ORIGINAL

25-5951

No. _____

FILED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD TAI YOUNG MOON, JR. — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RONALD TAI YOUNG MOON, JR.
(Your Name)

FCI EDGEFIELD, P.O. BOX 725
(Address)

EDGEFIELD, SC, 29824
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether denying access to sealed ex parte transcripts, essential for proving actual innocence through alibi witnesses and third-party perpetrator evidence, violates due process and the right to present a defense under *Schlup v. Delo*, 513 U.S. 298 (1995), *Holmes v. South Carolina*, 547 U.S. 319 (2006), and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), where circuits diverge on transcript unsealing in innocence claims.

2. Whether the admission of over thirty minutes of highly prejudicial, minimally probative adult pornography evidence violated the Fifth Amendment's fair trial guarantee by inflaming the jury, inconsistent with this Court's recent decision in *Andrew v. White*, 604 U.S. ___ (2025), and precedents like *Payne v. Tennessee*, 501 U.S. 808 (1991), exacerbating circuit splits on prejudicial evidence in habeas review.

3. Whether the Eleventh Circuit's denial of a certificate of appealability, by imposing a heightened standard that forecloses review of substantial constitutional claims in habeas proceedings—including ineffective assistance, due process violations from sealed transcripts, prejudicial evidence, and sufficiency challenges—conflicts with this Court's precedents in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Slack v. McDaniel*, 529 U.S. 473 (2000), amid emerging circuit splits on COA thresholds, and whether this denial perpetuates a national crisis in ensuring uniform constitutional protections in child pornography cases.

4. Whether due process under *Jackson v. Virginia*, 443 U.S. 307 (1979), mandates appellate review of preserved sufficiency-of-evidence challenges in child pornography cases, and whether the Eleventh Circuit's COA denial conflicts with its own precedent and other circuits' application of *Jackson*.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Ronald Tai Young Moon, Jr., No. 2:19-cr-00324-ACA-HNJ-1, United States District Court for the Northern District of Alabama:

- Memorandum Opinion and Order (September 14, 2020): Denied Defendants Motion for Acquittal and Motion for New Trial. Signed by Judge Annemarie Carney Axon.
- Final Order on 28 U.S.C. § 2255 Motion to Vacate Sentence (June 18, 2024): Denied ˇ Movants motion and denied a certificate of appealability. Signed by Judge Annemarie Carney Axon.

United States v. Ronald Tai Young Moon, Jr., No. 24-12069, United States Court of Appeals for the Eleventh Circuit:

- Opinion on Direct Appeal (May 10, 2022): Affirmed the district courts judgment. Published opinion, signed.
- Order on Motions (October 24, 2024): Granted a certificate of appealability construed from the notice of appeal. Signed by Judge BCG.
- Order on Motion for Reconsideration in Habeas Appeal (December 18, 2024): Construed as a motion for reconsideration under 11th Cir. R. 22-1(c) and 27-2, denied. Signed by Judges BCG and ALB.

- Order on Motion to Unseal Transcripts in Habeas Appeal (March 13, 2025): Denied Appellants motion to unseal trial transcripts and release audio recordings.
- Opinion on Habeas Appeal (June 25, 2025): Vacated and remanded the district courts judgment. Non-published, per curiam opinion. Before Rosenbaum, Abudu, and Marcus, Circuit Judges.
- Order on Petition for Rehearing and Rehearing En Banc in Habeas Appeal (August 25, 2025): Denied Appellants petitions for rehearing and rehearing en banc. No Judge in regular active service on the Court having requested that the Court be polled.
- Mandate in Habeas Appeal (September 3, 2025): Vacated the district courts judgment without prejudice and remanded for consideration of ineffective assistance of appellate counsel claim. Per curiam opinion.
- Order on Motion to Stay Mandate in Habeas Appeal (September 17, 2025): Denied Appellants motion to stay the issuance of the mandate pending a petition for writ of certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix G to the petition and is

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

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

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

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

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

The opinion of the _____ court appears at Appendix _____ to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was June 25, 2025.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 25, 2025, and a copy of the order denying rehearing appears at Appendix H.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2251(a)

"(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed."

18 U.S.C. § 2251(e)

"(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under the Uniform Code of Military Justice or the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under the Uniform Code of Military Justice or the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section,

engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life."

18 U.S.C. § 2252A(a)(5)(B)

"(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;"

8 U.S.C. § 2252A(b)(2)

"(2) Whoever violates, or attempts or conspires to violate, paragraph (5) of subsection (a) shall be fined under this title or imprisoned not more than 7 years, or both, but, if any image of child pornography involved in the offense involves a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 10 years, or if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years."

