No. 15-14787-AA

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK JOSEPH UNREIN,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:14-cr-262, Hon. Elizabeth A. Kovachevich

APPELLANT'S BRIEF OF MARK JOSEPH UNREIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Anderson, Howard C. – Assistant Federal Public Defender;
2. Bentley, A. Lee, III – United States Attorney;
3. Burns, P.A. – Appellate counsel for Defendant-Appellant;
4. Burns, Thomas A. – Appellate counsel for Defendant-Appellant;
5. Cavanaugh, Kelly Ann – Trial counsel for Defendant-Appellant;
6. Dinsbier, Adam R. – Trial counsel for Defendant-Appellant;
7. Kaiser, Amanda C. – Assistant United States Attorney;
8. Kovachevich, Hon. Elizabeth A. – United States District Judge;
9. Leeman, Michael V. – Assistant United States Attorney;
10. Maddux, Michael P. – Trial counsel for Defendant-Appellant;
11. McCoun III, Hon. Thomas B. – United States Magistrate Judge;
12. Michael P. Maddux, P.A. – Trial counsel for Defendant-Appellant;
13. Muench, James C. – Assistant United States Attorney;
14. Olivero, Siobhan – Trial Counsel for Defendant-Appellant;
15. Porcelli, Hon. Anthony E. – United States Magistrate Judge;
16. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

17. Saltzman, Adam M. – Assistant United States Attorney;

18. Seider, Germaine S. – Assistant United States Attorney, Appellate Division;

19. Sneed, Hon. Julie S. – United States Magistrate Judge;

20. Unrein, Mark Joseph – Defendant-Appellant;

21. Whittel & Melton, LLC – Trial counsel for Defendant-Appellant.

August 1, 2016

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Mark Joseph Unrein requests oral argument. This appeal from a four-day jury trial involves legal error in the denial of an entrapment defense, structural error in the denial of the right to present an entrapment story to negate an element of the offense, prosecutorial misconduct during closing argument, the denial of a motion to sever an attempted child enticement charge from a possession of child pornography charge, and evidentiary error. Oral argument will assist the Court.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Unrein was charged by criminal complaint (Doc. 1) and subsequently indicted (Docs. 7, 53) for violations of federal criminal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court entered a final judgment (Doc. 163), which Unrein timely appealed (Doc. 165).

STATEMENT OF THE ISSUES

1. Did the District Court commit legal or structural error when it precluded Unrein from presenting an entrapment affirmative defense or story that would negate an element of attempted child enticement?

2. Did the District Court abuse its discretion when it overruled Unrein's objections and denied his motion for mistrial regarding the prosecutor's inflammatory comments during closing argument?

3. Did the District Court abuse its discretion when it denied Unrein's Rule 14 motion to sever the attempted child enticement charge from the possession of child pornography charge?

4. Did the District Court abuse its discretion when it admitted into evidence Craigslist advertisements, which Unrein had posted or responded to, soliciting nipple sucking and biting, toplessness, nudism, swinging, adult movies, casual sex, mutual blow jobs, and mutual masturbation from consenting men and women, including transvestites?

STATEMENT OF THE CASE

Course Of Proceedings

The criminal complaint charged Unrein with one count of attempted child enticement in violation of 18 U.S.C. § 2422(b). Doc. 1 at 1.

Thereafter, a grand jury indicted Unrein for the same charge. Doc. 7. Unrein pled not guilty. Doc. 9.

Initially, the Magistrate Judge released Unrein on bond pending trial. Doc. 12. Subsequently, the District Court disagreed with the Magistrate Judge, concluded Unrein was a danger to the community, and revoked his bond. Doc. 33.

Before trial, the Government superseded the indictment and added an additional count for possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). Doc. 53 at 1-2. Again, Unrein pled not guilty. Doc. 60.

In response to the superseded indictment, Unrein filed a motion to sever the charges. Doc. 64. The Government opposed. Doc. 65. Without a hearing, the District Court denied the motion. Doc. 66.

On the eve of trial, Unrein filed two motions in limine. Docs. 91, 92. Specifically, Unrein moved to preclude improper testimony and argument that described Unrein as "'dangerous' and 'creepy'" (Doc. 91 at 1) and to exclude testimony and evidence regarding Unrein's Craigslist interactions with consenting adults (Doc. 92). The Government opposed. Docs. 106, 107. At trial, the District Court orally denied Unrein's first

motion in limine without prejudice to reassertion at trial (Doc. 174 at 16-17) and orally granted in part and denied in part Unrein's second motion in limine (Docs. 174 at 15-16, 196-97).

Relatedly, the Government moved in limine to preclude Unrein's entrapment defense. Doc. 96. Unrein opposed. Doc. 100. At trial, the District Court orally granted the motion. Doc. 173 at 229-44.

The case proceeded to a four-day jury trial. Docs. 173, 174, 175, 176, 177. When the Government rested its case, Unrein orally moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Doc. 176 at 108. The District Court initially deferred ruling, then denied the motion. Doc. 176 at 108, 198-99. Ultimately, the jury returned guilty verdicts on both counts, and the District Court adjudicated Unrein guilty. Docs. 135; 177 at 4-5, 11.

Pursuant to Federal Rules of Criminal Procedure 29 and 33, Unrein timely filed a post-trial motion for new trial or judgment of acquittal. Doc. 144. The Government opposed. Doc. 145. The District Court denied the motion. Doc. 150.

At sentencing, the District Court made some minor hand-written modifications to the Pre-Sentence Investigation Report ("PSR"), but

otherwise adopted it in its entirety. *See* Doc. 172 at 1-14; PSR. According to probation, Unrein's total offense level was 32 and his criminal history category was I, which equated to a guidelines range of 121 to 151 months' imprisonment. Doc. 172 at 14. The District Court sentenced Unrein at the high-end of the guidelines range to 151 months' imprisonment on counts one and two, to run concurrently and to be followed by 15 years' supervision. Doc. 172 at 37-38. Additionally, consistent with the parties' agreement, the District Court ordered Unrein to pay $2,000 restitution to two child pornography victims. Doc. 172 at 41. The same day, the District Court entered judgment. Doc. 163.

Unrein now appeals his convictions, but not his sentences. Doc. 165. He is currently incarcerated.

Statement Of Facts

A. The Motion To Sever

Unrein moved the District Court to sever the charges for three reasons. Doc. 64. First, Unrein wanted severance to freely exercise his Fifth Amendment right against self-incrimination; without that freedom, "testifying about one alleged criminal offense [would] expose him to cross-examination on the other, [about] which he would otherwise

have remained silent." Doc. 64 at 4. Additionally, Unrein contended "[i]t would be unfairly prejudicial to try the two charges together because one is an alleged attempted touching offense and the other is possession of child pornography, which can be classified as a non-touching offense." Doc. 64 at 5. Finally, Unrein argued that absent severance, the jury might convict on a theory that "where there's smoke there's fire, i.e., that because Mr. Unrein has been charged with two counts of sexual offenses involving minors he must be guilty of at least one of them." Doc. 64 at 5.

In response, although Unrein had not contended joinder was improper (*see* Doc. 64), the Government argued the counts were properly joined under Federal Rule of Criminal Procedure 8(a). Doc. 65 at 1-5. Additionally, the Government contended that the District Court should not exercise its discretion to sever the charges under Rule 14(a). Doc. 65 at 5-12. In doing so, the Government placed its primary reliance on *United States* v. *Hersh*, 297 F.3d 1233 (11th Cir. 2002), and an unpublished district court order (Doc. 65.1).

B. The Motions In Limine

Before trial, the parties filed and responded to several motions in limine. Docs. 91; 92; 96; 100; 106; 107.

1. Unrein's Motion To Preclude Testimony Or Argument He Was "Dangerous And Creepy"

At the pretrial bond hearing, the prosecutor had described Unrein's arrival at the sting house as "dangerous and creepy." Doc. 75 at 7. Moreover, the prosecutor expressly described Unrein himself as a "sex crazed fiend" and implied he was a "pervert." Doc. 75 at 9, 54. Deeply troubled by these gratuitous remarks, Unrein moved in limine to exclude any such testimony or argument at trial. Doc. 91. Unrein claimed introduction of such testimony or argument would inject improper prosecutorial opinions and would contravene Federal Rules of Evidence 401 (relevance), 403 (probative value substantially outweighed by unfair prejudice), and 404(a) (character evidence). Doc. 91 at 1-8.

