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In the
Supreme Court of the United States

TERRY LEON BLANKENSHIP, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Wesley P. Page
Federal Public Defender

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

OFFICE OF THE FEDERAL PUBLIC DEFENDER
Southern District of West Virginia
300 Virginia Street, East, Room 3400
Charleston, West Virginia 25301
304/347-3350
jonathan_byrne@fd.org

Counsel for Petitioner

Dated: October 9, 2026

I. QUESTIONS PRESENTED FOR REVIEW

A 12-year-old girl alleged that Petitioner sexually abused her. Weeks later, she fully recanted the allegation: “Everything was a lie. I made it all up.” Months after that, Petitioner, who was on supervised release for a prior sex offense, was arrested for violating the conditions of that release. He was later charged with enticement of a minor, although the grand jury was never told about the girl’s recantation. A later indictment dropped the enticement count, but charged Petitioner with obstruction, witness tampering, and conspiring (with his wife) to tamper with a witness, allegedly to ensure that the girl stuck by her recantation.

Petitioner went to trial on those charges. The Government’s case was made up largely of portions of recorded conversations between Petitioner and his wife, one of which ended with his wife stating that if the girl did not tell the truth “it’s gonna’ get ugly.” Petitioner’s counsel sought to ask the Government’s witness what came next, to show that “it’s gonna’ get ugly” referred to how diligently defense counsel would treat the matter. After losing an objection to that question, the Government argued that if defense counsel asked the question, it would “open the door” to evidence that defense counsel had previously cross-examined the girl in a prior case, leaving her in tears. The district court agreed and counsel decided not to ask the question. Petitioner was convicted on all counts.

At sentencing, the driving issue was whether Petitioner had, in fact, sexually abused the girl. The girl never testified in court or otherwise under oath. Instead, the district court reviewed videos of two forensic interviews with the girl – one from

after her initial allegation and the second from after her recantation. From those videos, the district court concluded that the girl's initial allegation was truthful, but her recantation was not. Concluding that Petitioner had sexually abused the girl, the district court calculated the advisory Guideline range accordingly and, ultimately, imposed an upward variance sentence.

This Petition presents two issues:

First, whether the usual clear error standard of review for factual determinations at sentencing should give way to *de novo* review in a case, such as this one, where the key factual determination is based almost entirely on video evidence reviewed by the district court that can be similarly reviewed by the Court of Appeals.

Second, whether the Government's evidence regarding Petitioner's counsel's prior cross-examination of his accuser would have been relevant to any matter the jury needed to consider, so as to support a conclusion that counsel would have "opened the door" by asking a question about the next portion of an exhibit presented by the Government.

II. LIST OF ALL PARTIES AND RELATED CASES

PARTIES

- Petitioner – Tony Leon Blankenship
- Respondent – United States of America

DIRECTLY RELATED CASES

- *United States v. Blankenship*, No. 1:23-cr-00077, U.S. District Court for the Southern District of West Virginia. Judgment entered June 12, 2025.
- *United States v. Blankenship*, Appeal No. 25-4336, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on July 13, 2026.

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V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *United States v. Blankenship*, 2026 WL 2018756 (4th Cir. 2026), is unpublished and attached to this Petition as Appendix A. The portion of the trial transcript in which the district court held that defense counsel’s questioning would “open the door” to the introduction of evidence about his past cross-examination of the complainant is attached to this Petition as Appendix B. The portion of the sentencing hearing transcript in which the district court concluded that the complainant’s initial statement was credible is attached to this Petition as Appendix C. The district court’s judgment and commitment order is unpublished and attached as Appendix D.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on July 13, 2026. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court’s entry of that judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of Federal Rule of Evidence 402, which provides, in pertinent part:

Relevant evidence is admissible . . .

* * *

Irrelevant evidence is not admissible.

As well as 18 U.S.C. § 3553, which provides, in pertinent part:

(a) Factors To Be Considered in Imposing a Sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On June 6, 2023, an indictment was filed in the Southern District of West Virginia charging Terry Leon Blankenship with enticement of a minor to engage in a commercial sex act, in violation of 18 U.S.C. § 1591(a)(1), (b)(1), (b)(2), and (c) (Count One), and committing a felony offense involving a minor while required to register as a sex offender, in violation of 18 U.S.C. § 2260A (Count Two). JA14-15.¹ On September 19, 2023, a superseding indictment was returned charging Blankenship with the same offenses in Counts One and Two, in addition to attempting to obstruct the enforcement of 18 U.S.C. § 1591, in violation of 18 U.S.C. § 1591(d) (Count Three), attempting to tamper with a witness, in violation of 18 U.S.C. § 1512(b)(1) (Count Four), and conspiracy to tamper with a witness, in violation of 18 U.S.C. § 1512(k) (Count Five). JA16-20. On October 3, 2023, the Government dismissed Counts One and Two. JA21. On October 17, 2023, a second superseding indictment was returned

¹ “JA” refers to the Joint Appendix that was prepared in this case for the appeal to the Fourth Circuit.

recharging the remaining counts as Counts One (attempted obstruction), Two (attempted witness tampering), and Three (conspiracy). JA23-25. Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Blankenship was convicted at trial of the three charges in the second superseding indictment. JA188-189. A judgment order was entered on June 12, 2025. JA662-669. Previously, Blankenship timely filed a notice of appeal on May 27, 2025. JA661; Fed. R. App. P. 4(b)(2). The Fourth Circuit had appellate jurisdiction under 28 U.S.C. § 2253 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case arises from the allegations of a 12-year-old girl² that Blankenship was sexually abusing her. She recanted weeks later. Nonetheless, Blankenship was charged first with enticement and then with several offenses arising from what the Government alleged was a scheme between he and his wife, Laurel, to ensure the girl's recantation was not itself recanted. Blankenship was tried and convicted of attempted obstruction, attempted witness tampering, and conspiracy to attempt to tamper with a witness and eventually sentenced to 144 months in prison.

² The girl is alternately referred to in proceedings below as "Minor Female 1," "Minor Victim 1," "F.C.," or "AT." To the extent possible, she will be consistently referred to as "AT" in this Petition.

1. AT alleges that Blankenship provided her with various items in return for sex. Even after she recants those allegations, Blankenship is arrested and charged.

On August 22, 2022, Mercer County (West Virginia) Sheriff's Department Lieutenant Steven Sommers responded to a call regarding a 12-year-old girl, AT. JA47; JA53. AT alleged that Blankenship "would provide her vapes, minutes for her phone," and alcohol "in return for sexual favors." JA54. She also made similar allegations against another man. JA674. AT knew Blankenship because he was "the neighbor to her guardian" and "they're acquaintances." JA54. AT was living with her guardian, Janet Presley, due to a "previous CPS investigation" in which AT "was removed from the custody of her mother." JA55. On August 25, 2022, AT took part in a forensic interview in which she restated her allegations against Blankenship.³ JA55. But on October 4, 2022, AT recanted her allegations against Blankenship (and the other man). JA47.