8 U.S.C. § 2256(2)(A)

(2) "Sexually explicit conduct" means actual or simulated— (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

STATEMENT OF THE CASE

I am factually innocent. I was indicted on May 29, 2019, on charges of sexual exploitation of children. This case started with a search warrant looking for billing and prescription records; no mention was ever made of child pornography in the search warrant or by any officer at the scene when the search warrant was executed. The Superseding Indictment was filed on October 31, 2019, adding 6 counts including Production of Child Pornography, Attempted Production of Child Pornography, and Possession of Child Pornography. I pleaded not guilty and proceeded to trial on February 3, 2020.

The Government presented evidence during a six-day trial including edited video recordings, forensic analysis, and witness testimony. The jury returned a guilty verdict on all counts on February 11, 2020. On September 30, 2020, the District Court sentenced me to 360 months of imprisonment followed by five years of supervised release. The judgment was entered on October 2, 2020, and I filed a timely Notice of Appeal on October 13, 2020.

My direct appeal challenged the violation of my Sixth Amendment right to a public trial, as I had not waived this right myself on the record, nor did my attorney waive this right for me on the record or in any hearing in the court. I also claimed that I was denied a Franks hearing after the court had granted it. I also filed an appeal on the denial of the trial judge to recuse herself, as she had represented Blue Cross Blue Shield (my initial accuser); the court subsequently denied my motion to recuse.

The 11th Circuit Court of Appeals affirmed my conviction and sentence on May 10, 2022. My petition for rehearing en banc was denied on July 5, and the

Supreme Court denied certiorari on October 31, 2022. On October 30, 2023, I filed a motion pursuant to 28 U.S. Code § 2255 to vacate, set aside, or correct my sentence. My motion raised the following claims:

· Ineffective Assistance of Trial Counsel

- Trial Counsel failed to effectively challenge the sufficiency of the evidence pursuant to Rule 29 Federal Rules of Criminal Procedure.
- Counsel failed to review and exclude highly prejudicial, irrelevant and inadmissible adult pornography improperly submitted to the jury. That evidence was never admitted into evidence by the court hence violating my due process right. See *United States v. Harvey*, 999 F.2d 981 (2d Cir.), see also, *Andrew v. White*, 604 U.S. __, 145 S. Ct. 75 (2025).
- Counsel failed to object to erroneous jury instructions improperly broadened the statutory elements of the charged offenses by allowing subjective use of Dost Factor 6.

· Ineffective Assistance of Appellate Counsel

- Appellate Counsel failed to raise sufficiency of evidence under *Jackson v. Virginia,* 443 U.S. 307 (1979), and *Hesser v. United States*, 40 F.4th 1221 (11th Cir. 2022) on appeal despite these issues being preserved at trial with a Rule 29 motion.
- Appellate counsel failed to argue that erroneous jury instructions constructively amended the indictment.
- Appellate Counsel failed to challenge the reasonableness of Moon's 360-month sentence on appeal despite the issue being preserved at trial.

· Insufficiency of the Evidence

- The evidence was constitutionally insufficient to support my conviction as the government failed to establish any of the elements required under the charges nor was there any evidence of my direct involvement in producing the recordings.
- Appellate counsel failed to challenge the sufficiency of the evidence under *In re Winship*, 397 U.S. 358 (1970), *Jackson v. Virginia*, and Rule 29.

The District Court denied my § 2255 motion without a hearing on June 18, 2024.

The trial court ruled that the ineffective assistance of trial counsel claims were procedurally defaulted because they could have been raised on direct appeal. But see *Massaro v. United States*, 538 U.S. 500 (2003); also see *Hesser v. United States,* 40 F.4th 1221 (11th Cir. 2022). The district court did not substantively address my ineffective assistance of counsel claim including the failure to challenge my sentence on appeal. Although I provided an affidavit from the appellate counsel admitting omissions were not strategic and acknowledging the issues had merit, the district court conflated the 6th amendment claims including my substantive sentencing challenge. The court dismissed the ineffective assistance of counsel claims without analyzing them under the *Strickland v. Washington*, 466 U.S. 668 (1984), standard and failing to evaluate whether appellate counsel's performance was deficient or whether I was prejudiced.

