purported "victim," Whitmer, was never in danger; she knew about the FBI's "kidnapping" hoax and received regular updates for months. She blamed President Trump.[1]

D. The Sixth Circuit affirms.

Croft appealed to the Sixth Circuit. Among other errors, he alleged that his constitutional right to present a defense and cross-examine witnesses against him

[1] T. Barrabi, *Michigan Gov. Whitmer was aware of kidnapping plot, state AG says*, FOX NEWS (Oct. 9, 2020) (at: https://www.foxnews.com/politics/michigan-gov-whitmer-aware-kidnapping-plot-militia).

was denied by the district court's rulings which barred Croft's use as substantive evidence the non-hearsay statements by and between Chambers, Impola, Schweers, Long, Bates/"Red," Chappel, Robeson, and/or Plunk, and likewise between the agents/informants and the alleged "conspirators," all as party admissions and for truth under Evid.R. 801(d)(2)(D).

The Sixth Circuit agreed that the district court erred in limiting 801(d)(2)(D) to "cover[] *only* those situations where an informant's words and actions are directly and expressly authorized by a government agent." (*Appx* 036 (emphasis in original).) However, the court rejected Croft's contention that the error was a constitutional error, stating that "erroneous evidentiary rulings rarely constitute a violation of a defendant's right to present a defense." (*Appx* 037.) "We have found that the erroneous exclusion of evidence does not 'cause . . . constitutional injury' when '[a] variety of avenues [are] available to [the defendant] to present his defense, including his own testimony.'" (*Appx* 037 (citation omitted).) Because Croft could have testified in support of the entrapment defense but did not—and, as to any statements which the district court's orders would have barred him from testifying about, he could have explored through cross-examination of the confidential informants—the appellate court found the availability of those other avenues for presenting the evidence defeated any claim of a *constitutional* injury. (*Appx* 038.)

With the trial error thus deemed to not be a "constitutional" one, the court rejected Croft's contention that, on the issue of whether the error is harmless or not, the government had to satisfy the exacting beyond-reasonable-doubt standard of

Chapman v. California, 386 U.S. 18, 24 (1967). The court, instead, applied the more lenient, government-favorable standard of Kotteakos v. United States, 328 U.S. 750 (1946), and concluded the error was harmless under that standard. (*Appx* 038-043.)

REASONS FOR GRANTING THE WRIT

I. The district court denied Petitioner's constitutional right to present a defense, and committed a trial error of constitutional dimension, when the court applied the Federal Rules of Evidence in such an arbitrary manner as to effectively remove Evid. Rule 801(d)(2)(D) from the evidence rules which Petitioner was permitted to utilize in presenting his entrapment defense to the government's conspiracy charges.

The Constitution guarantees the accused the right to a meaningful opportunity to present a complete defense and to a jury's determination of his guilt or innocence, all as essential to due process and a fair trial. Chambers v. Mississippi, 410 U.S. 284, 294, 302 (1973); Crane v. Kentucky, 476 U.S. 683, 690 (1986); Green v. Georgia, 442 U.S. 95, 97 (1979); Holmes v. South Carolina, 547 U.S. 319, 324 (2006). It likewise forbids trial courts from applying arbitrary rules of evidence that exclude important defense evidence. Holmes v. South Carolina, 547 U.S. at 324; Washington v. Texas, 388 U.S. 14 (1967). These rights stem from Fifth Amendment's guarantee of due process and the Sixth Amendment's confrontation and compulsory process clauses.

The Constitution, it is true, does not grant a criminal defendant an "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). The defense, no less than the government, must comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the

ascertainment of guilt and innocence." Chambers, 410 U.S. at 301. And, when those rules are applied fairly and without arbitrariness, it is generally true that an unfavorable evidentiary ruling will rarely take on constitutional dimensions. See *Appx* 037; see also United States v. Perkins, 937 F.2d 1397, 1401 (4th Cir. 1991).