On March 24, 2023 – five months after AT recanted her allegations – Blankenship was alleged to have violated his conditions of supervised release based on those allegations.⁴ Blankenship was arrested on March 28, 2023, and detained. JA48; JA676. Then, on June 6, 2023, Blankenship was charged by indictment with enticement of a minor to engage in sexually explicit conduct and doing so while being

³ That interview was admitted into evidence for sentencing and is included in Volume V of the Joint Appendix as Government Sealed Exhibit 149.

⁴ In 2009, Blankenship was sentenced to 100 months in prison, followed by a lifetime term of supervised release. His supervised release was ultimately revoked. *United States v. Blankenship*, 1:08-cr-00073, Dkt. No. 134 (S.D. W. Va.). No issues related to that revocation are presented in this Petition.

required to register as a sex offender. JA14-15. The grand jury was not informed of AT's recantation. JA78-79. Blankenship retained Derrick W. Lefler to represent him.

On July 20, 2023, the district court appointed a guardian *ad litem* for AT to represent her interests and ordered that she undergo a second forensic interview.⁵ JA48. On September 19, 2023, the Government obtained a superseding indictment, restating the original two charges against Blankenship and adding charges of attempted obstruction, attempted witness tampering, and conspiracy to attempt to tamper with a witness. JA16-20. The second forensic interview took place on September 29, 2023, in which AT maintained her recantation and said that the allegations against Blankenship (and the other man) were false and that “[e]verything was a lie. I made it all up.” JA48; Defendant Sealed Exhibit 159. On October 3, 2023, the Government moved to dismiss the first two counts of the superseding indictment and the district court approved of the dismissal the next day. JA21-22.

Finally, on October 17, 2023, the Government obtained a second superseding indictment charging only the attempt and conspiracy offenses. JA23-25. It would be those charges upon which Blankenship would go to trial. The Government's case against Blankenship was based primarily on clips from a series of calls (some phone calls, most video calls) between Blankenship and Laurel on April 4, 2023, and between July 20 and July 25, 2023.

⁵ That interview was made part of the record for sentencing and is included in Volume V of the Joint Appendix as Defendant Sealed Exhibit 159.

2. Blankenship is convicted of attempting to obstruct and tamper with a witness, as well as conspiring to do so.

Blankenship's trial took place on January 18, 2024. JA26-171. After the parties entered into evidence a series of stipulations setting forth the procedural history of AT's allegation, recantation, and the original charges against Blankenship, JA47-48, the Government presented their only witness, Sommers. JA52-97. Sommers provided background on the investigation, including AT's home situation and her initial allegations against Blankenship (and another man). JA53-56. In Sommers' words, Blankenship was charged with "sex trafficking." JA56. Sommers also testified that sometimes he had encountered defendants in jail calls who speak in code because "they know that their conversations are being recorded." JA63.

a. The Government presents audio and video evidence of Blankenship's conversations with Laurel about AT's recantation.

Primarily, Sommers was used to authenticate and introduce the phone and video clips that were the core of the Government's case. JA56-72. In those clips,⁶ Blankenship and Laurel discussed the case and what might happen with AT and her recantation. The Government's theory was that these demonstrated a conspiracy to ensure that AT did not withdraw her recantation.

For example, in one phone call, Laurel explained that "Granny" (Presley, AT's guardian) was "in the works of calling to have an appointment to change [AT's] living

⁶ The clips are included in Volume IV of the Joint Appendix and will be referred to in this Petition as "Government Exhibit X."

situations,” to which Blankenship responded to “try and get her to postpone that until this is all over.” Government Exhibit 1A. He further explained that “[i]t could mean me, uh, coming home or could mean me pretty much going to jail for the rest of my life.” *Ibid.* Sommers testified that Presley “could have initiated the guardianship change through Mercer County Family Court.” JA62. In a phone call from July 20, 2023, the day that the district court had appointed a guardian *ad litem* for AT and ordered a second forensic interview be conducted, Blankenship said he “[w]ish[ed] I had somebody to do a little homework for me,” adding they would “talk more about that when I’m on the video call with you.” JA48; JA63; Government Exhibit 1C. Laurel told him “I have covered a lot of stuff already that I don’t tell you about.” *Ibid.* In a video clip from later that day, Blankenship and Laurel returned to the subject of “homework,” with Blankenship stating that “I can’t spell it out,” but that it was “[c]oncerning today.” JA Government Exhibit 1D. Laurel explained that “your idea of homework is probably some homework I’ve already done” and that she was a “step ahead of you.” *Ibid.* Sommers noted that Blankenship was winking at points during the call and that in his review of the videos Blankenship did not have “a habit of regularly winking through conversations.” JA69.

In a clip from the next day, July 21, 2023. Blankenship says “I hope [AT] tells the truth” and “[a]dmits that she lied . . . that everything she said in that video was a lie.” Government Exhibit 1G. After some discussion of where AT might have gotten the items Blankenship had allegedly provided her, Laurel concluded by stating that if AT did not tell the truth “it’s gonna’ get ugly.” *Ibid.*

As to AT's recantation, Sommers confirmed it was first made on October 4, 2022, to a social worker. JA76. Sommers became aware of it at some monthly meeting (at which a prosecutor was present) of the team involved with AT's case by April 2023. JA76-77; JA87. Once he had that information, he did not ask Presley about it. JA77. He testified that he could not have had a second forensic interview done with AT because the "policy and procedures of the agency that conducts those interviews would not have conducted a second forensic interview." JA78. The agency would "not conduct a second interview unless ordered to" regardless of "whether it's a recantation or a re-visiting of the same allegations," and Sommers did not seek such an order. JA78; JA86. Sommers did not ask AT about the recantation. JA78. Nor did he inform the grand jury of the recantation because "I had no direct evidence of it." JA78-79. Sommers also admitted that he did not have any evidence of what "homework" was, but agreed it was possible that it included "trying to find out what people are saying or . . . who may be improperly influenc[ing]" AT. JA79-80.

b. The district court limits Blankenship's cross-examination of Sommers.