In response, the Government claimed Unrein had "misconstrued" and quoted the prosecutor out of context. Doc. 107 at 1-3. The Government did not, however, explain precisely what context was necessary to understand what else the prosecutor could have meant when she said

"the best way to describe Mr. Unrein from—from our examination of his records is he's just like a sex crazed fiend." Doc. 75 at 8-9.

At any rate, the District Court asked the Government at trial whether it would make any such comments. Doc. 174 at 16-17. The prosecutor said, "of course I'm not going to call the defendant personal names [or] say anything objectionable. And if I did, he has every right to object." Doc. 174 at 16. Based on these representations, the District Court denied the motion in limine without prejudice:

> THE COURT: She's not going to use labels. You can get up and object, and I'll instruct the jury to disregard it. Okay? So your motion is denied without prejudice to asserting it during the trial. Okay?

Doc. 174 at 17.

Nevertheless, during closing argument, and over numerous objections and a motion for mistrial, the prosecutor repeatedly described Unrein as someone who "creeps" around, looks at "disgusting images," and "doesn't care about any scars he'[d] leave on the child" that would "haunt her forever." Doc. 176 at 124-26, 138.

2. Unrein's Motion To Exclude His Craigslist Interactions With Consenting Adults

Unrein also moved to exclude any evidence, testimony, or argument regarding his Craigslist[1] interactions with consenting adults in which he sought casual sex with men and women, including transvestites (i.e., people who dress and act like the opposite sex). Doc. 92; *see also* Gov't Exs. 34B, 34C. Unrein claimed such evidence was irrelevant, unfairly prejudicial, and improperly related to his character or propensity. Doc. 92 at 1, 4-6; *see also* Gov't Exs. 34B, 34C.

In response, the Government argued this evidence would negate Unrein's anticipated defense that his intent while surfing online was innocent because he met the agent in Craigslist's "strictly platonic" section. Doc. 106 at 2. Additionally, the Government pointed out that "in less than one year," Unrein "responded to approximately 699 ads and posted numerous ads soliciting sex with strangers." Doc. 106 at 3; *see also* Gov't Ex. 34C. Finally, the Government suggested that any harm could be cured by a Rule 404(b) instruction. Doc. 106 at 1.

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[1] Craigslist is an "online service that provides classified ads and discussion forums to users" in North America. Doc. 174 at 199-200. In addition to personal advertisements, it includes offers to sell "property, furniture, other effects, collections" or "housing, jobs, resumes, gigs, [and] a community section." Doc. 174 at 200.

At trial, defense counsel indicated he would not contend Unrein lacked criminal intent because he met the agent-mother in the "strictly platonic" section. Doc. 174 at 195-97. This compromise would have quelled the Government's need to counter Unrein's potential intent argument. *See* Doc. 174 at 195-97. The District Court, however, declined Unrein's invitation and struck a middle ground: it excluded from evidence hundreds of personal advertisements to which Unrein responded that had been posted outside the "strictly platonic" section, but allowed the Government to introduce into evidence the 21 personal advertisements he himself posted (Gov't Ex. 34B) and the "strictly platonic" advertisements to which he responded (Gov't Ex. 34C). *See* Docs. 174 at 15-16, 196-97; 176 at 198. In response to that ruling, Unrein moved for a mistrial, which the District Court denied. Doc. 175 at 17-18.

3. The Government's Motion To Preclude Unrein's Entrapment Defense

The Government moved to preclude Unrein from presenting an entrapment defense to the jury. Doc. 96. Specifically, after characterizing the interactions between Unrein and the agent-mother, the Government contended Unrein's evidence for an entrapment defense was legally insufficient because it "clearly demonstrate[d]" Unrein "was the

one who pursued [the] illegal activity." Doc. 96 at 2. In making this argument, the Government placed substantial reliance on this Court's unpublished decision in *United States* v. *Hargrove*, 601 Fed. App'x 924 (11th Cir. 2015).[2]

Unrein opposed. Doc. 100. Instead, Unrein contended the Government's arguments went "to the weight and not the admissibility of the entrapment defense." Doc. 100 at 1. Contrary to the Government's position, Unrein explained, "there exists evidence sufficient for a reasonable jury to find in his favor." Doc. 100 at 3. Unrein also distinguished *Hargrove* because it involved a defendant who brought up sex, whereas here, the agent-mother had brought up sex. Doc. 100 at 3-4.

C. The Trial

1. Jury Selection And Opening Statements

The parties selected a jury and made opening statements. Docs. 173 at 13-228; 174 at 27-49. During her opening statement, the prosecutor explained that although the agent-mother posted her advertisement in Craigslist's "strictly platonic" section, that "often does not mean

[2] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

strictly platonic and is a site used to arrange for sex and meeting for sex just like other personal sites do or provide." Doc. 174 at 29-30.

Unrein did not address that "strictly platonic" theory. *See* Doc. 174 at 34-49. Instead, Unrein explained he was "a very misunderstood man" who did not intend "to engage in sexual activity," but rather intended "to go there and to meet the mother, the fictitious mother and the fictitious daughter to be a father figure to her." Doc. 174 at 35.

2. The Testimony

a. Agent Renee McAteer

Agent Renee McAteer had worked for Homeland Security Investigations in child exploitation cases for eight years. Doc. 174 at 52. In this case, she served as the undercover agent-mother. Doc. 174 at 53-54. At length, she described her interactions with Unrein and how the sting had ensnared him. Doc. 174 at 60-146.

Specifically, Agent McAteer had posted an advertisement on Craigslist, and Unrein responded. Doc. 174 at 58-60; Gov't Ex. 1. Thereafter, she and Unrein began emailing and speaking over the phone. Doc. 174 at 60-146; Gov't Exs. 2A, 2B, 2C, 3-10.

In the advertisement, Agent McAteer portrayed herself as an "open-minded mother of a beautiful 12-year-old girl seeking masculine influence." Doc. 174 at 54. Unrein's email response indicated he was likewise "open-minded" and interested in spending time "together." Doc. 174 at 63. Unrein described himself as "nice, happy, upbeat, and [capable of being] of great assistance with [her] daughter." Doc. 174 at 67-68.

Later, Unrein asked Agent McAteer how she envisioned he could help. Doc. 174 at 70. She said she was "completely open to suggestion." Doc. 174 at 70. Accepting that invitation, Unrein revealed he planned to show the mother and daughter "care and affection." Doc. 174 at 70. In response, Agent McAteer told Unrein that only her daughter "need[ed] care[,] affection[,] and to feel special." Doc. 174 at 71.

Unrein and Agent McAteer then discussed the specifics of his anticipated encounter with the daughter (Doc. 174 at 71-76), communicating by telephone (Doc. 174 at 76-77), and meeting in person (Doc. 174 at 74-76). During these email interactions, Agent McAteer brought up sex before Unrein (Doc. 174 at 75), who repeatedly expressed he was interested in friendship (Doc. 174 at 63, 68-75).

Upon Agent McAteer's request, Unrein called her. Doc. 174 at 76-77; Gov't Ex. 3. Among other things, they discussed Unrein's experience teaching his own children about sex (Doc. 174 at 87; Gov't Ex. 3), whether Unrein would be comfortable talking to a 12-year-old girl about sex (Doc. 174 at 91-92; Gov't Ex. 3), the fictitious daughter's fictitious attachment disorder (Doc. 174 at 92-93; Gov't Ex. 3), the prospect of the daughter sexually experimenting with Unrein and what such experimentation would entail (Doc. 174 at 94-100, 103-05, 109-11; Gov't Ex. 3), meeting in public (Doc. 174 at 101; Gov't Ex. 3), Unrein's sexual history (Doc. 174 at 101-02; Gov't Ex. 3), and meeting at the sting house that evening (Doc. 174 at 104-09; Gov't Ex. 3).

Unrein called Agent McAteer seven more times. Doc. 174 at 111-145; Gov't Exs. 4-10. During the second call (Doc. 174 at 111-114; Gov't Ex. 4), Unrein worried he was the target of a sting operation, asked whether Agent McAteer had spoken to her daughter yet, and asked whether he could speak with her daughter himself (Doc. 174 at 111-114; Gov't Ex. 4). Agent McAteer claimed her daughter was in the shower and assured Unrein she was not a law enforcement officer. Doc. 174 at 111-114; Gov't Ex. 4.