Nonetheless, it is equally fundamental that the Rules of Evidence cannot be applied to "infring[e] upon a weighty interest of the accused" or in a manner which is "arbitrary or disproportionate to the purposes they are designed to serve." Holmes, at 324-25. See also United States v. Scheffer, 523 U.S. 303, 308-09 (1998). What the Constitution prohibits is the exclusion of critical, trustworthy defense evidence, particularly where the evidence refutes the government's allegations or directly supports the defendant's affirmative defense. See Holmes (rejecting as arbitrary a state rule excluding evidence of a third party's commission of the charged crime where the rule made admissibility of such evidence turn on the strength of only the prosecution's evidence); Crane v. Kentucky (blanket exclusion of defense evidence concerning the circumstances surrounding defendant's confession violated right to present a defense where his sole defense was that there was no physical evidence otherwise linking him to crime and that his confession was unreliable); Chambers, (arbitrary application of Mississippi's "voucher" rule and hearsay rule, which effectively prevented the defendant from presenting evidence of a witness's confessions to the murder and from impeaching the witness on the basis of his confessions); Washington v. Texas, 388 U.S. at 23 (arbitrary application of procedural statute preventing co-defendants or co-participants from testifying for one another

violated right to present a defense by excluding "a witness who was physically and mentally capable of testifying to events that he had personally observed."). When the rules of evidence are applied in such an arbitrary and unfair manner, the accused's rights under the Fifth and Sixth Amendments are denied and the error is one of constitutional dimension. Scheffer, 523 U.S. at 308; Rock v. Arkansas, 483 U.S. 44, 56 (1987).

The district court's application of Evid.R. 801(d)(2), by eliminating subdivision (D) entirely with the district court's creation of its unfounded "Christof rule," was arbitrary, disproportionate, and directly contrary to Evid.R. 801(d)(2). Rule 801(d)(2)(D) itself could not be any clearer that it applies to allow admission against the opposing party/government, as non-hearsay substantive evidence, the relevant statements of the government's retained agents/informants when those statements are within the scope of the agents/informants' assignment, and *regardless* of whether the FBI employee(s) working with the agents/informants had "approved" the statements much less "scripted them" in Christof fashion.

Rule 801(d)(2) excludes admissions of a party-opponent from the definition of hearsay. "***There is no question that . . . 'the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases.***'" United States v. Mirabal, 98 F.4th 981, 986 (9th Cir. 2024) (emphasis supplied), citing United States v. Morgan, 581 F.2d 933, 937 n.10 (D.C. Cir. 1978). See also United States v. Branham, 97 F.3d 835, 851 (6th Cir. 1996); United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988).

Under 801(d)(2)(D), statements of government employees and non-employee agents, within the scope of their work, are admissible against the government for their truth in a criminal case. "[T]he paradigm of the non-employee agent is the confidential informant who works with law enforcement agents in developing a case against a target." Anne B. Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 456 (2002). That is ***exactly*** what Chappel, Plunk, and Robeson were doing, for many months, from March 2020 until the arrests on October 7-8, 2020. The Sixth Circuit correctly applied 801(d)(2)(D) in Branham, 97 F.3d at 851, concluding that an informant was the government's "agent" under 801(d)(2)(D) with respect to statements he made in order to establish a relationship with the target/defendant. See also United States v. Reed, 167 F.3d 984, 988-89 (6th Cir. 1999); Lippay v. Christos, 996 F.2d 1490, 1499 (3rd Cir. 1993).

Rule 801(d)(2)(D), as properly applied in Branham and similar cases, allows admission of statements by the government's agent/informant for their truth as admissions of the government, *even though* the agent/informant is not authorized to speak, so long as the agent/informant is speaking about matters within the scope of the project. That rule is properly "applied against the government in criminal cases." Poulin, 87 MINN. L. REV. at 414-15. See also Morgan, 581 F.2d at 938; Mirabal, 98 F.4th at 986. The application of the rule against the government is especially applicable where entrapment has been alleged by the defense. Branham, indeed, was an entrapment case. Moreover, this Court has held that, for purposes of entrapment, a confidential informant is an agent of the government. Sherman v. United States,

356 U.S. 369, 373-76 (1958); United States v. Luisi, 482 F.3d 43, 53 (1st Cir. 2007); Poulin, 87 MINN. L. REV. at 458 & n.326.