The district court also denied my request for an evidentiary hearing. The court did not address the factual disputes raised by me for all three elements in *Clisby* including appellate counsel's unchallenged admission of his errors. Effectively, although the court denied my § 2255, its rulings actually affirmed that counsel was in fact ineffective by not granting the evidentiary hearing. As an uncontested

affidavit must be accepted as true for the purpose of passing upon the legal sufficiency of the affidavit, *Berger v. United States*, 255 U.S. 22 (1921) and *United States v. Kis*, 658 F.2d 526 at 536 (7th Cir. 1981) which state that all it takes is an affidavit to establish a prima facie case.

On June 18, 2024, the district court denied a certificate of appealability. I filed a timely notice of appeal on June 24, and a petition for a COA in the appellate court on July 18, 2024. On October 24, 2024, the appellate court granted a COA based on the motion for COA, but only whether the district court violated *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) by failing to address my ineffective assistance of appellate counsel's claim as a substantive constitutional issue. This appeal followed. I filed an appeal of the denial of the COA on the ineffective assistance of counsel claims for the Rule 29 issue and also the due process violation of the admission of highly prejudicial and irrelevant adult pornography. My appeal was denied. I filed a motion for rehearing en banc with the entire circuit court of appeals and that motion was denied. This petition for writ of certiorari has ensued.

REASONS FOR GRANTING THE PETITION

Petitioner is factually innocent of the crimes for which he was convicted. *Schlup*. No direct proof exists demonstrating that Petitioner produced, attempted to produce, or knowingly possessed child pornography. Four alibi witnesses testified that Petitioner was not present when the video recordings were made, and the government presented hard physical evidence of a third-party perpetrator that conclusively demonstrated Petitioner's innocence.

The trial judge refused to charge the jury with alibi and third-party perpetrator instructions after ordering an ex parte conference with the government to discuss how to proceed and then sealing the transcript. The judge committed at least 13 structural errors in this case, seven of which were contained in the jury instructions. These errors included improper instructions that Petitioner's pre-arrest silence constituted evidence of criminal wrongdoing. In addition, the court constructively amended the indictment charges and used a non-statutory element, "Dost Factor Six" from *U.S. v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), which is unconstitutionally vague and ambiguous. This allowed the jury to convict Petitioner for "thought crimes" by applying a subjective standard instead of the required objective one when construing "lascivious." The court's instruction was contrary to *U.S. v. Williams*, 553 U.S. 285 (2008), where the Supreme Court admonished the Eleventh Circuit Court of Appeals for even considering a subjective standard in determining and predicting child pornography.

Multiple attorneys proved ineffective by failing to object to the numerous Fifth and Sixth Amendment violations and countless violations of the Federal Rules of Evidence. In all appeals to rectify these wrongs, the trial and appellate

courts resorted to procedural barriers to avoid addressing Petitioner's sufficiency-of-evidence claim and due process claims, which would undisputedly exonerate a factually innocent man. They even ignored the circuit court's own binding precedent regarding Petitioner's Rule 29, Fed. R. Crim. P., motion and the trial court's admission of irrelevant evidence without reviewing it, much less performing a Rule 403 balancing test, and then allowing the jury to view it without admitting it into evidence.

Without the errors of ineffective counsel, the bias of the trial judge, and the misrepresentations of the prosecutors, no reasonable jurist would find Petitioner guilty. A conviction requiring 13 structural errors is inherently suspect and demands judicial scrutiny and meaningful legal analysis to ensure an innocent man has not been wrongfully convicted.

a. Circuit Conflicts and National Importance

This case presents critical circuit conflicts and questions of national constitutional significance warranting this Court's review under Supreme Court Rule 10. First, the Eleventh Circuit's reliance on the *Dost* Factors as guides for defining "lascivious exhibition," as seen in *U.S. v. Miller*, 819 F.3d 1315 (11th Cir. 2016), conflicts with the D.C. Circuit's narrower approach in *U.S. v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021), which limits the term to the minor's conduct, and the First Circuit's critique in *U.S. v. Amirault*, 173 F.3d 28 (1st Cir. 1999), calling them "overgenerous." This split leads to inconsistent child pornography convictions, risking overreach and chilling free expression nationwide.

Second, the trial court's constructive amendment of the indictment—

broadening "the purpose" to "a purpose" in 18 U.S.C. § 2251—creates a circuit divide. The Fourth Circuit in *U.S. v. McCauley*, 983 F.3d 690 (4th Cir. 2020), treats such changes as due process violations, while the Eleventh Circuit's approach, implied in *U.S. v. Miller*, tolerates broader jury discretion. This disparity undermines uniform application of due process protections.