On cross examination, Sommers was asked about the call that ends with Laurel stating that if AT does not tell the truth "it's gonna' get ugly." After refreshing Sommers' recollection, Lefler asked "that really wasn't the entirety of that [call], was it?" JA81. The Government objected, arguing that Lefler was about to "ask about what the next statement during that recording is" and it "should be excluded as hearsay." JA81. Lefler explained that "the next line . . . in that statement is that because Lefler will leave no stone unturned, that it will be, whatever the phrase was,

it will be hell because, basically, your lawyer is going to do a good job for you.” JA82. Laurel’s statement “as it exists . . . it sounds threatening and ominous, like Ms. Blankenship is going to do something when, in fact, it’s just a comment . . . it’s cross examination to provide a complete statement.” JA82. The Government responded that “there was a reason that I cropped it there and that is simply because there is some prior history between” Lefler and AT “and I felt that it crossed too far into the risk of opening the door to that situation coming into evidence.” JA83. The district court concluded that “while it might otherwise be considered hearsay . . . I think in this instance, I’m going to allow it.” JA84.

The Government followed up by stating, “I might as well ask this,” continuing that “I would believe that bringing in evidence that Mr. Lefler could, in doing his job, make things ugly for the victim, would open the door to testimony about their prior experience with one another.” JA84. That was, “in a nutshell” that AT “was a victim when she was approximately six years old in another sexual assault case,” she testified and “was cross-examined by Mr. Lefler.” JA84. “That individual was acquitted,” the Government continued, and AT “was left in tears following her testimony.” JA84. That could be proven by testimony from Sommers, who was also the case agent in that matter. JA84.

The district court told Lefler “I think you’ve got a difficult choice here . . . if I allow you to do this, I think it’s going to open the door to exactly what stones you would be leaving unturned.” JA84-85. Lefler responded, “I’m just not sure why that implicates that at all.” JA85. The district court continued that “if you insist on

bringing that out . . . I think that opens the door to, on redirect, the Government explaining what that could mean. So, I – I don’t see any way around that.” JA85. Lefler responded that “that is a statement that could be made in any case where a lawyer is doing his job and stones are applicable to the present case and, clearly, that testimony and that prior experience wouldn’t be part of this case in any circumstances.” JA85. Nonetheless, Lefler stated that “I understand the Court’s ruling” and “I obviously would ask to note my exception.” JA85-86. Ultimately, Lefler did not ask Sommers the question. JA86.

Blankenship was convicted on all three counts in the second superseding indictment. JA166-167; JA188-189.

3. Blankenship is sentenced to 144 months in prison.

Following the jury’s verdict, a Presentence Investigation Report (“PSR”) was prepared to assist the district court at sentencing. JA670-705. The probation officer ultimately recommended that Blankenship’s final offense level be 42. JA685. Combined with a Criminal History Category II, his recommended advisory Guideline range was 360 months to life in prison, capped by a total statutory maximum of 780 months. JA686; JA689. Those calculations were driven largely by the probation officer’s conclusions that AT’s initial allegations against Blankenship were true and he had, in fact, sexually abused her. JA680-685. Blankenship objected to those calculations, specifically to “the factual assertions set forth in . . . the report and

dispute[d] the veracity of any accusations leveled against him.” JA700.⁷ Blankenship also objected that the PSR should include “the fact that AT also made allegations of sexual abuse by another adult . . . who was staying in the home of AT’s guardian” which were also recanted. JA700. Blankenship also objected to the Guideline enhancements set forth in the PSR. JA702-703. In a memorandum filed in advance of an evidentiary hearing on the objections, Blankenship confirmed that the “disputed facts related to whether defendant committed actual sexual offenses against” AT. JA206.

a. The district court reviews the forensic interviews and holds a hearing on disputed sentencing issues.

An evidentiary hearing on the PSR objections was held on May 18, 2024. JA208-338. The Government introduced the video of AT’s first forensic interview into evidence, while Blankenship entered the second interview video into evidence. JA254-50. The Government presented four witnesses in support of the PSR calculations, all related to AT’s initial allegations against Blankenship.

The first was Monica Holliday, the legal director of Child Welfare Services. JA215-229. Holliday was appointed to serve as AT’s guardian *ad litem* and had served the same role in a prior 2016 abuse and neglect case, and related criminal case, involving sexual abuse allegations related to AT and her siblings. JA216-217. AT, who was six or seven years old at the time, testified at the trial, and was cross-examined by Lefler. JA218-219. Holliday explained that there was no conclusive DNA

⁷ The Government had no objections. JA700.

match with the defendant, who was found not guilty. JA219. Although Holliday testified that testifying in court is “usually a traumatic experience for them to go through,” she did not testify that AT’s prior experience was traumatic for her. JA218-219.

Holliday met with AT prior to the second forensic interview and concluded that AT would not testify against Blankenship. JA221. Holliday explained that conclusion was based on the fact that AT “immediately recanted her statement . . . the allegations” and “her history and the information from the past with having to testify during . . . the first case and it not working out in her favor.” JA222. In her more than nine years of experience serving as a guardian *at litem*, Holliday said it was “common” for children to recant allegations of sexual abuse, but admitted “I don’t know how often.” JA223. Holliday testified that she observed the second forensic interview, in which AT maintained her recantation, giving “what I would consider a bizarre story about being mad, and that she didn’t want her and her boyfriend to get in trouble at the time” which she thought “didn’t make very much sense.” JA224. She also testified that AT was mad at Sommers for seizing her cell phone – “I guess, as a typical teenager, she was very interested in having her phone back” – and appeared to believe that if the case was over she would get it back. JA225.

On cross-examination, when Holiday was asked if her testimony was “entirely your speculation?”, she admitted that “I can’t prove any of it, no.” JA226. She also agreed that, in her experience, she had seen situations where children had fabricated allegations. JA226. Asked “if the situation were that this young lady had been caught

having boys come up to the house, sneak[ing] into the house,” Holliday agreed that AT’s explanation for why she made the initial allegations was “not bizarre.” JA226-227. Furthermore, she agreed that she “cannot rule out” that AT did not want to “testify to something that wasn’t the truth”. JA227.