Chappel, Robeson, and Plunk were all agents of the government for any and all purposes relevant to 801(d)(2)(D), and especially as to Croft's entrapment defense. They were each under the close and continuous direction and supervision of at least two special agents of the FBI (Chambers and Impola); they were all required to abide by FBI rules and admonishments; they needed and received FBI approval to break the law in the course of their duties (i.e., to engage in "otherwise illegal activity"); they were important, active, and contributing members of the FBI's team on the "Whitmer" case; and they were compensated, and in Chappel's case exorbitantly.[2] As to these three, it is not a close call that, at all relevant times, they were the FBI's agents/servants in the Whitmer/Watchmen/Croft/Fox investigation.

This conclusion is compelled by the plain meaning of 801(d)(2)(D), by the purpose and intent of that rule, and by this Court's reasoning in Sherman. The relevant statements of Chappel, Robeson, and Plunk, just like those of Chambers et al., were all admissible against the government under 801(d)(2)(D) because they were all agents/servants of the government at the time the statements were made and the statements related to matters within the scope of their duties. They were admissible even if not "approved" by the principal, and "even though contrary to the principal's interest, as party admissions often are." Poulin, 87 MINN. L. REV. at 462 & n.350.

Their admission is also compelled because, under Rule 801(d), what's good for

[2] The FBI paid Chappel some $54,000, mostly in cash, plus a $4,000 laptop.

the goose is good for the gander. The government freely used, against Croft, 801(d)(2)**(E)**'s provision, which made the statements of his alleged co-conspirators admissible for truth against him on the theory that the declarant/co-conspirator is supposedly his "agent." There is no coherent application of 801(d)(2)**(D)** which would then somehow shield admission against the government of statements by its own agents/informants on the same basis, especially when those agents/informants are the ones who were drumming up the alleged "conspiracy" under which the 801(d)(2)(E) statements were admitted against Croft.

Rather than comply with 801(d)(2)(D)'s plain meaning and this Court's reasoning in Sherman, the district court chose to follow poorly reasoned case law from other circuits which have refused to give 801(d)(2)(D) the broad scope the rule commands.[3] The reasoning of those cases is "unsound," Poulin, 87 MINN. L. REV. at 417, especially where entrapment is the critical issue and where the law thus already holds that informants are the government's agents. Sherman, 356 U.S. at 376.

The district court's adoption of its "Christof rule" did not result in merely an occasional erroneous application of Evid.R. 801(d)(2). It was much worse than that because its effect was to decree—for *Croft's* trial and as to *his efforts* to defend himself by showing the government's entrapment via the words of *the government's own closely supervised paid agents*—that Croft would not be permitted to use Evid.R. 801(d)(2)**(D)** at all. It was not merely an error wherein the district court made an

[3] See, e.g., United States v. Yildiz, 355 F.3d 80, 82 (2nd Cir. 2004); Lippay v. Christos, 996 F.2d 1490, 1499 (3d Cir. 1993); Christopher B. Mueller & Laird C. Kirkpatrick, 4 FEDERAL EVIDENCE § 8:56 (4th ed. May 2021).

occasional trial "mistake" in its application of 801(d)(2)(D) to admit, or not admit, particular pieces of evidence. Here, by contrast, the district court effectively removed 801(d)(2)(D) altogether from the arsenal of federal evidence rules that were available to the defendants in their trial (by collapsing 801(d)(2)(D) into (B) and (C)), while, at the same time, fully enforcing against the defendants, and for the government's benefit, the co-conspirator non-hearsay rules of 801(d)(2)(E). If *that* distinctly arbitrary and legally unmoored application of the Rules of Evidence does not deny the accused in an allegedly government-involved "conspiracy" case his constitutional right to present his defense, then that constitutional right has been sapped of any meaning.

The sheer volume of barred admissions was extensive, as detailed in the 258-entry spreadsheet presented by the defense at trial and summarized above at pp. 9-10. (R. 383-1, PageID#2575-620.) And these are only the barred admissions which were known to the defense because they were reflected in texts/recordings. The result was a trial about entrapment with defendants' hands tied behind their backs and the jury blindfolded to critical relevant facts.