Thereafter, Unrein called Agent McAteer again and spoke to the daughter (actually a Citrus County deputy posing as the daughter) about what she and Unrein were going to do together. Doc. 174 at 115-122; Gov't Ex. 5.

After telling Agent McAteer he was heading out, Unrein called and once again expressed his apprehension regarding the possibility that the meeting was actually a sting operation. Doc. 174 at 126-132; Gov't Ex. 6. In response, Agent McAteer explained that she was "starting to really regret [the arrangement]" because her daughter would be crushed if Unrein "cancel[ed] out." Doc. 174 at 130; Gov't Ex. 6.

Unrein's next two calls went to Agent McAteer's voicemail. Doc. 174 at 133; Gov't Exs. 7, 8. When Unrein finally reached her again, he asked why the number her voicemail greeting identified was different from the one she had given him. Doc. 174 at 136; Gov't Ex. 9. Agent McAteer explained she kept both her work and personal lines on the same phone. Doc. 174 at 136; Gov't Ex. 9.

When Unrein drew near the sting house, he asked Agent McAteer to meet him near Walmart because he could not find it. Doc. 174 at 136-37; Gov't Ex. 9. She said she could meet at Ruby Tuesday's (Doc. 174 at

137; Gov't Ex. 9) but later claimed she had been drinking and would not leave the house (Doc. 174 at 142; Gov't Ex. 10). Eventually, Unrein arrived at the sting house. Doc. 174 at 146-47.

Law enforcement arrested Unrein at the sting house, and Agent McAteer described the surveillance video. Doc. 174 at 168-73; Gov't Exs. 11-14. Agent McAteer also described the contents of Unrein's duffle bag, which contained prescription Cialis.[3] Doc. 174 at 178; Gov't Ex. 15B.

Consistent with the District Court's evidentiary compromise, Agent McAteer also described all the "strictly platonic" Craigslist advertisements to which Unrein had responded. Doc. 175 at 10-17; Gov't Ex. 34C. Those advertisements described sexual acts with men and women in fairly graphic terms (e.g., nipple sucking and biting, toplessness, nudism, swinging, adult movies, casual sex, mutual blow jobs, mutual masturbation, etc.). Doc. 175 at 10-17.

Unrein immediately moved for a mistrial: "all of his sexual proclivities are now supposedly for the jury to judge even though there's not a single issue in the elements dealing with sexual proclivities except for the interest of a child." Doc. 175 at 17-18. In response, the prosecu-

[3] Cialis treats erectile dysfunction and symptoms of enlarged prostate. *See* Cialis, https://www.drugs.com/cialis.html.

tor represented that Unrein had referred to the "strictly platonic" section in his opening statement, which she contended had opened the door. Doc. 175 at 18.

Alas, the prosecutor's factual representation was false. *See* Doc. 174 at 34-49. Instead, it was only the prosecutor's opening statement that had referred to the "strictly platonic" section. Doc. 174 at 29-30. Perhaps in reliance on the prosecutor's false representation, the District Court denied the motion for mistrial. Doc. 175 at 18.

b. William Clinton Powell

William Clinton Powell was the director of government and law enforcement relations for Craigslist in San Francisco. Doc. 174 at 183. Testifying as a records custodian, Powell authenticated emails between Unrein and Agent McAteer. Doc. 174 at 183-208.

c. Gregory Phillips

Gregory Phillips was a senior technical security investigator for AOL. Doc. 174 at 209. Testifying as a records custodian, Phillips authenticated customer records it produced in response to a subpoena. Doc. 174 at 209-21; Gov't Exs. 33A, 33B.

d. Sergeant Ed Blair

In the sting operation, Sergeant Ed Blair of the Citrus County Sheriff's Office was responsible for inventorying Unrein's vehicle. Doc. 175 at 55. Sergeant Blair found handwritten notes with directions to the sting house and a duffle bag with Cialis, but no condoms, sexual lubricants, or sex toys. Doc. 175 at 56-57, 60.

e. Lawrence Cencer

Lawrence Cencer was Unrein's boss. Doc. 175 at 63. Cencer testified he never used Unrein's laptop and had not received a visit from Unrein on the night of the incident. Doc. 175 at 64.

f. Detective John Bergen

After Unrein was arrested, Detective John Bergen of the Citrus County Sheriff's Office executed a search warrant at Unrein's home. Doc. 175 at 69-70. Among other things, Detective Bergen seized handwritten notes, an adult video titled Teen Fuck Fiends, a laptop, and a hard drive. Doc. 175 at 80-82; Gov't Exs. 19, 19A, 20A, 20B. The District Court overruled Unrein's objection to admission of the adult video, but agreed to give a Rule 404(b) instruction. Doc. 175 at 73, 75-76, 82. For the jury's edification, Detective Bergen pointed out that the cover of the

adult video summarized its storyline as involving "the world's biggest dicks and the tiny young girls that crave them." Doc. 175 at 83.

g. James Hogg

James Hogg was employed by Samsung Electronics America. Doc. 175 at 96. To satisfy the jurisdictional nexus element of the possession of child pornography charge, he authenticated the hard drive as manufactured by Samsung in Korea. Doc. 175 at 97. On cross-examination, Hogg admitted he relied on the methodologies of his coworkers in Samsung's hard drive division, but could not explain those methodologies. Doc. 175 at 99. The District Court overruled Unrein's foundation objection. Doc. 175 at 101-03.

h. CFA Justin Gaertner

Computer Forensics Analyst ("CFA") Justin Gaertner worked for Homeland Security Investigations. Doc. 175 at 106. He explained how his forensic analysis uncovered "e-mails between the undercover Special Agent McAteer and the suspect," "child pornographic images, child erotica images, possible child porn and age difficult child porn as well as user information and Internet history." Doc. 175 at 118, 149-59; Gov't Ex. 27A, 27B, 27C.

CFA Gaertner obtained this information by previewing Unrein's hard-drive through a write-block device. Docs. 175 at 110; 176 at 27. Such devices connect an agent's computer to a suspect's hard-drive and are supposed to prevent the agent's computer from transmitting any data onto the suspect's hard-drive. Docs. 175 at 110; 176 at 27.

In all, CFA Gaertner found approximately 100 images of child pornography and 1,000 images of child erotica. Doc. 175 at 164-65. But CFA Gaertner conceded Unrein had not acquired these images through file sharing, which is typically how child pornography images are acquired. Doc. 176 at 43-44.

i. Lucille Davis

Lucille Davis met Unrein on a dating website. Doc. 176 at 52. While they were dating, Davis admitted she had used Unrein's computer, but denied she had looked up any child pornography. Doc. 176 at 53.

j. Diane Boulanger

Diane Boulanger was Davis's 23-year-old daughter. *See* Doc. 176 at 64, 66. She denied ever using Unrein's computer. Doc. 176 at 65.

k. Glorianne Gufreda

Glorianne Gufreda was Unrein's ex-wife of 30 years. Doc. 176 at 69. They had two children together, Michael Unrein and Tina Ralston.

Doc. 176 at 69. While they were married, Goufreda admitted she had used Unrein's computer, but denied she had looked up any child pornography. Doc. 176 at 71.

l. Michael Unrein

Michael Unrein denied using his father's computer to search for child pornography. Doc. 176 at 80.

m. Tina Ralston

Tina Ralston denied using her father's computer to search for child pornography. Doc. 176 at 87.

n. The Government Rests

After the Government rested its case, Unrein rested his case as well. Doc. 176 at 110.

3. The Motion For Judgment Of Acquittal

Pursuant to Federal Rule of Criminal Procedure 29, Unrein orally moved for judgment of acquittal as to both counts. Doc. 176 at 108, 110, 196-97. The District Court denied the motion. Doc. 176 at 198-201.

4. Closing Arguments, Jury Instructions, And Verdicts

The Government and Unrein presented their closing arguments to the jury. Doc. 176 at 112-68. The District Court instructed the jury, but

did not give an entrapment instruction. Doc. 176 at 169-88. After two hours of deliberations, the jury returned guilty verdicts on both charges. Docs. 135; 177 at 4-7. Thereafter, the District Court adjudicated Unrein guilty and remanded him to custody. Doc. 177 at 11, 13.