Third, the refusal to give an alibi instruction despite supporting evidence conflicts with the Fifth Circuit's mandate in *U.S. v. Megna*, 450 F.2d 511 (5th Cir. 1971), while other circuits require explicit requests. This split affects the fairness of trials across jurisdictions, particularly in cases of factual innocence.

These conflicts, combined with the constitutional stakes, compel this Court's intervention to resolve divergent interpretations and safeguard federal criminal procedure.

b. The COA

When a federal petitioner's motion pursuant to 28 U.S.C. § 2255 is denied, the movant must obtain a Certificate of Appealability (COA) from the district court or the court of appeals before appealing the denial. 28 U.S.C. § 2253(c)(2). To obtain a COA, the movant must demonstrate that reasonable jurists may debate or agree with the applicant, or that the issues presented deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322 (2003). *Cf. Slack v. McDaniel*, 529 U.S. 473 (2000) and *Buck v. Davis*, 580 U.S. 100 (2017). A COA serves as a jurisdictional prerequisite before a court may consider the merits of an appeal.

A COA may be granted if the applicant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court has

held that a COA should issue if "reasonable jurists would find the district court's assessment debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274 (2004). Even mixed constitutional and statutory claims satisfy the COA standard. *U.S. v. Mulay*, 805 F.3d 1263 (10th Cir. 2015).

If the district court denies a COA on a procedural issue, the applicant must show that the court's ruling is debatable and that the rejected claim is colorable—i.e., there is a fair probability, though not certainty, of success on the merits. *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999).

In the underlying case, both the district court and the circuit court denied the COA on the claim of ineffective assistance of counsel for failure to fully pursue the Rule 29, Fed. R. Crim. P., insufficiency-of-evidence claim, and the ineffective assistance claim regarding the improper delivery to the jury of a USB drive containing hardcore adult pornography that the court had ordered removed, scenes from major motion pictures, and "covert" (peeping-Tom) video recordings of adult women and minor girls in various stages of undress that the government claimed constituted child pornography. [App. A, p. 2, 51].

The district court denied the COA without explanation. The appellate court ruled that Petitioner failed to assert a substantial constitutional claim. The brief denial of a COA by the appellate judge provided no basis for meaningful review. [App, F and S].

c. Procedural Default

In *Massaro v. U.S.*, 538 U.S. 500 (2003), a unanimous Supreme Court held that "a convicted federal defendant may properly first bring an ineffective

assistance claim in a collateral proceeding under § 2255 regardless of whether the defendant could have raised the claim on direct appeal." Reasonable jurists would agree with Petitioner that he could raise ineffective assistance claims in his § 2255 collateral attack on his convictions.

In pursuing his insufficiency-of-evidence claim, Petitioner relies on Eleventh Circuit precedent in *Hesser v. United States*, 40 F.4th 1221 (11th Cir. 2022). In *Hesser*, the defendant's counsel failed to raise a Rule 29, Fed. R. Crim. P., motion. After losing his direct appeal, Hesser filed for relief under 28 U.S.C. § 2255, alleging ineffective assistance of counsel. The three-judge panel held that the failure to preserve the insufficiency claim was ineffective under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). In reviewing the sufficiency of the evidence, the panel found it lacking and reversed the conviction. The circuit court specifically cited its reliance on *Jackson v. Virginia*, 443 U.S. 307 (1979), when reviewing the sufficiency claim.

In the case at bar, Petitioner's trial counsel preserved the insufficiency issue with a Rule 29 motion, which the trial court summarily dismissed. Appellate counsel failed to raise the issue on appeal. In appellate counsel's affidavit, he admitted that the insufficiency claim should have been raised but provided no reason for the omission. [App. I]. The trial court disregarded counsel's sworn affidavit and, with no contrary evidence in the record, concluded that counsel made a tactical decision to pursue the issue of the open and public trial violation—even though this meant advancing a novel silent waiver claim that had never been addressed in the circuit or by the Supreme Court. *But see Brookhart v. Janis*, 384 U.S. 1 (1966). Without an evidentiary hearing, counsel's unopposed affidavit

stands in stark contrast to the court's unsupported conclusion that appellate counsel's failure to pursue the insufficiency claim was a reasonable tactical decision.