The Government’s next witness was Kelshawn Grant, a therapist who had previously worked for CPS. JA230-248. He was involved in the “initial assessment” of AT in 2022. JA232. At the time, AT was living with Presley, her grandfather, and a younger sibling and had been in “many different living arrangements” previously. JA234. He interviewed Presley, who said Blankenship was “just a neighbor” and was unaware he was a registered sex offender, but that when Presley’s husband had to go to the hospital the children would be “under the guardianship” of Laurel. JA235; JA236. Presley described AT as “a very promiscuous and defiant child.” JA246. This “raised red flags” because she “often paints the child in a negative light, from my perception.” JA236. Grant also interviewed AT and she “recanted everything that was mentioned in the forensic interview.” JA236. Grant testified that AT “came across as playful, as she didn’t really weigh the severity of . . . the allegations” and “was quick to dismiss a lot of the allegations that I told her about.” JA237. AT told him that “she didn’t think it would go this far” and made the initial allegations because Presley called police for AT “bringing a boy to the house late at night, and the boy had to be escorted home.” JA237. Grant opined that, in his experience, children recanted allegations in about ten percent of cases, potentially due to fear of being removed from their current living situation. JA237-238. Grant thought this was “the most stable”

living situation AT had been in and agreed that she “did seem happy” there. JA239-240. In his report, Grant wrote that he believed AT’s initial allegations were true and that she recanted “because she feared she would end up back in foster care.” JA240.

On cross-examination, Grant stated that he only talked with Sommers in relation to the initial referral following AT’s allegations. JA242-243. Had Sommers asked him about AT’s recantation, he would have told him. JA243. Grant also confirmed that AT had also made allegations against another man, including descriptions of acts that the other man had performed, but recanted those allegations as well. JA243-244. AT had told him she identified Blankenship and the other man because they were who she thought of at the time. JA245. Grant also agreed that AT’s recantation could be the product of her not wanting to “perpetuate an untruth.” JA246.

The Government’s next witness was Sommers. JA249-273. He was alerted to AT’s allegations by her aunt, Sergeant, who told Sommers that she had AT’s phone and had “come across Snapchat messages between” Blankenship and AT. JA249-250. This had arisen from an incident the night before in which “one or two boys . . . were caught” at Presley’s house and the “night shift dealt with it” after Presley called the police. JA250. When he arrived at Presley’s home, he could not corroborate the Snapchat messages as “the messages were gone.” JA251-252. He did not execute a search warrant on any Snapchat account for Blankenship. JA253. With regard to the 2016 criminal trial in which AT testified, Sommers testified that there was some physical evidence suggestive of abuse, but nothing to match the defendant alleged to

have committed the offense. JA258. During her testimony, AT was “emotional” and “crying.” JA259.

On cross-examination, when Lefler asked of the 2016 trial that “I wasn’t mean to her; didn’t rough her up at all?”, Sommers answered, “[n]o, sir.” JA260. He also said he would not argue with Lefler if his recollection was that AT was not crying during her cross-examination, but did agree that “there were several statements that were not consistent” in that case. JA260. He also admitted that he had “no confirmation” that the Snapchat messages ever existed and that, although he seized two phones, there was nothing on them that corroborated AT’s allegations. JA262. Sommers confirmed that no charges were brought against the other man against whom AT had made allegations. JA269.

The Government’s final witness was Dylan Shaffer, Blankenship’s probation officer while he was on supervised release. JA274-296. He spoke with Blankenship on August 16, 2022, at which time Blankenship denied having had any contact with minors. JA275. On September 6, 2022, however, Blankenship admitted babysitting AT and her sibling “two or three times per week” since June. JA275-276. Shaffer testified that on March 13, 2023, he searched Blankenship’s phone and found texts and a log of calls between Blankenship and Presley. JA276-278. Based on what Shaffer found on the phone, he confronted Blankenship, who admitted continuing to have contact with AT. JA286. On cross-examination, Shaffer admitted that the texts all took place in an 18-hour period and the call log covered the month prior to the search. JA287-288. He admitted that the calls and texts were to Presley’s phone and

that “I do not know who was on the call” and agreed it could have been Presley. JA288. Shaffer also admitted that of the texts only the last suggested it might have been made by someone other than Presley and that Blankenship did not respond to it. JA289.

Blankenship presented testimony from his brother, as well as testifying on his own behalf. JA297-332. Blankenship denied any kind of sexual contact or relationship with AT. JA300-301. He also testified as a medical condition that made it too painful for him to engage in sexual relations. JA308-311.

b. The district court concludes the Blankenship sexually abused AT and calculates the advisory Guideline range accordingly.

The district court reconvened for sentencing on May 27, 2025. JA616-660. The district court walked through what it called “probably the most complicated guideline calculation I’ve had to deal with maybe ever,” ultimately applying multiple cross references before applying U.S.S.G. § 2G1.3 as the controlling Guideline.⁸ JA620-626. That produced a base offense level of 24, reduced to 18 under U.S.S.G. § 2X3.1 because Blankenship’s offenses involved attempt. JA626-627.

At that point, the district court explained that “I need to pause and make some credibility findings.” JA627. The district court recognized that Blankenship had testified and “basically denied any of this stuff with the girl occurred,” and that he had “spent about three hours this morning” watching videos of both of AT’s forensic

⁸ Blankenship does not take issue with this portion of the district court’s Guideline calculations in this appeal.

interviews. JA627. The district court also considered “the testimony of other witnesses that we had at the hearing.” JA628.

The district court found “the girl to be credible and believable and I find her recantation to not be credible” for two reasons. JA628. The first was “the social workers and others that testified . . . indicated that it is often the case that children who find themselves in a home where they want to be will do anything to avoid being removed from that home.” JA628. The district court added that – “I am paraphrasing for her” – that “she said she likes being in that home” and “I think she has found in that home for the first time stability.” JA628. Therefore, “she confirms that motivation.” JA628. The second reason was that the district court agreed that AT’s “explanation as to why she lied about Mr. Blankenship . . . didn’t make much sense,” adding that the “explanation she gave makes no sense whatsoever. So, I find her to be credible.” JA629. The district court found Blankenship’s denials “not to be credible given the credibility findings I made with regard to her.” JA629. The district court found that while the medical information submitted by Blankenship does “corroborate some of his testimony regarding his medical condition, it does not corroborate” that he was “not physically capable of sexual conduct because of medical issues.” JA629. Therefore, the district court found “by a preponderance of the evidence that the allegations” made by AT “in fact, happened for purposes of this sentencing proceeding.” JA629-630.

The district court then imposed the following enhancements predicated on its conclusion that AT’s initial allegations against Blankenship were true:

- two levels under U.S.S.G. § 2G1.3(b)(1)(B) because the minor was in the defendant's care, custody or control;
- two levels under U.S.S.G. § 2G1.3(b)(2)(B) because the defendant unduly influenced a minor to engage in sexual conduct;
- two levels under U.S.S.G. § 2G1.3(b)(4)(A) because the offense involved a sex act;
- two levels under U.S.S.G. § 3A1.1(b)(1) because the offense involved a vulnerable victim; and
- two levels under U.S.S.G. § 3C1.1 for obstruction of justice based on Blankenship's testimony at the evidentiary hearing.