5. The Post-Trial Motion

Pursuant to Federal Rules of Criminal Procedure 29 and 33, Unrein timely filed a post-trial motion for judgment of acquittal and new trial. Doc. 144. With respect to attempted child enticement, Unrein contended "the evidence only showed that the Defendant had the intent to cause the undercover agents to assent to meet, not to engage in unlawful sexual activity with a minor." Doc. 144 at 4. Similarly, Unrein contended the evidence regarding possession of child pornography was insufficient because CFA Gaertner's initial forensic analysis uncovered none, and Unrein lacked control of the mirrored hard drive when it was discovered. Doc. 144 at 5.

Finally, Unrein requested a new trial for three reasons. First, Unrein challenged the improper admission of the Teen Fuck Fiends video (which the Government helpfully informed the jury had casted "the world's biggest dicks and the tiny young girls that crave them"). Doc.

144 at 6; Gov't Ex. 19A. Second, Unrein contested the admission of his 21 Craigslist posts and the "strictly platonic" posts to which he responded, which had solicited nipple sucking and biting, toplessness, nudism, swinging, adult movies, casual sex, mutual blow jobs, and mutual masturbation from consenting men and women, including transvestites. Doc. 144 at 6; Gov't Exs. 34A, 34B, 34C, 34D. Third, Unrein disagreed with the denial of his entrapment defense. Doc. 144 at 6.

The Government opposed (Doc. 145), and the District Court denied the motion (Doc. 150).

D. The Sentences And Appeal

The District Court sentenced Unrein to concurrent sentences of 151 months' imprisonment, with credit for time served, 15 years' supervised release, and $2,000 in restitution. Doc. 172 at 37-38, 41 (citing *Paroline* v. *United States*, 134 S. Ct. 1710 (2014)). Unrein timely appealed. Docs. 163; 165.

Standard Of Review

1. "The proper standard of review for an appeal from a district court's disallowance of an entrapment defense is not clear within this Circuit." *United States* v. *Hargrove*, 601 Fed. App'x 924, 924 (11th Cir.

2015).[4] Some panels review de novo, *United States* v. *Rutgerson*, 2016 U.S. App. LEXIS 8709 (11th Cir. May 12, 2016), while others review for abuse of discretion, *United States* v. *Alston*, 895 F.2d 1362, 1368 (11th Cir. 1990). Under the binding prior panel precedent,[5] however, the "sufficiency of the defendant's evidence of government inducement is a legal issue" that is reviewed de novo. *United States* v. *Sistrunk*, 622 F.3d 1328, 1333 (11th Cir. 2010) (collecting cases); *accord United States* v. *Davis*, 902 F.2d 860, 866 (11th Cir. 1990). Moreover, structural error claims are reviewed de novo. *See United States* v. *Nealy*, 232 F.3d 825, 829 (11th Cir. 2000) (structural error "require[s] per se reversal").

2. "This Court reviews a district court's denial of a motion for a mistrial based on a prosecutor's statements during closing argument for abuse of discretion." *United States* v. *Thompson*, 422 F.3d 1285, 1297 (11th Cir. 2005).

3. The denial of a motion to sever charges under Federal Rule of Criminal Procedure 14 is reviewed for abuse of discretion. *United States* v. *Hersh*, 297 F.3d 1233, 1241 (11th Cir. 2002).

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[4] *See supra* note 2.

[5] Under the prior-panel-precedent rule, a prior panel's holding cannot be unsettled without en banc or Supreme Court intervention. *Smith* v. *GTE Corp.*, 236 F.3d 1292, 1302-03 & n.11 (11th Cir. 2001).

4. "Our review of a district court's evidentiary rulings is for abuse of discretion." *United States* v. *Ham*, 998 F.2d 1247, 1252 (11th Cir. 1993).

SUMMARY OF THE ARGUMENT

1. The District Court committed two errors when it precluded Unrein's entrapment defense. First, it committed harmful legal error because Unrein met his burden of production by presenting more than a scintilla of evidence that Agent McAteer induced him to commit attempted child enticement. This evidence created a jury issue whether law enforcement entrapped Unrein. Second, the District Court committed structural error when it prevented Unrein from presenting an "entrapment story" to the jury. All defendants have a constitutional right to present a defense as to the elements of the charges, and that entrapment story could have allowed Unrein to negate the "persuades, induces, entices, or coerces" element of attempted child enticement. To remedy these errors, this Court should vacate Unrein's conviction and grant a new trial.

2. The District Court abused its discretion when it overruled Unrein's objections and denied his motion for mistrial at closing argu-

ment. During closing argument, the prosecutor made numerous improper comments that inflamed the jury, vouched for witness credibility, offered personal opinions, went outside the evidence, and personally attacked defense counsel. Their cumulative effect prejudiced Unrein and deprived him of a fair trial. Accordingly, this Court should vacate Unrein's conviction and grant a new trial.

3. The District Court abused its discretion when it refused to sever the attempted child enticement charge from the possession of child pornography charge. First, Unrein may have wanted to testify about one charge and refrain from testifying about the other. Second, because both offenses involved the sexual exploitation of minors, the jury may have impermissibly considered proof that Unrein committed one offense to convict him of the other. Third, Unrein was likely confounded by the joint trial. As such, Unrein suffered compelling prejudice, and this Court should therefore vacate his convictions and afford him new, separate trials.

4. The District Court abused its discretion when, over objection, it admitted into evidence Unrein's 21 personal Craigslist posts and the "strictly platonic" posts to which he had responded, soliciting nipple

sucking and biting, toplessness, nudism, swinging, adult movies, casual sex, mutual blow jobs, and mutual masturbation from consenting men and women, including transvestites. These posts were irrelevant to his charges, unfairly prejudicial, and impermissibly related to his character. To remedy these errors, this Court should vacate Unrein's conviction and grant a new trial without this evidence.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT COMMITTED LEGAL AND STRUCTURAL ERROR WHEN IT PREVENTED UNREIN FROM PRESENTING AN ENTRAPMENT DEFENSE OR ENTRAPMENT STORY AT TRIAL

The District Court erred when it precluded Unrein from presenting an entrapment defense. It did so both when it granted the Government's motion in limine and when it denied Unrein's requested special jury instruction. These decisions had two distinct consequences. First, they barred Unrein from presenting an entrapment affirmative defense. Second, they also prohibited Unrein from presenting an entrapment "story" to the jury to negate an element of attempted child enticement. The first consequence led to a harmful legal error; the second consequence led to a structural error that requires automatic reversal.

A. Unrein Produced Sufficient Evidence To Entitle Him To A Jury Determination On The Affirmative Defense Of Entrapment

Unrein met the exceedingly light burden required to entitle him to present an entrapment affirmative defense to the jury.

Ordinarily, entrapment is an affirmative defense that, when successful, absolves a defendant who committed a crime of all criminal liability. *E.g.*, *Matthews* v. *United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 886 (1988). Here, Unrein presented legally sufficient evidence from which a reasonable juror could conclude law enforcement entrapped him into committing attempted child enticement. *United States* v. *Ryan*, 289 F.3d 1339, 1344 (11th Cir. 2002). Accordingly, the District Court erred when it precluded his entrapment affirmative defense.

"In their zeal to enforce the law, . . . Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Jacobson* v. *United States*, 503 U.S. 540, 548, 112 S. Ct. 1535, 1540 (1992); *accord Sorrells* v. *United States*, 287 U.S. 435, 442, 53 S. Ct. 210, 212-13 (1932); *Sherman* v. *United States*, 356 U.S. 369, 372, 78 S. Ct. 819, 820 (1958). For

that reason, the common law has carved out the affirmative defense of entrapment. *E.g.*, *Matthews*, 485 U.S. at 63, 108 S. Ct. at 886.

"[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Id.*; *accord United States* v. *Gamache*, 156 F.3d 1, 9 (1st Cir. 1998). "Cases like *Jacobson*, *Sherman*, and *Sorrells* demonstrate that even very subtle government pressure, if skillfully applied, can amount to inducement." *United States* v. *Poehlman*, 217 F.3d 692, 701 (9th Cir. 2000) (citing *Jacobson*, 503 U.S. at 552, 112 S. Ct. 1541, *Sorrells*, 287 U.S. at 439-41, 53 S. Ct. at 211-12, and *Sherman*, 356 U.S. at 371, 78 S. Ct. at 820).