Strickland requires a two-prong test to prove counsel was ineffective: (1) whether counsel's actions were professionally reasonable, and (2) whether those actions prejudiced the outcome. Petitioner cited *Jackson v. Virginia* as the standard for determining insufficiency of evidence, which was explicitly applied in *Hesser*. While the trial court opined that the application of *Jackson v. Virginia* to a § 2255 case was an open question in the circuit (surely a basis to grant a COA in its own right), there can be no question that a sufficiency-of-evidence claim raises a constitutional issue. *Jackson* concisely states the standard that a defendant's conviction must rest on the findings of a properly instructed jury using relevant and admissible evidence that the defendant is guilty beyond a reasonable doubt. *See also In re Winship*, 397 U.S. 358 (1970), and *U.S. v. Gaudin*, 515 U.S. 506 (1995). The Supreme Court made this clear, stating:

> "[L]est there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364.

The Court went further in *Gaudin*, holding that "[a] jury's responsibility is not merely to determine facts, but [to] apply the law to the facts and draw the ultimate conclusion of guilt or innocence." 515 U.S. at 514. It is clear from these cases and succinctly in *Jackson* that a jury can only reach a decision beyond a reasonable doubt when provided admissible evidence and proper statements of the law to apply. *Jackson*, 443 U.S. at 318–19.

At trial, the government admitted it did not have evidence of child pornography based on the federal statute, but believed that, under state law and using the non-statutory Dost Factors (*U.S. v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986); *see also U.S. v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021)), Petitioner had created a lascivious exhibition of child pornography in violation of federal law. [App. M, Doc. 141 pp. 14-15, 21]. In other words, the government sought to persuade the jury to adopt its subjective belief that Petitioner intended to create child pornography—a thought crime contrary to precedent. *See U.S. v. Balsys*, 524 U.S. 666 (1998). Furthermore, there was no evidence of minors engaged in sexual activity. [App. A, p. 51]. *See U.S. v. Williams*, 553 U.S. 285 (2008); 444 F.3d 1286 (11th Cir. 2006). The determination of child pornography under federal law is a purely objective test requiring visual depictions of minors engaged in actual explicit sex acts. [App. M, Doc. 141, pp. 14–15, 21]. By employing the language of *Dost* Factor Six, the government cobbled together from "over 60" different videotapes that were seized, "less than one minute" [App. J, p. 359] of frontal nudity that depicted the pubic area of two teenage girls [App. A, p. 5] undressing and/or dressing, and which also contained commercial adult pornography, G through R rated motion pictures, sporting events, and voyeur videos of adults engaged in non-sexual activities, some of which were video recorded over Moon's family home videos. [App. J, p. 352, 359]. The government scattered these onto a thumb drive and presented it as evidence of federal child pornography—labeled as a lascivious exhibition.

The evidentiary insufficiency included not only a lack of child pornography but also, no evidence that Petitioner produced or attempted to produce child

pornography, or that he accessed, knew, or should have known the tapes contained what the government misrepresented as federal child pornography. *Williams* (2006) / (2008).

The attached table summarizes the numerous errors in the court's instructions. [Petition for Rehearing en banc, App. H, p. 5 & App. N]. The most egregious errors include the refusal to give an alibi instruction (*U.S. v. Megna*, 450 F.2d 511 (5th Cir. 1971)) and an instruction on the third-party perpetrator defense (*Holmes v. South Carolina*, 547 U.S. 319 (2006)), as well as the failure to instruct that the government bore the burden to refute these defenses beyond a reasonable doubt.

During the trial, five witnesses—including Petitioner's wife, her friend, daughter, niece, and niece's friend—testified that Petitioner was either not present when the videos were made but the family's "IT guy" was at the house or that Petitioner was in bed due to his early clinic hours. [App. M, Doc. 136, pp. 587 – 88, Doc. 137, pp. 658-660, 774, 787-88, Doc. 138, pp. 799-800, 835–36].

The government presented evidence corroborating Petitioner's defense by introducing a video clip showing a hand with a clubbed thumb, which their experts testified belonged to the person who recorded the covert videos. The clip had not been reviewed by the defense, as the government intended to use it in rebuttal. [App. M, Doc 141, p. 66]. This "surprise" backfired when it was established that the hand was not Petitioner's, as he lacks a clubbed thumb with a mole or other distinguishing features.

During pretrial discussions about the "hand video," the court held ex parte meetings with the defense and prosecution teams. [App. M, Doc 141, pp. 63–79].

Petitioner can only assume the prosecution meeting addressed the evidentiary setback. This discussion may explain why the court did not instruct the jury on alibi evidence or the exculpatory hand video. The court sealed the nine pages of transcript from these meetings [App. M, Doc 141 pp. 63-79], and both the trial and appellate courts have refused to unseal it. [App. O]. *See Sealed Appellant v. Appellee*, 2024 U.S. App. LEXIS 5553 (5th Cir. March 7, 2024); *see also Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), and *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986).