The subject ruling is precisely the type of arbitrary application of the Rules of Evidence which is prohibited under Chambers and violative of the accused's constitutional right to present a defense. It violated the Constitution for the district court to apply the Rules of Evidence in such an arbitrary way. The Sixth Circuit was thus correct to find that the district court erred in its application of 801(d)(2)(D) (*Appx* 038), but that court was wrong to conclude that the error was not of a constitutional

dimension (*Appx* 038), when it plainly was. The district court's "Christof rule" denied Croft's right to a fair trial in accord with fundamental standards of due process, wherein the jury, in considering Croft's entrapment defense, would be able to "examine the conduct of the government agent[s]." Sherman, 356 U.S. at 373. Instead, the district court's error facilitated the government's tactics to "disown [its agent/informants] and insist it is not responsible for [their] actions." Sherman, 356 U.S. at 373. It disallowed entire categories of government admissions which would have helped Croft demonstrate the entrapment.

II. Because the district court's error in removing Evid. Rule 801(d)(2)(D) from the evidence rules which Petitioner was permitted to utilize in presenting his entrapment defense is a constitutional error, the error is subject to the Chapman harmless error standard which requires the government to prove that the error was harmless "beyond a reasonable doubt," a standard the government cannot meet in the circumstances of this very close case.

Because the district court's error in Croft's trial was one of constitutional dimension, the error is subject to Chapman's harmless error standard under which the government must prove the error to be harmless "beyond a reasonable doubt." See Chapman, 386 U.S. at 24; Neder v. United States, 527 U.S. 1, 15-16 (1999). The government's burden for constitutional errors is "considerably more onerous" than its burden for non-constitutional errors. United States v. Lane, 474 U.S. 438, 446 n.9 (1986); United States v. Kettles, 970 F.3d 637, 643 (6th Cir. 2020).

For this constitutional error to be harmless, the government was required to establish, beyond a reasonable doubt, "that a rational jury would have found the defendant guilty absent the error." Neder, 527 U.S. at 18. There must be proof beyond

a reasonable doubt "that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24. "Harmless beyond a reasonable doubt" is an "exacting standard indeed." Ellis v. United States, 941 A.2d 1042, 1048-49 (D.C. App. 2008). "The properly admitted evidence against the defendant must be 'overwhelming.'" Id. The "inquiry [under Chapman] . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (emphasis in original).

Reviewing courts are particularly reluctant to find that the government has met its harmlessness burden when the subject trial error, as here, resulted in *barring* evidence which would have helped to establish the defendant's principal defense. See, e.g., United States v. Harris, 733 F.2d 994, 1005 (2d Cir. 1984) ("[C]ourts are particularly reluctant to deem error harmless where. . . the error precludes or impairs the presentation of an accused's sole means of defense."); United States v. Corona, 41 Fed. Appx. 33, 34 (9th Cir. 2002) (error was not harmless because informant's statements were probative on the issue of government inducement and the error prevented Corona from supporting his claim of entrapment); United States v. Evans, 728 F.3d 953, 956, 967 (9th Cir. 2013) (trial court's erroneous exclusion of the "central piece of evidence" for Evans' "main defense" and which went to the "very heart" of the dispute could not be harmless); United States v. Carter, 491 F.2d 625, 630 (5th Cir. 1974).

When the defendant's guilt was "genuinely contested," and there is evidence

upon which a jury "could have reached a contrary finding, the error is not harmless." United States v. Rhynes, 218 F.3d 310, 323 (4th Cir. 2000) (en banc). Thus, even though the Sixth Circuit found that the evidence at Croft's trial satisfies the much lower sufficiency-of-evidence standard under Jackson v. Virginia, 443 U.S. 307 (1979) (*Appx* 012-026), that does not mean the evidence also satisfies the considerably more stringent standard for determining harmless error under Chapman. Mere sufficiency of the evidence does not dictate a finding of harmless error, particularly where the government's evidence was not overwhelming. In cases of "genuinely contested" guilt, and lack of overwhelming evidence, as here, reviewing courts must be "less tolerant of the idea that errors committed during the trial of [the] case are acceptable because they are harmless." United States v. Ignasiak, 667 F.3d 1217, 1236-37 (11th Cir. 2012). See also Strickland v. Washington, 466 U.S. 668, 696 (1984) ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); United States v. Molt, 615 F.2d 141, 145-46 (3rd Cir. 1980) ("Of course, the closer the case, and the more important and persuasive the evidence wrongfully admitted or excluded, the less likely it is that a court will find the error harmless.").