JA630-637. That produced a final offense level of 28 which, combined with a Criminal History Category II, produced an advisory Guideline range of 87 to 108 months in prison. JA637-638.

c. The district court imposes an upward variance sentence of 144 months in prison.

Blankenship argued for a "variant sentence below the recommended guideline range," while the Government ultimately requested an upward variance to a sentence of 135 months. JA642; JA649. The district court imposed a sentence of 144 months in prison. JA563.

The district court began its explanation of its sentence by stating, "Mr. Blankenship, you had sex with a 12-year-old girl," concluding that AT's initial statement was "highly detailed and involved sexual language that a 12-year-old shouldn't even know." JA651. Then "you worked with your wife to cover it up," concluding that a "fair reading of the facts is that once you all found out about that recantation you wanted to make sure that she stuck with it," although "whether that was actually successful was unclear." JA652. The district court concluded that

Blankenship's prior sentence "did not deter you." JA652. The district court stated that it was "not relevant" that AT "talked about another perpetrator," continuing that "I don't know what happened with that . . . so, I really can't take that into consideration because I have no context." JA653. The district court also said that it was "mindful, as the Government pointed out, of . . . you getting the benefit of your obstruction," which "I don't think I can address that appropriately on a 1-to-1 basis, but I do think that taking that into consideration serves the factor of promoting respect for the law." JA653. The district court then imposed a sentence of 144 months in prison, to be followed by a lifetime term of supervised release. JA653.

4. The Fourth Circuit affirms.

Blankenship sought review of his convictions and sentence from the Fourth Circuit. He raised four issues, two of which are relevant to this appeal. First, he argued that the district court abused its discretion by concluding that, if Lefler asked about the next statement in the phone call that ended "it's gonna' get ugly" it would open the door for the Government to present evidence of Lefler's prior cross-examination of AT. Second, he argued that the district court erred in concluding that Blankenship had sexually assaulted AT and imposing multiple Guideline enhancements as a result. In doing so, Blankenship argued that the appropriate standard of review should be *de novo*, rather than clear error, given that AT never testified and her credibility was judged based on recordings of the forensic interviews that were available to the Court of Appeals.

The Fourth Circuit affirmed Blankenship’s sentence in a two-page, five-paragraph unpublished, *per curiam* opinion. *United States v. Blankenship*, 2026 WL 2018756 (4th Cir. 2026). Of those five paragraphs, the first was entirely devoted to procedural aspects of the case, the second to swiftly restating Blankenship’s appellate issues, and the third to the relevant standards of review. In that paragraph, the court restated that it reviews “factual findings for clear error” without addressing Blankenship’s argument that should not be the standard in this case. *Id.* at *1 (cleaned up). The fourth paragraph contained the court’s analysis, which was, in its entirety:

In these circumstances, having carefully assessed the record on appeal — as well as the various appellate submissions of the parties — we discern no reversible error. Rather, we are of opinion that the able district judge carefully and thoroughly analyzed the various contentions interposed by Blankenship in the underlying court proceedings, and that the judge properly assessed and disposed of each of them on sound and legally correct bases.

Id. at *2. In the final paragraph the court stated that “we are satisfied to reject each of Blankenship’s appellate contentions,” affirm the judgment, and dispense with oral argument. *Ibid.*

IX. REASONS FOR GRANTING THE WRIT

- I. **The writ should be granted to determine whether the usual clear error standard for review of factual determinations at sentencing should give way to *de novo* review in a case where the key factual conclusion was based almost entirely on video evidence that can be reviewed by the Court of Appeals.**

The primary issue for the district court to resolve at sentencing was whether AT's initial allegation that Blankenship sexually abused her was true. That issue not only drove the advisory Guideline calculation, but underpinned the rationale for the ultimate sentence the district court imposed. The district court's conclusion that AT's initial allegation was credible was based almost entirely on two videos of the forensic interviews of AT, both of which were in the record and available for the Court of Appeals to review. The Fourth Circuit reviewed the factual question of whether AT's initial allegation for clear error, even though the usual rationales for such deference do not apply to the video evidence. Whether the proper standard of review in such a situation is clear error or *de novo* is an important question of federal law that has divided the lower courts and that this Court should resolve. *See* Rules of the Supreme Court 10.

- A. **The primary reason for giving overwhelming deference to trial court factfinders does not apply when the evidence at issue is video footage equally available to an appellate court.**

In the usual case, a Court of Appeals reviews a district court's factual findings underpinning the advisory Guideline calculation for clear error. *United States v. Gross*, 90 F.4th 715, 720 (4th Cir. 2024). In addition, "[w]hen a court renders factual

findings based on determinations regarding the credibility of witnesses, we give even greater deference to the trial court’s findings.” *United States v. Slager*, 912 F.3d 224, 233 (4th Cir. 2019). That is consistent with how factual findings are generally treated on appeal. A key reason for such deference is that factual findings “depend peculiarly upon the credit given to witnesses by those who see and hear them.” *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949). As one court explained, the “trial judge has observed the appearance and demeanor of the witnesses and heard their voices; he has breathed in the atmosphere of the courtroom and observed the multitudinous details that do not appear on the record.” *United States v. Cruz*, 581 F.2d 535, 541 (5th Cir. 1978). “We,” the court concluded, “see but the insistent notations on a typed manuscript.” *Ibid.*

But more than a quarter of the way through the Twenty-First Century, the appellate record is no longer limited to “insistent notations on a typed manuscript.” “As digital technology continues to permeate our lives, trial court proceedings more frequently include the presentation of video-recorded and audio-recorded evidence.” Judge Jack M. Sabatino, *The Appellate Digital Deluge: Addressing Challenges for Appellate Review Posed by the Rising Tide of Video and Audio Recording Evidence*, 96 Temp. L. Rev. 11, 14 (2023). As another judge put it, we “live in an era of instant replay,” which “raises the question of what standard of review should appellate courts use when assessing video evidence.” Pierre H. Bergeron, *Rethinking Appellate Standards of Review for Video Evidence*, 56 Ct. Rev.: J. of Am. Judges Ass’n 140, 140

(2020). As yet, there is no settled answer to how appellate courts should review video evidence in cases.