At trial, two FBI agents—Agents Mauldin and King—testified that the hand with the clubbed thumb in the video belonged to the person clandestinely filming the dressing room and adjacent bathroom. [App. J, pp. 333, 360; App. M, Doc 138 pp. 961–65]. When Petitioner demonstrated the hand was not his, the government claimed it belonged to the niece's friend and was unrelated to the voyeurism. This assertion was refuted when the defense noted the niece's friend wore black nail polish in the same scene, while the third-party's fingernails had none. [App. M, Doc. 139, pp. 1046–1051; App. P, pp. 1098–1101]. The niece and her friend testified that Petitioner was not home that day, but the IT expert was. [App M, Doc. 138, pp. 835–39].

Even without a burden to do so, the defense witnesses consistently testified that this IT expert and his partner—who had performed technical work at both of Petitioner's homes and his clinic—were responsible for the recordings.

Not only did the court fail to instruct the jury about the alibi evidence and the third-party perpetrator, but it also failed to explain that the alibi defense never shifted the burden of proof from the government. *See U.S. v. Megna*, 450 F.2d 511

(5th Cir. 1971). The rule is clear: "[Where] the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory." *Calderon v. U.S.*, 279 F. 556, 558 (5th Cir. 1922). A request for an exception (a charge to the jury) was not necessary. *See also Bird v. U.S.*, 180 U.S. 356, 361 (1901). *Compare U.S. v. Marcus*, 166 F.2d 497, 504 (3d Cir. 1948); *Marson v. U.S.*, 203 F.2d 904, 912 (6th Cir. 1953).

This constitutional principle, enshrined in *Jackson* and reinforced by *In re Winship* and *Gaudin,* underscores the national importance of ensuring trial fairness. Structural errors, such as improper jury instructions and the admission of prejudicial evidence, threaten due process across jurisdictions, necessitating this Court's review to affirm these bedrock protections.

d. Fifth Amendment

This case began as an investigation into alleged billing fraud and prescription irregularities. Dozens of officers executed a search warrant supported by an affidavit exceeding 50 pages, during a federal government shutdown due to lack of appropriations. No criminal charges for billing or prescription fraud were ever presented to a grand jury.

While executing the warrant, Petitioner was interviewed for 4.5 hours, focusing on his billing and prescription practices. No mention was made of child pornography; the warrant and affidavits contained no such allegations. Five months later, Petitioner was arrested and charged with production, attempted production, and possession of child pornography. At trial, the prosecution argued that Petitioner

should have spoken about the alleged child pornography. [App. M, Doc 138, pp. 974–75]. An objection based on the Fifth Amendment was raised but withdrawn by counsel after the court admonished that the comments were appropriate. The court relied on *Salinas v. Texas*, 570 U.S. 178 (2013), and *U.S. v. O'Keefe*, 461 F.3d 1338 (11th Cir. 2006). [App. A, p. 38]. These cases are inapposite, as Petitioner was never questioned or accused of child pornography prior to indictment and arrest. The government's comments violated Petitioner's Fifth Amendment right against self-incrimination. An immediate mistrial should have been declared. [App. P, Doc. 139, pp. 1119–20].

This violation extends beyond *Salinas,* which permitted pre-arrest silence only in specific contexts, risking a national erosion of self-incrimination rights when applied to unrelated investigations like this one. The court's instruction that silence constituted concealment further compounds the constitutional breach, highlighting a need for this Court to clarify the Fifth Amendment's scope.

In addition to this error, the court instructed the jury that Petitioner's silence constituted concealment of a crime and could be used as evidence of guilt. [App. K, p. 1064].

e. Constructive Amendment of the Indictment

Petitioner was indicted in a Superseding Indictment with two counts of Production of Child Pornography and two counts of Attempted Production of Child Pornography, in violation of 18 U.S.C. §§ 2251(a) and (e). He was also indicted for Possession of Child Pornography in Counts 5 and 6, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2). [App. L]. In charging the jury, the trial court

constructively amended the indictment, denying Petitioner's Sixth Amendment right to have charges decided by a grand jury and broadening the scienter requirement dictated by Congress.