This was a *very close* case, one in which Croft believes the government failed to even meet the Jackson standard as to the counts which charged the alleged "conspiracy." Two of Croft's co-defendants in Trial 1 were acquitted outright, and the jury in that trial was unable to reach verdicts as to Croft and Fox. With a proper application of 801(d)(2)(D) in *Trial 2,* one which respected defendants' rights to due

process and a fair trial, there is a reasonable probability the result in Trial 2 would have likewise been acquittals because the government's admissions at issue, had they been admitted for the jury's consideration, were strongly supportive of Croft's entrapment defense. They would have placed the case in an entirely different light, with the many substantive-evidence and non-hearsay examples—in the written and/or spoken words *of the agents/informants' themselves*—to show the Chambers team's close coordination and collusion; their aggressive strategizing to exploit their targets' vulnerabilities and to overcome them; their incessant inducements at every key step of the way, to and including the Ypsilanti arrests on October 7; and their cavalier use of unethical if not illegal acts to ensnare their targets, and only taking action *against* such behavior *after* its benefits had already been reaped and despite the Chambers' team's toleration and encouragement of it while it was occurring.

The FBI team's use of illegal activity is particularly jarring and would have been so to the jury. The barred 801(d)(2)(D) recordings showed, for example, that Chappel, Robeson, Plunk worked closely together and coordinated efforts against the "targets" including by participating in recorded phone calls to which Chambers/ Impola had access and/or listened in real time. They discussed in these calls their "inducement" of illegal activity and that doing so may be necessary. For example:

- 9/17/20, recorded call with Chappel, Robeson, Plunk: [Robeson]: "I am not going to induce any fuc*** illegal activity that we don't have to. **Okay, I'm not above doin anything that has to be done brother, period.** 100% till the fuc**** wheels fall off." (Item #158, PageID#2607.) "Last thing I want is any of us getting jammed up on just a storytelling, you know what I mean?" (Item #159, PageID#2607.) "I'm not going to, certainly not going to put your boy in that spot, Dan [Chappel], you know what I mean? That's absolutely unnecessary verbage for him to even consider it as far as I am

> concerned. We're supposed to be insulating him." (Item #160, PageID#2607.)

Chambers applauded this sleaze-infested phone call of his chosen operatives:

- 9/17/20, Chambers to Chappel: "Good call with Steve [Robeson] and jen [Plunk]." (Item #157, PageID#2607.)

This and other evidence demonstrates coordination and collusion and an openly-admitted toleration of illegal or unethical activities as may be necessary—in the judgment of the likes of Robeson, as squarely within his government-informant duties—to induce the "targets" to fall for the scam being run against them by these overzealous government agents. These and other party admissions only highlight how wrong it was for the trial court to bar Croft from presenting the evidence about Robeson's later firing from the Chambers team and the reasons for that firing as revealed in the exhibits that were presented to the district court, but were disallowed, i.e., Exhibits 1041-42. (TT2, PageID#15808-17, 15904-06.)

Those documents make clear that the FBI's discharge of Robeson, for cause, on November 17, 2020, was in large part for conduct of which Chambers, Chappel, et al. were fully aware, encouraged, and participated in throughout Robeson's activities as one of Chambers' key operatives in this case:

> [Robeson] was a noncompliant informant and an unreliable declarant. As with all informants, before cooperating with the FBI, he agreed to a number of rules and terms. Those included following agent direction, not committing unsanctioned crimes, candid disclosure to his handling agents, and others. [Robeson] violated those rules, ending his cooperation and relationship with the FBI. His violations included the following undisclosed and unauthorized acts:
>
> - offering use of 501(c) charity funds to purchase weapons for

attacks;

- obtaining and possessing weapons while prohibited from doing so because he was a felon;

- offering personal equipment, like the use of a drone, to aid in acts of domestic terrorism.