This Court applied a more searching review to an appeal using video evidence in *Scott v. Harris*, 550 U.S. 372 (2007). Harris led police on a high-speed chase, which ended when an officer, Scott, “applied his push bumper to the rear of [Harris]’s vehicle” and Harris “lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed,” leaving Harris seriously injured. *Id.* at 374. Harris sued under 42 U.S.C. § 1983, arguing that Scott’s actions violated the Fourth Amendment. The Court of Appeals affirmed the denial of Scott’s motion for summary judgment, “[t]aking” Harris’ “view of the facts as given.” *Id.* at 376. Scott sought review from this Court, which reversed. *Ibid.*

In doing so, this Court stated that the “first step in assessing the constitutionality of Scott’s actions is to determine the relevant facts.” *Scott*, 550 U.S. at 378. While noting the usual standard that courts must view the facts in the light most favorable to the party opposing summary judgment, this Court noted “an added wrinkle in this case: existence in the record of a videotape capturing the events in question.” *Ibid.* There was no allegation that the video had been tampered with, “nor any contention that what it depicts differs from what actually happened.” *Ibid.* Moreover, the videotape “quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.” *Ibid.* In light of the video, Harris’ “version of events is so utterly discredited by the record that no reasonable jury could have believed him” and the “Court of Appeals should not have relied on such visible

fiction.” *Id.* at 380-381. Instead, “it should have viewed the facts in the light depicted by the videotape.” *Id.* at 381.

Scott indicates the value of appellate courts reviewing video evidence, showing it is a powerful tool to reach the correct outcome in a given case, as well as providing an example of where established tradition should give way. Where the primary evidence at issue is a video, the traditional reasons for applying deference to a district court’s factual findings – because “it has the benefit of observing the witnesses, and is thereby aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said,” *U.S. Fire Ins. Co. v. Allied Towing Corp.*, 966 F.2d 820, 824 (4th Cir. 1992)(cleaned up), and “the various cues that bear so heavily on the listener’s understanding of and belief in what is said are lost on an appellate court later sifting through a paper record,” *Cooper v. Harris*, 581 U.S 285, 309 (2017) – do not apply. Nonetheless, courts below are divided as to whether the review of video evidence should continue to receive the deference accorded other factual findings.

The New Jersey Supreme Court has been on both sides of the issue. *State v. Diaz-Bridges*, 34 A.3d 748 (N.J. 2012), involved reviewing whether a defendant’s assertion during a police interrogation was sufficient to invoke his right to silence. *Id.* at 751. The interrogation “was videotaped and recorded in its entirety.” *Id.* at 752. The court held that “if the trial court has based its findings on conduct or behaviors that defendant exhibited during a videotaped interrogation that may be observed with equal precision by an appellate court, a review of the interrogation is

appropriate.” *Id.* at 760. That did not alter “our admonition to appellate courts that they give due deference to the fact-finding role of the trial courts.” *Ibid.* “However,” the court went on, “when the trial court’s sole basis for its findings and conclusions is its evaluation of a videotaped interrogation, there is little, if anything, to be gained from deference.” *Id.* at 761. Thus, in such instances “deference to the trial court’s interpretation is not required” and “[a]ppellate courts need not . . . close our eyes to the evidence that we can observe in the form of the videotaped interrogation itself.” *Ibid.*

The court changed course a few years later in *State v. S.S.*, 162 A.3d 1058 (N.J. 2017). *S.S.* also involved the issue of whether a defendant asserted his right to remain silent during a videotaped interrogation. In this instance, the trial court concluded that he had, “[r]elying solely on a review of the video-recorded interrogation.” *Id.* at 1060. The intermediate appellate court had “engaged in a *de novo* review” of the video and reversed. *Ibid.* The court engaged in a “careful reappraisal of *Diaz-Bridges*,” concluding that the “non-deferential standard articulated in that case is at odds with traditional principles limiting appellate review,” including that trial judges “have ongoing experience and expertise in making factual rulings,” the “customary role” of appellate courts is not to “replicate the work of our trial courts,” and “notions of judicial economy and finality call for a standard of review where appellate courts defer to a trial court’s factual findings in the absence of clear error.” *Ibid.* The court surveyed how other courts had addressed the issue, noting that “several United States Circuit Courts of Appeals” and “state jurisdictions” have maintained a

deferential standard of review in cases involving video evidence. *Id.* at 1068-1069 (collecting cases). The court ultimately concluded that “a standard of deference to a trial court’s factfindings, even factfindings based solely on video or documentary evidence, best advances the interests of justice in a judicial system that assigns different roles to trial courts and appellate courts.” *Id.* at 1069.

However, as the S.S. court recognized, “a number of jurisdictions favor a *de novo* approach.” S.S., 162 A.3d at 1069. In *People v. Madrid*, 179 P.3d 1010 (Colo. 2008), an *en banc* Supreme Court of Colorado reviewed whether a defendant’s statements should be suppressed. Those statements were “audio- and video-recorded” and there were “no disputed facts outside that record bearing on the issue of suppression.” *Id.* at 1014. Therefore it could review without deference because “we are in a similar position as the trial court to determine whether the statements should be suppressed.” *Ibid.*; see also *People v. Platt*, 81 P.3d 1060, 1067 (Colo. 2004)(*en banc*)(“[w]hen considering recorded statements – whether documentary, audio-taped, or video-taped – the trial and appellate courts are in a similar review position”); see also *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000)(“when a court’s findings of fact at a suppression hearing are based solely on evidence that does not involve issues of credibility, such as the videotape evidence in this case, the rationale underlying a more deferential standard of review is not implicated”); *State v. Tuttle*, 650 N.W.2d 20, 34 n.11 (S.D. 2002)(standard of review was *de novo* “because we had the same opportunity to review the videotape of the defendant’s statement as the trial court”). Massachusetts has “consistently held that lower court findings based on documentary

evidence available to an appellate court are not entitled to deference.” *Commonwealth v. Novo*, 812 N.E.2d 1169, 1173 (Conn. 2004), citing *Berry v. Kyes*, 22 N.E.2d 622 (Conn. 1939). That “principle applies whenever the evidence before the trial court is reduced to a tangible form, and is therefore available to the appellate court in the same form as it was reviewed by the trial court.” *Ibid*.

This Court has yet to directly address this issue that has divided the lower courts. In the civil context, the outcome is controlled by Rule 52(a) of the Rules of Civil Procedure. See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-576 (1985). There is no similar rule that applies in criminal cases, although this Court has held that the “considerations underlying” that rule “apply with full force in the criminal context, at least with respect to factual questions having nothing to do with guilt.” *Maine v. Taylor*, 477 U.S. 131, 145 (1986). Nonetheless, this Court could, and should, revisit the matter in light of the “deluge” of video evidence presented to trial courts in 2026.

B. This case is a good vehicle for addressing this issue because the key determination for sentencing was made almost entirely on the basis of video evidence.