In the jury instructions for Counts 1–4 [App. K], the court created cognitive dissonance (*U.S. v. Vang*, 128 F.3d 1065, 1072 (7th Cir. 1997)) by charging that the production must be for the purpose of producing a visual depiction of "sexually explicit conduct" by a minor or minors. [App. K, p. 1065, line 18; p. 1066, line 3; p. 1068, line 8]. Later, the court altered this requirement, stating the government need only prove that a purpose of the "sexually explicit conduct" was to produce a visual depiction [App. K, p. 1068, line 9], and that the purpose need not be the only or dominant purpose [App. K, p. 1066, line 11]. Effectively, the court instructed the jury that a single purpose or any purpose could satisfy this element. The jury could select either "the purpose" or "a purpose," despite being told the court was the sole source of law. [App. K, p. 1059, lines 4–7].

This instruction changed the strict purpose ("the purpose") stated in the indictment and gave the jury a broader range ("a purpose"), constituting a constructive amendment. *See Stirone v. U.S.*, 361 U.S. 212 (1960). *Compare U.S. v. McCauley*, 983 F.3d 690 (4th Cir. 2020), and *U.S. v. Keller*, 916 F.3d 388 (5th Cir. 2019). *But see U.S. v. Miller*, 819 F.3d 1315 (11th Cir. 2016).

As there were no visual depictions of minors engaged in sexual acts [App. A, p. 51]—the statutory requirement for child pornography (*see Hillie*; *Williams* (2008))—the government's conviction relied on the court's improper instruction, which altered statutory language and included the non-statutory Dost Factor Six, confusing and misleading the jury. *See Artuz v. Bennett*, 531 U.S. 4, 10 (2000);

Sullivan v. Louisiana, 508 U.S. 275 (1993).

In Counts 5 and 6, Petitioner was charged with possession of child pornography. The court explained that the statutory meaning of "sexually explicit conduct" includes the "lascivious exhibition of the genitals or pubic area" but failed to acknowledge it is one of five sexual acts under 18 U.S.C. § 2256(2)(A) [App. D]. The court misconstrued the statutes by violating the "rule of the last antecedent" and the "noscitur a sociis" canon, stipulating that a lascivious "exhibition" is not concrete and that the lascivious "nature of the depictions" should be determined with respect to the depictions themselves, knowing the government had no intention of allowing the jury to view the original videotapes. [App. K]. *See Lockhart v. U.S.*, 577 U.S. 347 (2016); *U.S. v. Howard*, 968 F.3d 717 (7th Cir. 2020); *see also Hillie* (2021). At this point, the court steered the jury away from statutory requirements. The court's opinion that the "lascivious exhibition of the genitals or pubic area" is somehow vague and ambiguous requiring its own judicial interpretation is inappropriate [App. A], and "the court's interpretation of the statute as not requiring the image to depict overt sexual activity or behavior is in direct contradiction to the language of the statute and the intent of [C]ongress…[that] the Act not applied to asexual activities." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476–77 (1992), reinforces that statutory terms must align with congressional intent, precluding judicial expansion beyond the legislature's purpose. "The statutory term 'lascivious exhibition' (directly) refers to the minors conduct that the visual depiction depicts and not the depiction itself." *U.S. v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021).

The court then introduced the Dost Factors [App. K, p. 1067, lines 8–25;

App. M, Doc 141 pp. 14–15]. In this case, the instruction on Dost Factor Six allowed the jury to convict based on whether a minor engaging in asexual activity (e.g., changing clothes) met the statutory requirement of a "lascivious exhibition," and whether the depiction was designed to elicit a sexual response in Petitioner as the viewer (a subjective thought crime), rather than in a reasonable person viewing depictions of actual minors engaged in sex acts (the objective standard). The court replaced legislated specific intent requirements with a subjective, non-statutory standard, violating due process and separation of powers. Modifying statutory elements through judicial interpretations violates due process. *U.S. v. Davis*, 139 S.Ct. 2319 (2019). These constructive amendments—for each of the six charges—included statutory restructuring and use of the non-statutory Dost Factor Six (not in the indictment), providing at least two ways for conviction (subjective and objective), where the indictment included only one (objective). *U.S. v. Blessett,* 31 F.4th 1211 (9th Cir. 2022). This constitutes structural error requiring automatic reversal and vacatur. *See Weaver v. Massachusetts*, 582 U.S. 286 (2017); *see also U.S. v. Keller*, 916 F.3d 388 (5th Cir. 2019).