[Robeson] also failed to record, and to disclose the presence of existing recordings of, pertinent conversations and events.

(Proffered Defense Exh. 1042 at pp. 9-10; see also R. 396, PageID #2728-29.)

The conclusion of non-harmlessness is further compelled when the barred 801(d)(2)(D) admissions are viewed through the lens of what Croft's jury had been instructed about the entrapment defense and the government's burden of proof thereunder. The jury was instructed that the government has "the burden of proving beyond a reasonable doubt that the Defendant was already willing to commit the crime prior to first being approached by government agents or other persons acting for the government," and that the factors the jury "may consider in deciding whether the government has proved this" include:

> Ask yourself what the evidence shows about the Defendants' character and reputation? Ask yourself if the idea of committing the crime originated with or came from the government? Ask yourself if the Defendant took part in the crime for profit? And ask yourself if the Defendant took part in any similar criminal activity with anyone else before or afterwards? Ask yourself if the Defendant showed any reluctance to commit the crime, and if he did, whether he was overcome by government persuasion? And ask yourself what kind of persuasion and how much persuasion the government used?

(TT2, PageID#16173-74.) The jury was also instructed on inducement that: "Government actions that could amount to inducement include persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward

or pleas based on need, sympathy or friendship." (TT2, PageID#16172.)

The barred admissions, as detailed above and in the table at pp. 9-10, are in the wheelhouse of factors the jury was required to consider, on *both* of entrapment's elements (inducement and predisposition), and the barred admissions *supported* Croft's defense. The evidence would have made it significantly more difficult for the government to meet its beyond-a-reasonable doubt burden on inducement and predisposition, and easier for Croft to prevail on his defense. The barred admissions provided evidence, *in their own words*, of Chappel, Robeson, Plunk, et al., that:

- Ideas for committing the crime originated with them and were aggressively pushed by them.
- They worked, as a team, to strategize about and work aggressively to overcome Croft's and Fox's respective reluctance, and they pushed a fast timeline with a purpose to overwhelm any resistance.
- Their "persuasion" was strategic, planned, and collusive, and included illegal and unethical acts.
- Their "persuasion" was unrelenting and was applied to nearly every event and every detail, including who would be invited to which events (alleged "overt" acts), ensuring attendance at those events, and even such details as *seating* at events so as to facilitate their audio capture of incriminating "statements" which they aggressively sought to induce.
- Their "persuasion" included fraudulent representations, coercive tactics, harassment, and promises of reward.

There are *dozens* of barred 801(d)(2)(D) admissions. There is a reasonable probability that any one or more would have tipped the jury's verdict, in this close case, to acquittals (as in Trial 1), or at least another hung jury reflective of the government's failure to achieve the required unanimity that it met its burden. The allowance of *all* the improperly barred admissions certainly would have done so.

Finally, the error's prejudicial impact on Croft's ability to pursue his entrapment defense infested the entire trial, further affirming that it was not harmless under the Chapman standard. Croft should have been permitted to use *all* the Rules of Evidence in pursuing his defense and to rely on the precedent of Sherman and Branham. Instead, the district court cancelled 801(d)(2)(D) and it disregarded Sherman and Branham, thereby *both* facilitating the government's efforts to disable any meaningful examination of the conduct of the government's agents-informants *and* furthering the government's trial strategy to "disown [its agent/informants] and insist it is not responsible for [their] actions." Sherman, 356 U.S. at 373.

It is, of course, possible (although highly unlikely) that Croft may have still been convicted *even if* the district court's errors had not occurred and *even if* the above-listed admissions had all been allowed as substantive evidence for the jury's consideration. "The existence of such a possibility, however, is not equivalent to proof that the error was harmless beyond a reasonable doubt." Ellis, 941 A.2d at 1051.