According to Justice Frankfurter's concurrence in *Sherman*, criminal intent "originates with the police" in every case that involves a sting operation. 356 U.S. at 382, 78 S. Ct. at 825 (Frankfurter, J., concurring); *accord Poehlman*, 217 F.3d at 701. But where the Government "'simply furnished the opportunity for the commission of the crime, that is not enough to enable a defendant to escape conviction.'" *Poehlman*, 217 F.2d at 700 (quoting *Sherman*, 356 U.S. at 382, 78 S. Ct. at 825 (Frankfurter, J., concurring)). Whether the "police actually induced the

crime . . . depends on whether they applied some form of persuasion that materially affected what Justice Frankfurter called the 'self-struggle [to] resist ordinary temptations.'" *Id.* (quoting *Sherman*, 356 U.S. at 382, 78 S. Ct. at 825 (Frankfurter, J., concurring)).

For example, government agents impermissibly induce unlawful conduct by: (1) making "repeated requests . . . in an atmosphere of comradery," *id.* at 701-02 (citing *Sorrells*, 287 U.S. at 439-41, 53 S. Ct. at 211-12), (2) "establishing a friendly relationship with the defendant, and then playing on his sympathy," *id.* at 702 (citing *Sherman*, 356 U.S. at 371, 78 S. Ct. at 820), or (3) "giving the defendant the idea of committing the crime, coupled with the means to do it," *id.* (citing *United States* v. *Hollingsworth*, 27 F.3d 1196, 1200-02 (7th Cir. 1994)). Moreover, "[w]hile parental consent is not a defense to statutory rape, it nevertheless can have an effect on the 'self-struggle [to] resist ordinary temptations.'" *Id.* (quoting *Sherman*, 356 U.S. at 384, 78 S. Ct. at 826 (Frankfurter, J., concurring)).

This Court has held that a defendant may demonstrate the "'persuasion or mild coercion'" element of inducement to the jury in two ways. *Ryan*, 289 F.3d at 1344 (quoting *Alston*, 895 F.2d at 1368). First,

a defendant may introduce evidence showing "'he had not favorably received the government plan, and the government had to 'push it' on him.'" *Id.* (quoting *Alston*, 895 F.2d at 1368). Second, a defendant may demonstrate "'that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate.'" *Id.* (quoting *Alston*, 895 F.2d at 1368). This "evidence must be viewed in the light most favorable to the defendant." *Id.* (citing *United States* v. *Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984)).

But "'before an entrapment defense may be presented to the jury,'" a district court must determine "'an evidentiary foundation for a valid entrapment defense [is] present.'" *Sistrunk*, 622 F.3d at 1333 (quoting *Ryan*, 289 F.3d at 1343). Put differently, "'the trial court must determine whether a juror could entertain a reasonable doubt about whether the defendant was entrapped.'" *Ryan*, 289 F.3d at 1343 (quoting *Alston*, 895 F.2d at 1367). To satisfy this standard, the defendant must present "'more than a scintilla'" of evidence. *Id.* (quoting *Alston*, 895 F.2d at 1367).[6]

[6] *Ryan* simultaneously describes the standard as at least "'some evidence'" and "'more than a scintilla'" of evidence *Id.* The standards appear to be identical. *See id.*

When the defendant is "laying an evidentiary foundation for entrapment, [he] bears the initial burden of production as to government inducement." *Id.* If "the defendant meets this burden," however, "the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *Id.* (citing *United States* v. *Brown*, 43 F.3d 618, 623 (11th Cir. 1995)).

The defendant's initial "'burden is light because a defendant is generally entitled to put a recognized defense to the jury where sufficient evidence exists for a reasonable jury to find in [his] favor.'" *Id.* (quoting *Brown*, 43 F.3d at 623).

To meet this featherweight burden, a defendant may "'produc[e] any evidence sufficient to raise a jury issue that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.'" *Id.* at 1343-44 (quoting *Brown*, 43 F.3d at 623).

Once the defendant has produced "'some evidence that the government induced the defendant to commit the crime, the question of entrapment becomes a factual one for the jury to decide.'" *Id.* at 1344 (quoting *United States* v. *Timberlake*, 559 F.2d 1375, 1379 (5th Cir.

1977)).[7] In response to the Government's motion in limine and at the hearing, Unrein presented more than a scintilla of evidence showing Agent McAteer induced him to commit attempted child enticement.

1. The District Court Erred When It Ruled Unrein Had Not Met His Burden Of Production Regarding Government Inducement

Unrein met his burden of production when he presented legally sufficient evidence of Government inducement.

At the hearing on the Government's motion in limine, the District Court ruled Unrein was not entrapped and precluded him from presenting the defense at trial. Doc. 173 at 244. The District Court erred, however, because Unrein presented sufficient evidence to create a jury issue whether "'the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.'" *Ryan*, 289 F.3d at 1343-44 (quoting *Brown*, 43 F.3d at 623).

The record evidence indicates Unrein "'had not favorably received the [government's] plan'" to meet at the purported vacation house so he could entice a minor. *Id.* at 1344 (quoting *Alston*, 895 F.2d at 1368). Ra-

[7] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

ther, "'the government had to "push [the plan]" on him'" on at least two occasions. *Id.*

During a recorded telephone conversation between Unrein and Agent McAteer, Unrein expressed concern that the planned encounter was a sting operation. Gov't Ex. 6. When the agent-mother was initially unable to assuage Unrein's suspicions, he indicated he did not want to go through with the plan. Gov't Ex. 6. Thereafter, the agent-mother feigned distress over the devastation her "daughter" would suffer if Unrein were to back out. Doc. 173 at 232-33; Gov't Ex. 6. Her performance included crying. Doc. 173 at 232-33; Gov't Ex. 6.

Agent McAteer's emotional display was intended to exploit Unrein's sympathy and discourage him from abandoning the plan. *See Poehlman*, 217 F.3d at 702 (citing *Sherman*, 356 U.S. at 371, 78 S. Ct. at 820). Therefore, her emotional plea demonstrates the Government had to force the plan on Unrein and qualifies as legally sufficient evidence from which a reasonable juror could find government inducement. *See Ryan*, 289 F.3d at 1344.

Additionally, before Unrein arrived at the sting house, he called the agent-mother to tell her he was close but could not find it. Gov't Ex.

10. He asked her to meet him at Walmart so he could follow her to the house. Gov't Ex. 10. The agent-mother claimed she had been drinking and could not meet him. Gov't Ex. 10. Unrein then tried to cancel the rendezvous by suggesting they meet some other time. Gov't Ex. 10. The agent-mother once again expressed deep concern over the emotional impact the failed meeting would have on her "daughter." Gov't Ex. 10. She suggested Unrein ask for directions at Walmart, Ruby Tuesday's, or a nearby gas station. Gov't Ex. 10.

A reasonable juror could interpret this conversation in two ways. First, he or she could conclude Unrein did not "'favorably receiv[e] the government plan'" to meet at the vacation house without first meeting in public and would not have done so absent the agent-mother's influence. *Ryan*, 289 F.3d at 1344 (quoting *Alston*, 895 F.2d at 1368). Second, a reasonable juror could consider Unrein's desire to meet some other time as (1) his direct refusal to participate in the crime, or (2) the failed execution of several attempts to set up the illicit encounter. *Id.* Either way, the agent-mother's persistence "materially affected the normal balance between risks and rewards from the commission of the

crime, and thereby induced" Unrein "to commit the offense." *Poehlman*, 217 F.3d at 703.

Because these interactions constitute more than a scintilla of evidence of government inducement, Unrein met his initial burden of production. *Ryan*, 289 F.3d at 1343; *Poehlman*, 217 F.3d at 698. When Unrein met that burden, he created a jury issue whether the agent-mother's "'conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.'" *Id.* at 1343-44 (quoting *Brown*, 43 F.3d at 623). In other words, when the District Court found Unrein's evidence was legally insufficient to entitle him to an entrapment defense, it impermissibly "weigh[ed] the evidence" and "resolve[d] conflicts in the proof." *Gamache*, 156 F.3d at 9.[8]

[8] This Court's unpublished, nonprecedential decision in *United States* v. *Hargrove*, 601 Fed. App'x 924 (11th Cir. 2015), which the District Court mentioned at trial (Doc. 173 at 241), does not change this result. *Hargrove* is inapplicable because that defendant alleged a materially different type of inducement. *See id.* at 924 (alleging inducement when law enforcement initiated unlawful communications).

Specifically, Hargrove was not entitled to an entrapment defense because he "did not produce sufficient evidence of government inducement to lay a foundation." *Id.* Although "the government [had] made the initial contact with Hargrove," this Court concluded Hargrove had not met the burden of production as to government inducement. *Id.* "Hargrove, not the government, [had] brought up sex and proposed meeting."