At sentencing, the primary issue in this case was, in the end, whether Blankenship sexually abused AT as she initially alleged. That is evident from the beginning of the district court’s reasons for imposing sentence: “Mr. Blankenship, you had sex with a 12-year-old girl.” JA651. From that conclusion followed numerous Guideline enhancements, the Government’s sentencing argument, and the basis for

the district court's imposition of an upward variance sentence greater than even the Government sought.

But that conclusion is flawed and the evidence cannot be read to support a conclusion that Blankenship actually assaulted AT. AT never testified under oath, at sentencing or during any other proceeding. She was never cross examined. The only evidence of her credibility or demeanor came from the videos of the two forensic interviews, which the district court reviewed, and which are inherently incompatible. In the first, AT says that Blankenship (and another man) sexually abused her, providing her with vapes, alcohol, and minutes for her phone in return for sex. JA55. In the second, AT says that was all a lie. She tells the interviewer, "I don't want you to see me, like, as a liar or whatever, but I lied about the whole thing. Everything was a lie. I made it all up." Defendant Sealed Exhibit 159 at 17:48-17:54. This is not a case where a complaining witness gives several statements which, in some fashion, are different from one another in particular details that might undermine their credibility. Rather, this is a situation where AT said she had lied, the allegations were made up, and she recanted them completely. On the issue of the most critical fact – was AT truthful in her allegation that Blankenship sexually abused her? – any conclusion that the allegation was true is impossible to square with that evidence. Only by giving deference to the district court's conclusion that AT's initial allegation was credible could a court of appeals affirm that conclusion. Nothing else the district court could point to could overcome the fact that the only evidence of abuse – AT's

initial allegation – was wholly and utterly said to be a fiction by the person who made it.

The district court found AT “to be credible and believable and I find her recantation not to be credible” for two reasons, neither of which are supported by the record. JA628. The first reason was based on the testimony of “the social workers and others that testified” about how “it is often the case that children who find themselves in a home where they want to be will do anything to avoid being removed.” JA628. While that is an accurate summary of that testimony, the district court’s conclusion ignores its own description of that testimony, that such situations are “often the case.” None of the witnesses who testified could speak to AT’s motives for recantation specifically – all they could do was speculate from general principles. For instance, Holliday testified that in her nearly ten years of serving as a guardian *ad litem* it was “common” for children to recant, but she later agreed that everything she said was “speculation.” JA223; JA226. Similarly, while Grant testified that around ten percent of children recant allegations, he admitted that he could not rule out the possibility that AT recanted because she did not want to continue to perpetuate an untruth. JA238; JA246. While he could speculate as to AT’s motives for recanting, he could not point to anything she said to support that speculation. Neither could testify specifically as to whether AT was following those general trends – and, of course, AT was never asked about it herself.

The second reason cited by the district court was that AT’s “explanation as to why she lied about Mr. Blankenship . . . didn’t make much sense” or made “no sense

whatsoever.” JA628. Curiously, the very next sentence by the district court, after concluding that her reason for recantation was false, was “[s]o, I find her to be credible.” JA628. This mirrors Holliday’s initial testimony, in which she called AT’s recantation story “bizarre,” but ignores her later admission on cross-examination that it was not. JA224; JA227. This “heads you lose, tails we win” dynamic was also present in Grant’s testimony, in which he stated that Presley described AT as “a very promiscuous and difficult child,” which rather than being treated as a potential reason to believe AT’s recantation was written off as a “red flag” about Presley because she “often paints the child in a negative light.” JA236.

The district court’s conclusion that AT’s recantation was not credible also overlooks two key pieces of information developed at sentencing. First, as referenced during trial, in 2016 AT was the centerpiece of a state criminal trial in which she accused a man of sexual assault. That defendant was acquitted after AT was vigorously cross-examined, suggesting that there should be serious concerns about her veracity. JA258-259. Indeed, Sommers admitted that several of the statements AT made during that proceeding were “not consistent” with each other. JA260. Second, Blakenship was not the only person AT alleged to have assaulted her in 2022 – and she recanted the allegations as to that person, too. JA244-245. For reasons unclear from the record, that man was never arrested nor charged with any offense, much less pursued with Federal charges once the allegation against him collapsed. JA271.

The district court's conclusion can find no support in any other evidence in the record, aside from AT's initial allegation. Sommers admitted that he could find "no confirmation" of any evidence that Blankenship and AT exchanged Snapchat messages and that although he seized two cell phones there was nothing on them to corroborate AT's allegations. JA262. Furthermore, Sommers showed no interest in determining what the truth actually was once AT recanted. He did not ask Presley about the recantations. JA77. He did not seek an order to compel a second forensic investigation. JA87. He did not ask AT about the recantation. JA78. Yet, when he testified before a grand jury that returned the initial charges against Blankenship ***eight months after the recantation*** he did not tell the grand jury about it. JA78-79.

Implicit in the district court's holding is that the very nature of the allegations made by AT, a minor, make them credible (even though, in Grant's words, she "didn't really weigh the severity" of them, JA237). This is clear from its comment, while explaining the sentence imposed, that AT's "statement was highly detailed and involved sexual language that a 12-year-old shouldn't even know." JA652. This echoes the view of many investigators in the 1980s during the Satanic Panic cases that children simply do not make up allegations of sexual abuse. The criminal justice system knows, after much pain and struggle, that that is not the case. See Jonathon J. Booth, *A New Satanic Panic*, 36 Yale J. of Law & Feminism 102, 110 (2025)(noting that the theory that "children never fabricate the kinds of explicit sexual manipulations" they reported "was supported by no empirical evidence"); John Felipe

Acevedo, *Crime Fantasies*, 46 Am. J. Crim. L. 193, 224 (2020)(noting that cases proceeded to trial even “when the available physical evidence did not support the core claims of the purported victims”); Paul Flahive, *Texas continues to exonerate people who were wrongly convicted during ‘satanic panic’*, All Things Considered (Nat’l Pub. Radio broadcast April 18, 2023).

Ultimately, the Government’s initial case against Blankenship, that he sexually abused AT, was based entirely on AT’s initial allegation. Her recantation was not a series of slowly less detailed statements about the incidents, but a complete and utter denial that the incidents ever happened. AT, by her own words, was not a reliable witness and had admitting lying. Particularly given that she has never testified under oath about this matter, or was subject cross-examination, a conclusion that her initial allegations are credible, while her total recantation is not, is erroneous and unsupported by the record. Review *de novo*, rather than for clear error, would have made a difference in this case.

II. The writ should be granted to determine whether a defense counsel’s prior cross-examination of a complainant is relevant in a case where he sought to ask a Government witness what was said next in a recording in which one person said “it’s gonna get ugly” if complainant does not tell the truth.