Jackson v. Virginia succinctly states that, in addition to finding facts, the jury must be properly instructed to apply the law to those facts. The sufficiency-of-evidence claim attacks both functions. Had counsel pursued the preserved Rule 29 motion, the trial outcome would have differed. *See Strickland.*

f. The Controversial Thumb Drive

The trial court ruled that the thumb drive issue—a trial error discovered while preparing the § 2255 petition—was procedurally defaulted. *Massaro v. U.S.*

is unequivocal on this point. It seems anomalous that the trial court maintains this position. Attempting to defeat this ineffective assistance claim, the court asserted it would have denied any defense motion on this issue and thus denied the COA. The appellate court, without discussion, denied the COA, finding Petitioner failed to substantiate a constitutional claim. [App. E].

This issue arose when the defense objected to the government's inclusion of commercial hardcore adult pornography and adult sex scenes from Hollywood films like *The General's Daughter* (John Travolta) and *Striptease* (Demi Moore, Burt Reynolds). The objections were grounded in *Old Chief v. U.S.*, 519 U.S. 172 (1997), and *U.S. v. Harvey*, 994 F.2d 149 (2d Cir. 1993). [App. M, Doc 141, pp. 79–89]. The parties agreed to remove the adult pornography from the thumb drive and not show it to the jury. The trial court accepted the agreement and ordered compliance. [App. Q].

The government claimed it made the changes. When the jury requested to see the videos, the court sent the unedited, unadmitted thumb drive to the jury. The prosecutor removed the drive from his pocket and handed it to the court officer, who delivered it. Neither the court nor defense reviewed the contents after the government's modifications. They had not removed the offending clips. The court did not readmit the drive into evidence, and during closing arguments, the prosecution directed the jury to view the master file where it was concealed. [App. P, pp. 1074, 1078]. The jury viewed the contents, including the commercial adult pornography. This was discovered during § 2255 preparation.

Petitioner based this ineffective assistance claim on trial counsel's failure to review the drive after modifications and to object to the court allowing the jury to

view unadmitted evidence without a Rule 403 balancing test. The court's failure to review and balance probative value against prejudice violates *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). The recent Supreme Court decision in *Andrew v. White*, 604 U.S. __ (2025), reinforces *Payne*, holding that the Due Process Clause forbids evidence so unduly prejudicial that it renders a criminal trial fundamentally unfair. Like the thong underwear in *Andrew*—with questionable probative value and highly inflammatory impact—the hardcore adult pornography here had no probative value regarding whether the depictions showed minors engaged in lascivious exhibition and could only inflame the jury, portraying Petitioner as depraved.

Without the objected-to adult pornography, the jury would have evaluated only the non-sexual images to determine compliance with the law. *See U.S. v. Williams* (2008). *Andrew v. White* confirms this due process violation as fundamentally unfair and unconstitutional.

CONCLUSION

This is a case of factual innocence. The government produced no direct or circumstantial evidence that Petitioner created or attempted to create child pornography. The introduced videos do not meet the legal definition of child pornography unless the Dost Factors substitute for the statute—and only if viewed subjectively. People dressing or undressing do not constitute sex acts, and the government's edited "highlight reel" of cherry-picked clips mixed with adult pornography does not alter the law. It is the minor's conduct in the depictions that must be lascivious, not the government's "mixed tape."

At trial, Petitioner raised an alibi defense through five witnesses, but the judge—disbelieving them—declined to instruct the jury on alibi or explain that the burden remained with the government to rebut it.

The third-party perpetrator evidence—the video of the hand with a distinctive thumb—was introduced by the government, intended to implicate Petitioner but held for rebuttal. It backfired, as the hand was neither Petitioner's nor the niece's friend's. Both houseguests testified Petitioner was absent, while the IT expert was present. [App. M, Doc 138, pp. 835–36]. The government's no-nexus objection was apparently accepted, and no third-party perpetrator instruction was given.

The arguments supporting legal innocence buttress the assertion that the court denied constitutional safeguards protecting the innocent. The trial and appellate courts used procedural tools to block Petitioner's Rule 29 insufficiency claim, ignoring *Hesser v. U.S.* and *Jackson v. Virginia*.

These issues, coupled with the identified circuit splits and the national stakes

of due process and fair trial rights, present an extraordinary case under Rule 10. This Court's intervention is essential to resolve conflicting interpretations, protect constitutional safeguards, and prevent wrongful convictions.

Petitioner prays this Court grant the Certificates of Appealability, exercise its supervisory role over lower courts, and vacate the convictions due to violations of constitutional rights, irreparable structural errors, and plain due process breaches. Petitioner requests issuance of a mittimus freeing this innocent man and such other remedies as the Court deems appropriate.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: October 7, 2025

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