2. Because The District Court Never Considered Whether The Government Proved Predisposition Beyond A Reasonable Doubt, This Court Should Vacate And Remand

In this procedural posture, the appellate remedy is to vacate and remand for the District Court to determine in the first instance whether the Government carried its burden of persuading beyond a reasonable doubt that Unrein was predisposed to commit the crime.

The District Court ruled "[there was] no entrapment" after hearing argument almost exclusively about government inducement. *See* Docs. 96; 173 at 244. The Government's motion in limine was also silent as to the predisposition element of the entrapment defense. *See* Doc. 96. Therefore, the District Court precluded the entrapment defense based solely on its finding there was no government inducement. *See Matthews*, 485 U.S. at 63, 108 S. Ct. at 886 ("a valid entrapment defense has two related elements: government inducement of the crime, and a

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Id. Furthermore, "[t]here was no evidence that the government persuaded or coerced Hargrove, or that he ever refused to participate." *Id.*

Here, in contrast, on at least two occasions, Unrein refused to participate in, and was persuaded to recommit to, the illicit plan. *See supra* Argument I.A.1. The agent-mother induced Unrein by playing on his sympathies, not simply by making the initial contact. *See supra* Argument I.A.1. Moreover, the agent-mother, not Unrein, brought up sex for the first time. Doc. 96 at 69; Gov't Ex. 6. Therefore, *Hargrove* is inapposite on government inducement.

lack of predisposition on the part of the defendant to engage in the criminal conduct"). But when Unrein met his burden of production, *see supra* Argument I.A.1, the question became whether the Government could meet its burden of persuasion by producing sufficient evidence to prove beyond a reasonable doubt that Unrein was predisposed to commit the crime. That question remains unresolved.

"The question of whether sufficient evidence exists to present an issue to the jury is a legal one." *United States* v. *Bay*, 852 F.2d 702, 705 (3d Cir. 1988). When a court precludes the entrapment defense before trial, and the defendant thus has no opportunity to develop the evidence regarding its elements, the appropriate remedy is to "remand to the district court for a determination of that issue." *Id.*; *United States* v. *Fedroff*, 874 F.2d 178, 186 (3d Cir. 1989).

Here, the District Court decided the entrapment issue without receiving and considering evidence on the predisposition element. *See* Docs. 96; 173 at 244. "[It] should, therefore, hold a hearing in which [Unrein] will proffer all evidence of entrapment not already in the record." *Bay*, 852 F.2d at 705. Then, "[i]f the [District Court] decides that there is sufficient evidence to present the issue to the jury, a new trial

will be required," unless Unrein "has no further evidence, or . . . the court decides that all of the evidence together still would not warrant a jury verdict." *Id.*; *accord Fedroff*, 874 F.2d at 186; *United States* v. *Mayfield*, 771 F.3d 417, 443 (7th Cir. 2014); *United States* v. *Pillado*, 656 F.3d 754, 767 (7th Cir. 2011).[9]

[9] Relatedly, in the civil summary judgment context, this Court routinely remands cases for district courts to resolve issues that were not addressed in the first instance. *E.g.*, *In re Prudential of Fla. Leasing, Inc.*, 478 F.3d 1291, 1303 (11th Cir. 2007) ("[w]hen the district court does not address an issue, the proper course of action often is to vacate the order of the district court and remand"); *Sierra Club* v. *Van Antwerp*, 526 F.3d 1353, 1363 n.8 (11th Cir. 2008) ("we think the better course is to vacate the [summary] judgment and remand for the district court to address the issues . . . in the first instance"); *Byars* v. *Coca-Cola Co.*, 517 F.3d 1256, 1267-68 (11th Cir. 2008) ("we refuse to consider the merits of the issue" because the "summary judgment opinion did not discuss" it); *Sierra Club, Inc.* v. *Leavitt*, 488 F.3d 904, 918 (11th Cir. 2007) ("[w]e believe that the district court should consider the question in the first instance, particularly in light of the factual matters that it raises"); *Wilkerson* v. *Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001) ("[w]e decline to consider whether summary judgment is otherwise appropriate on Wilkerson's Title VII claim" and therefore "vacate summary judgment and remand the case so the district court may consider [that question] in the first instance"); *Beavers* v. *Am. Cast Iron Pipe Co.*, 975 F.2d 792, 800 (11th Cir. 1992) (vacating and remanding summary judgment because "district court's opinion did not explicitly address this issue").

3. The Preclusion Of The Entrapment Affirmative Defense Was Harmful

By ruling there was no government inducement and denying an affirmative entrapment defense on that basis (*see* Doc. 173 at 244), the District Court erroneously precluded Unrein from obtaining a jury determination on the affirmative defense. Notwithstanding the guilty verdict (Doc. 135 at 1), this error was harmful.[10]

The denial of an entrapment affirmative defense is reviewed for harmless error. *Sistrunk*, 622 F.3d at 1332. When district courts incorrectly preclude entrapment defenses, the Supreme Court, this Court, and other courts routinely find harmful error and reverse them.[11]

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[10] The District Court violated Unrein's Fifth and Sixth Amendment right to present a defense by precluding him from presenting an entrapment affirmative defense at trial. *See supra* Argument I.A.1.

[11] *E.g.*, *Matthews*, 485 U.S. at 66, 108 S. Ct. at 888 (reversing preclusion of entrapment defense because district court's ruling was based on faulty premise that a defendant has to admit crime for affirmative defense to be available); *United States* v. *Thompson*, 25 F.3d 1558, 1560 (11th Cir. 1994) ("district court erred when it granted the government's motion in limine and effectively prohibited Thompson from presenting" entrapment by estoppel defense); *Bay*, 852 F.2d at 705 (reversing "[b]ecause the court ruled [on the entrapment defense] prior to the presentation of evidence, [and] Bay may have been discouraged from putting evidence in the record which would have been sufficient to reach the jury").

Here, the error was harmful. Precluded from considering an entrapment defense, *see supra* Argument I.A.1, the jury rendered a verdict without the benefit of the appropriate legal framework and failed to consider Unrein's predisposition to commit attempted child enticement.

B. The District Court Committed Structural Error When It Precluded Unrein's Entrapment Story

In precluding Unrein's entrapment affirmative defense, the District Court also prevented him from presenting an "entrapment story" to the jury. Because this stifled Unrein's ability to negate an element of the crime, it was a structural error.

1. The Fifth And Sixth Amendments Guarantee Defendants The Right To Present A Defense Against Every Element Of A Charged Offense

Together, the Fifth and Sixth Amendments assure defendants the right, within the ordinary rules of evidence, to present a defense against all elements of charged offenses.

"The Fifth Amendment . . . guarantees that no one will be deprived of liberty without 'due process of law.'" *United States* v. *Gaudin*, 515 U.S. 506, 509-10, 115 S. Ct. 2310, 2313 (1995). And under the Sixth Amendment, "'the accused . . . enjoy the right to a speedy and pubic trial, by an impartial jury.'" *Id.* at 510, 115 S. Ct. at 2313 (quoting *Sulli-*

van v. *Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 2080-81 (1993)). Together, these amendments "[give] a criminal defendant the right to demand that a jury find him guilty" beyond a reasonable doubt "of all the elements of the crime with which he is charged." *Id.* at 511, 115 S. Ct. at 2314; *accord In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970).

Relatedly, the Fifth and Sixth Amendments also grant a defendant the right "to present a defense." *United States* v. *Bidwell*, 451 Fed. App'x 853, 855 (11th Cir. 2012) (citing *United States* v. *Frazier*, 387 F.3d 1244, 1271 (11th Cir. 2004) (en banc)).[12] Indeed, the "standard of fairness require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California* v. *Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984); *cf. Rock* v. *Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 2709 (1987) ("Even more fundamental to a personal defense than the right to self-representation . . . is an accused's right to present his own version of events in his own words.").

[12] *See supra* note 2.

2. The District Court Violated Unrein's Fifth And Sixth Amendment Right To Present A Defense When It Precluded His "Entrapment Story"

The District Court violated Unrein's Fifth and Sixth Amendment right to present his "entrapment story."