III. The Sixth Circuit impermissibly burdened Petitioner's exercise of his Fifth Amendment right not to testify at his trial, and otherwise violated his rights, when—in determining whether the district court's error was harmless or not when it barred Petitioner from presenting the 801(d)(2)(D) statements––the appellate court held that Petitioner's failure to testify in his own defense relegated the district court's error to review for harmlessness under the government-favorable Kotteakos standard and not the more rigorous Chapman standard.

A criminal defendant cannot be compelled to forfeit one constitutional right in order to assert another. Simmons v. United States, 390 U.S. 377, 393-94 (1968); Kercheval v. United States, 274 U.S. 220, 223-24 (1927). But that is the impact of the

Sixth Circuit's decision to subject the error which occurred in Croft's trial to the Kotteakos harmlessness standard, which is much easier for the government to meet and thus more likely to excuse the trial error as "harmless," merely because Croft exercised his Fifth Amendment privilege not to testify. The Sixth Circuit's reasoning only amplified the constitutional error at Croft's trial: The district court committed an error of constitutional dimension by applying 801(d)(2) in such an arbitrary and unfair manner (see I, II, above), yet, on appeal, the appellate court refused to review that error as the constitutional error that it is, and refused to hold the government to its heightened Chapman burden in reviewing that error, on the basis that the accused could have testified to some of the barred evidence but failed to do so by standing on his Fifth Amendment privilege. The Constitution prohibits such an intolerable choice.

The unconstitutional choice in Simmons was between a criminal defendant's Fourth and Fifth Amendment rights based on potentially incriminating uses of his suppression hearing testimony at trial. Simmons, 390 U.S. at 393-94. That situation created a Sophie's choice: If the defendant did not want the prosecution to use his motion hearing testimony at trial, he would have to give up his Fourth Amendment right to challenge the search; if he wanted to establish that he had standing for purposes of his Fourth Amendment motion, he had to give up his Fifth Amendment right for the purposes of his trial. Forced to choose, the defendant testified at his suppression hearing and, when the motion was denied, the prosecution used his testimony against him to obtain a conviction at trial.

In holding that the suppression-hearing testimony was not admissible at trial

to establish guilt, Simmons rested first on a deterrence concern, that allowing the suppression-hearing evidence would chill a defendant's exercise of his Fourth Amendment rights. Id. at 393. But the Court also recognized that allowing admission of suppression-hearing testimony "imposes a condition of a kind to which this Court has always been peculiarly sensitive. For a defendant who wishes to [assert his Fourth Amendment right] must do so at the risk that the words which he utters may later be used to incriminate him." Id. at 393. For those reasons, the Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." Id. at 394. See also Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

The rule and reasoning of Simmons, Lefkowitz, and related cases are consistent with the broader principle that the government may not "burden[] the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." Koontz v. St. Johns River Water Mgmt., 570 U.S. 595, 606 (2013).

These principles were violated in Croft's case by the Sixth Circuit's reasoning and its decision to treat the subject trial error as a non-constitutional error subject only to the more lenient Kotteakos harmlessness standard. The appellate court unconstitutionally penalized Croft for not sacrificing his Fifth Amendment privilege so that he could thereby preserve his Sixth Amendment right to present his defense and his associated right, if the Sixth Amendment right was denied, to have that denial be reviewed under the Chapman standard applicable to constitutional errors.

"Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." Brooks v. Tennessee, 406 U.S. 605, 612 (1972).

The accused's Sixth Amendment right to present a defense is no less weighty and no less constitutionally guaranteed when that defense does *not* include, for tactical or other reasons under the Fifth Amendment, the accused's own testimony. The Sixth Circuit's reasoning forces the defendant to choose between these rights, and, when he stands on both, it penalizes him for doing so. He must give up his Fifth Amendment right in order to preserve his Sixth Amendment right, despite the existence of an on-point evidence rule (Evid.R. 801(d)(2)(D)) which would not require that choice if the rule is properly applied, and, if he failed to do so, the attendant violation of his Sixth Amendment right is subjected to a government-favorable standard on direct appeal that is much more likely to result (and did here) in a determination of harmless error.

"The rule, in other words, 'cuts down on the privilege [to remain silent] by making its assertion costly.'" Brooks, 406 U.S. at 611 (quoting Griffin v. California, 380 U.S. 609, 614 (1965)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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