The Government’s case against Blankenship was primarily made up of recorded conversations between he and his wife, Laurel. One of those calls ends with Laurel stating that if AT did not tell the truth “it’s gonna’ get ugly.” Lefler, Blankenship’s trial counsel, sought to introduce what came next on that recording, that Laurel was referencing counsel’s work on Blankenship’s behalf. The district

court decided that would “open the door” to the Government presenting evidence of Lefler’s prior cross-examination of AT in a completely separate case. As a result, Lefler chose not to ask the question. Whether such a situation would have allowed the Government to offer irrelevant evidence as a result of Lefler’s question is an important question of federal law that this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. Lefler’s prior cross-examination of AT was irrelevant and a question about the next statement made after an admitted video call could not “open the door” to such evidence.

“A district court may allow testimony on redirect which clarifies an issue which the defense opened up on cross-examination even when this evidence is otherwise inadmissible.” *United States v. Catano*, 65 F.3d 219, 226 (1st Cir. 1995); cited in *United States v. McLaurin*, 764 F.3d 372, 383 (4th Cir. 2014). Nonetheless, such evidence is still subject to the requirement of Federal Rule of Evidence 402 that only relevant evidence is admissible at trial. Thus, the “‘opening the door’ principle of admissibility allows a party to introduce otherwise inadmissible evidence when the opposing party has introduced inadmissible evidence ***on the same issue***.” *United States v. Kaiser*, 609 F.3d 556, 572 n.4 (2d Cir. 2010)(cleaned up)(emphasis added); *see also United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000)(it “is widely recognized that a party who raises a subject in an opening statement ‘opens the door’ to admission of evidence ***on that same subject*** by the opposing party”)(emphasis added). Such “[r]ebuttal evidence,” then, “is defined as evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party” for which

“there must be a nexus between the purported rebuttal evidence and the evidence that the purported rebuttal evidence seeks to rebut.” *United States v. Jackson*, 327 F.3d 273, 306 (4th Cir. 2003). In this case, Blankenship sought to question Sommers about the next statement made in a video call between Blankenship and Laurel, but decided against it when the district court ruled that such a question would open the door to the Government inquiring about Lefler’s conduct in a prior case. The district court abused its discretion in coming to that conclusion because what occurred in a prior case was not relevant to the contested matters in this case.

The Government’s case against Blankenship rose and fell on clips of conversations between Blankenship and Laurel after he was arrested. One of them, in which Blankenship had said he hoped that AT “tells the truth” and would “admit that she lied” about the initial allegations, ended with Laurel saying that if she did not “it’s gonna’ get ugly.” Government Exhibit 1G. On cross-examination, Lefler sought to ask Sommers about what was said next on the call (after the clip ended), which was “because Lefler will leave no stone unturned, that it will be, whatever the phrase was, it will be hell because, basically, your lawyer is going to do a good job for you.” JA82. When the district court overruled the Government’s objection to that question, the Government pivoted to arguing that if the question was asked it “would open the door to testimony about their prior experience with each other,” that is, that Lefler had previously cross-examined AT in a state case in which the defendant was acquitted. JA84. Sommers happened to be the case agent on both cases and could

testify to those facts. JA84. In light of the district court's ruling, Lefler opted not to ask Sommers about what was said next. JA86.

The district court abused its discretion in concluding that Lefler's question would open the door to the Government asking about his prior cross-examination of AT because that was not relevant to any issue the jury had to decide in this case. Evidence is relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence" and that fact "is of consequence in determining the action." Fed. R. Evid. 401. Determining "whether a fact is 'of consequence in determining the action' generally requires considering the substantive issues the case presents." *Crawford v. City of Bakersfield*, 944 F.3d 1070, 1077 (9th Cir. 2019). The substantive issues in this case have nothing to do with what happened in a separate state case in 2016. The jury in this case was tasked with determining whether Blankenship attempted to obstruct a criminal investigation that began in 2022 by tampering with a witness after she recanted allegations against him made in 2022. That Lefler successfully cross-examined AT six years prior could not make a fact relevant to those decisions "more or less probable than it would be without the evidence."

There is nothing in the record to suggest that Lefler's prior cross-examination of AT had anything to do with her recanting the allegations against Blankenship and another man. The recantation occurred on October 4, 2022 – more than ***four months*** before Blankenship was arrested on a supervised release revocation petition. JA47-48. Blankenship had no counsel when AT recanted, so the possibility of facing Lefler

again in court could not have motivated it. Nor is there any evidence that she was aware that Blankenship ultimately retained Lefler to represent him. The other man AT accused was never arrested or charged and thus never had counsel that might cross-examine AT, yet she recanted her allegations against him as well. JA269. Put simply, Lefler's prior cross-examination of AT had nothing to do with the charges for which Blankenship was ultimately tried and convicted. The district court was incorrect to conclude otherwise.

B. The district court's ruling impugns the nature of the adversary system and the Sixth Amendment.

All Laurel said was that Lefler would do the job of a defense attorney. Our system of "adversarial testing . . . posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing the undivided interests of his client." *Polk County v. Dodson*, 454 U.S. 312, 318–19 (1981)(cleaned up); *see also Grievance Committee for the Southern Dist. of New York v. Simels*, 48 F.3d 640, 650 (2d Cir. 1995)(recognizing "the overriding concern of a defendant's Sixth Amendment right to the effective assistance of counsel and a lawyer's ethical duty of zealous advocacy"); *Daily Gazette Co., Inc. v. Canady*, 332 S.E.2d 262, 265 (W. Va. 1985)("the lawyer owes a duty of zealous representation to his or her client"). Effective assistance of counsel would have required effective cross-examination of AT, had the Government proceeded with the charges based entirely on her initial allegations. *California v. Green*, 399 U.S. 149, 158 (1970)(cross-examination is "the greatest legal engine ever invented for the discovery of truth")(cleaned up). Similarly, it would have required Lefler to thoroughly investigate

AT to prepare for such confrontation – to “leave no stone unturned.” JA82; *Strickland v. Washington*, 466 U.S. 668, 691 (1984)(defense counsel “has a duty to make reasonable investigations”). Laurel’s statement that things could “get ugly” because Lefler would do his job is unremarkable, except that it gives exculpatory context to the evidence presented by the Government.

X. CONCLUSION

For the reasons stated, this Court should grant certiorari in this case.

Respectfully submitted,

TERRY LEON BLANKENSHIP

By Counsel

WESLEY P. PAGE
FEDERAL PUBLIC DEFENDER

A handwritten signature in black ink, appearing to read 'J.D. Byrne', is written over a horizontal line.

Jonathan D. Byrne
Appellate Counsel
Counsel of Record