Before trial, Unrein sought to present an "entrapment story" to the jury in an attempt to negate the "persuades, induces, entices, or coerces" element of 18 U.S.C. § 2422(b). *See* Docs. 100; 173 at 229-33, 239-42. But the District Court did not allow that to happen. Instead, the District Court lifted the Government's heavy evidentiary burden from its shoulders while forcing Unrein to defend himself with his arm tied behind his back. This structural error in precluding Unrein from presenting the "entrapment story" requires automatic reversal.

The narrative would have explained how Agent McAteer (1) initially brought up sex between Unrein and her "daughter" (*see* Gov't Ex. 3; Docs. 96 at 69; 173 at 230), (2) played on Unrein's sympathy to dissuade him from backing out of the illicit engagement on at least two occasions (Gov't Exs. 6, 10 Doc. 173 at 240), and (3) implanted the idea of having sex with a child in his mind when he initially intended only to be a father figure (*see* Gov't Ex. 3; Docs. 96 at 67-69; 173 at 240).

If believed, this narrative would have negated an element of 18 U.S.C. § 2422(b), because it threw into question who had persuaded, induced, enticed, or coerced whom. And it was a narrative the venire panel anticipated during voir dire: when a prospective juror inquired whether sting operations "come under the category of entrapment," the District Court advised it would instruct the jury on that issue because it is a "legal point." Doc. 173 at 164-65.

By forbidding Unrein from presenting this narrative to the jury, the District Court violated Unrein's constitutional right to present a defense. *E.g.*, *Trombetta*, 467 U.S. at 485, 104 S. Ct. at 2532.

3. A Defendant's Right To Present A Defense Against Each Element Of A Crime Is Constitutionally Different From His Discretionary Entitlement To An Affirmative Defense

The qualified right to present an affirmative defense is categorically different from the constitutional right to present a defense against each element of a crime.

An entrapment affirmative defense "presupposes the commission of the crime," *Matthews*, 485 U.S. at 63, 108 S. Ct. at 887 (citing *United States* v. *Russell*, 411 U.S. 423, 435, 93 S. Ct. 1637, 1644 (1973)), and "is not of 'constitutional dimension,'" *Id.* at 66, 108 S. Ct. at 888 (quoting

Russell, 411 U.S. at 433, 93 S. Ct. at 1644). As such, before a defendant may present an entrapment affirmative defense to a jury, district courts may make preliminary determinations whether a defendant has produced sufficient evidence of government inducement to entitle him to an entrapment affirmative defense at trial. *E.g.*, *Ryan*, 289 F.3d at 1343.

But the Constitution does not allow district courts to make such preliminary determinations when a defendant seeks to present a defense that negates an element of the offense; instead, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *Gaudin*, 515 U.S. at 511, 115 S. Ct. at 2314. To that end, "the right . . . to present [evidence] provides the defendant with a sword that may be employed to rebut the prosecution's case." *Taylor* v. *Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653 (1988). But "[t]he decision whether to employ it in a particular case rests solely with the defendant." *Id.* Accordingly, when presenting a defense that negates an element of the offense, a defendant has more evidentiary leeway. *Id.*

Indeed, if judges could make pretrial evidentiary sufficiency determinations in these situations, they would essentially have the au-

thority to act as ultimate factfinder, which would violate the Sixth Amendment. *E.g.*, *Gaudin*, 515 U.S. at 511, 115 S. Ct. at 2314. Therefore, when a defendant seeks to defend a particular element of the crime, the "standard rules of evidence," not the judge's pretrial determinations concerning evidentiary sufficiency, set the limitations on the evidence the defendant may present. *Taylor*, 484 U.S. at 410, 108 S. Ct. at 653; *Bidwell*, 451 Fed. App'x at 855.

Ordinarily a defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence." *Taylor*, 484 U.S. at 410, 108 S. Ct. at 653; *Bidwell*, 451 Fed. App'x at 855. But Unrein's "entrapment story" would not have involved such inadmissible evidence. Instead, it would have involved the intercepted calls themselves.

Accordingly, the District Court violated Unrein's Fifth and Sixth Amendment right to present a defense when it precluded his "entrapment story."

4. The District Court's Infringement Of Unrein's Constitutional Right To Present His Entrapment Story To The Jury Was Structural Error

The preclusion of Unrein's "entrapment story" was a structural error that requires automatic reversal.

Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265 (1991). As such, structural errors are not subject to harmless error analysis. *Id.* at 309, 111 S. Ct. at 1265. Rather, they require automatic reversal, *Judd* v. *Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001), because they fundamentally affect the structure of the judicial proceedings, *Fulminante*, 499 U.S. at 310, 111 S. Ct. at 1265.

Structural errors exist "only in a very limited class of cases." *Johnson* v. *United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 1549-50 (1997) (citations omitted). One such class is when "a judge in a criminal trial . . . 'enter[s] a judgment of conviction or direct[s] the jury to come forward with such a verdict, regardless of how overwhelming the evidence may point in that direction.'" *Fulminante*, 499 U.S. at 294, 111

S. Ct. at 1256 (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 97 S. Ct. 1349, 1355 (1977)).

When the District Court violated Unrein's right to present a defense to the elements of the crime by precluding his entrapment story, *see supra* Argument I.B.2, it relieved the prosecution of its burden to prove the inducement element of attempted child enticement beyond a reasonable doubt. This error was the functional equivalent of "'entering a judgment of conviction or directing the jury to come forward with'" a guilty verdict. *Id.* (quoting *Martin Linen Supply Co.*, 430 U.S. at 572-73, 97 S. Ct. at 1355). Accordingly, the District Court's preclusion of the entrapment story was structural error and requires automatic reversal.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT OVERRULED UNREIN'S OBJECTIONS AND DENIED HIS MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S NUMEROUS INFLAMMATORY COMMENTS DURING CLOSING ARGUMENT

Over objection, the prosecutor repeatedly made inflammatory, prejudicial comments during her closing argument. The District Court abused its discretion when it overruled Unrein's objections and denied his motion for mistrial on that basis.

"Remarks made in the course of a prosecutor's closing argument will warrant reversal if the challenged remarks are (1) improper and

(2) prejudicial to a substantial right of the defendant." *United States* v. *Boyd*, 131 F.3d 951, 955 (11th Cir. 1997) (citing *United States* v. *Blakey*, 14 F.3d 1557, 1560 (11th Cir. 1994)); *accord Lopez*, 590 F.3d at 1256 (citing *United States* v. *Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006)). "'A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different.'" *Lopez*, 590 F.3d at 1256 (quoting *Eckhardt*, 466 F.3d at 947). If "'the record contains sufficient independent evidence of guilt,'" however, "'any error is harmless.'" *Id.* (quoting *Eckhardt*, 466 F.3d at 947).

A. Closing Argument Is Improper When It Inflames The Jury, Vouches For Witness Credibility, Offers Personal Opinions, Goes Outside The Evidence, Or Personally Attacks The Defendant's Lawyer

Generally, a prosecutor's closing argument is improper when it inflames the jury, vouches for witness credibility, offers personal opinions as to a defendant's guilt, goes outside the evidence, or personally attacks the defendant's lawyer.

For example, "statements by the prosecutor which [inflame] the jury, [vouch] for the credibility of witnesses, or [offer] the prosecutor's personal opinion as to the defendant's guilt [are] improper." *United*

States v. *Robinson*, 485 U.S. 25, 33 n.5, 108 S. Ct. 864, 869 (1988) (citing *Darden* v. *Wainwright*, 477 U.S. 168, 106 S. Ct. 2464 (1986), and *United States* v. *Young*, 470 U.S. 1, 105 S. Ct. 1038 (1985)).

Furthermore, a prosecutor's argument "that [goes] outside the evidence" and "impugn[s] [the defendant's] character with an inaccurate characterization . . . is clearly improper . . . because it encourage[s] the jury to convict [the defendant] based on facts not admitted as evidence." *Blakey*, 14 F.3d at 1560 (citing *Hutchins* v. *Wainwright*, 715 F.2d 512, 516 (11th Cir. 1983); *accord United States* v. *Johns*, 734 F.2d 657, 666 (11th Cir. 1997). Accordingly, "a prosecutor may not make suggestions, insinuations, and assertions calculated to mislead the jury," *Blakey*, 14 F.3d at 1560, or emotionally appeal to its "role as the conscience of the community," *United States* v. *Martinez-Medina*, 279 F.3d 105, 119 (1st Cir. 2002).[13]

[13] A prosecutor's closing argument that "[appeals] to the jury's emotions and role as the conscience of the community" is "plainly improper." *Martinez-Medina*, 279 F.3d at 119 ("the prosecutor's characterization of the defendants as 'hunting each other like animals' and killing one another 'with no mercy'" was "inflammatory and improper"); *accord Blakey*, 14 F.3d at 1559, 1562 (reversing for a new trial because prosecutor called the defendant a "'professional criminal'"); *Hall* v. *United States*, 419 F.2d 582, 587 (5th Cir. 1969) ("[t]he description of appellant as a 'hoodlum'" was the "type of shorthand characterization of

"A personal attack on an opposing lawyer may [also] constitute prosecutorial misconduct," *United States* v. *Miranda*, 279 Fed. App'x 950, 952 (11th Cir. 2008) (citing *Young*, 470 U.S. 1, 105 S. Ct. 1038 (1985)), and "'subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the defendant of a fair trial,'" *United States* v. *De La Vega*, 913 F.2d 861, 867 (11th Cir. 1990) (quoting *Unites States* v. *McClain*, 823 F.2d 1457, 1462 (11th Cir. 1987), *overruled on other grounds by United States* v. *Watson*, 866 F.2d 381, 385 n.3 (11th Cir. 1989)); *accord United States* v. *Martinez*, 146 Fed. App'x 450, 458 (11th Cir. 2005).

B. The Prosecutor's Closing Argument Was Improper

Judged by those metrics, the prosecutor's closing argument was improper in many respects.

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an accused, not based on evidence, [that] is especially likely to stick in the mind of the jury and influence its deliberations"); *United States* v. *Hands*, 184 F.3d 1332, 1332-1333 (11th Cir. 1999) (prosecutor's references to the defendant as "'wicked,'" "'vicious,'" a "'maniac,'" and a "'drug-dealing monster'" were "improper because they were calculated to enflame the jury, and to persuade the jurors to render a decision based on their emotional response to [the defendant's] behavior, rather than the evidence introduced at trial") (internal punctuation and citations omitted); *Boyd*, 131 F.3d at 955 (prosecutor's statement that defendants "don't care [about] the pain and the misery and the hurt and the death that they cause because they only want . . . money for themselves" was improper).

At the initial bond hearing, the prosecutor had described Unrein's advance toward the sting house using variations of the verb "to creep," characterized his pre-arrest behavior as "dangerous" and "creepy," and could not refrain from blurting out he was a "sex crazed fiend." Doc. 75 at 7, 8-9, 17. In response, Unrein moved in limine to prevent the prosecutor from describing him with variations of the words: "'creep,'" "'stalk,'" "'dangerous,'" "'scary,'" and "'unusual.'" Doc. 91 at 1.

At trial, the prosecutor agreed to refrain from calling Unrein a "'dangerous creep.'" Doc. 107 at 1. During closing argument, however, the prosecutor once again got carried away with herself and made several improper comments. She claimed Unrein "doesn't care about any scars he'll leave on the child" (Doc. 176 at 138), called the pictures found on his computer "disgusting" (Doc. 176 at 125), described him as somebody "who creeps around the house peering in the windows" (Doc. 176 at 124), speculated his actions would have haunted a victim forever (Doc. 176 at 126-27), and attacked defense counsel personally (Doc. 176 at 162, 167). These comments were improper.

In *Boyd*, the prosecutor's assertion that the defendants "don't care [about] the pain and the misery and the hurt and the death that they

cause because they only want . . . money for themselves" was improper. 131 F.3d at 955. Here, the prosecutor's comment that Unrein "doesn't care about any scars he'll leave on the child" (Doc. 176) was likewise improper because it inflamed the passions of, and was "calculated to mislead," the jury. *Blakey*, 14 F.3d at 1560. Moreover, the prosecutor's remark impermissibly leveraged the jury's "role as the conscience of the community." *Martinez-Medina*, 279 F.3d at 119. The prosecutor's implicit assertion was that Unrein had no conscience to curb his behavior, so the jury, "as the conscience of the community," must find him guilty to keep him in check. *Id.* Such argument is "plainly improper." *Id.*

The prosecutor also called the images found on Unrein's computer "disgusting" (Doc. 176 at 125) and described Unrein as somebody "who creeps around the house peering in the windows" (Doc. 176 at 124). The inescapable inferences to be drawn from these statements were that Unrein was himself disgusting and a creep. As such, these comments "went outside the evidence" and "impugned . . . [the defendant's] character." *Blakey*, 14 F.3d at 1560 (citing *Hutchins*, 715 F.2d at 516 (11th Cir. 1983).

Hands is illustrative. There, the prosecutor used the words "'wicked,'" "'vicious,'" "'maniac,'" and "'monster'" to describe the defendant. *Hands*, 184 F.3d at 1333. Those characterizations warranted reversal. *Id.* at 1334-35. Here, the prosecutor's use of the terms "disgusting" and "creep" (Doc. 176 at 24, 25) were likewise "calculated to inflame the jurors and to persuade them to render a decision based on their emotional response to [Unrein's] behavior, rather than the evidence introduced at trial." *Id.* at 1333. Accordingly, the prosecutor's use of the terms "disgusting" and "creep" during her closing argument was improper.

Additionally, the prosecutor's speculative assertion that Unrein's conduct would "haunt" a fictitious child victim "forever" (Doc. 176 at 126) was also improper because it "went outside the evidence" and "impugned . . . [Unrein's] character." *Blakey*, 14 F.3d at 1560 (citing *Hutchins*, 715 F.2d at 516, *cert. denied*, 465 U.S. 1071, 104 S. Ct. 1427). At trial, the Government presented no expert testimony or other evidence regarding what permanent psychological effect, if any, a 12-year-old girl would experience after an adult attempted to entice her to have sex. Therefore, the prosecutor's comment was nothing more than an improperly admitted personal opinion masquerading as an expert opinion:

"The role of the attorney in closing argument is 'to assist the jury in analyzing, evaluating and applying the evidence. It is not for the purpose of permitting counsel to 'testify' as an 'expert witness.'" *United States* v. *Garza*, 608 F.2d 659, 662 (5th Cir. 1979) (quoting *United States* v. *Morris*, 568 F.2d 396, 401 (5th Cir. 1978)).[14]

During her closing argument, the prosecutor also accused defense counsel of misstating the law (Doc. 176 at 162) and "misstat[ing] the evidence" (Doc. 176 at 167). The Fifth, Sixth, Eighth, and Ninth circuits have held that such personal attacks on defense counsel's representations and veracity are improper and affect a defendant's substantial rights.[15] In this Circuit, however, accusing defense counsel of misstating the evidence, making a "ficti[tious]" closing argument, and "impugn[ing]

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[14] *See supra* note 7.

[15] *E.g.*, *United States* v. *Rodriguez-Lopez*, 756 F.3d 422, 434 (5th Cir. 2014) (prosecutor who "[d]isparag[ed] defense counsel's motives for representing a criminal defendant" acted improperly); *United States* v. *Carter*, 236 F.3d 777, 785-86 (6th Cir. 2001) ("prosecutor's misstatement of [a witness's] testimony and personal attacks on defense counsel's truthfulness were likely to mislead the jury and cause prejudice"); *United States* v. *Wadlington*, 233 F.3d 1067, 1080 (8th Cir. 2000) (prosecutor's accusations that defense counsel misstated evidence were improper "[t]o the extent that [they] [could have been] construed as personal attacks"); *United States* v. *Frederick*, 78 F.3d 1370, 1380 (9th Cir. 1990) (prosecutor who sarcastically "sought to compliment the defense lawyer on 'confusing'" the witness acted improperly because she implied defense counsel's tactics were underhanded).

the integrity of" government witnesses by calling them liars with no factual basis, ordinarily does "not rise to the level of misconduct." *United States* v. *Calderon*, 127 F.3d 1314, 1333, 1336 (11th Cir. 1997).

Nevertheless, *Calderon* is distinguishable because it involved a three-week trial, whereas Unrein's trial was only five days long. *See* Docs. 173-77. When the improper statements regarding defense counsel are coupled with those concerning Unrein, there exists "'a reasonable probability . . . that, but for the remarks, the outcome of the trial would have been different.'" *Lopez*, 590 F.3d at 1256 (quoting *Eckhardt*, 466 F.3d at 947). Therefore, the prosecutor's remarks about defense counsel were both "improper" and "prejudicial." *Boyd*, 131 F.3d at 955 (citing *Blakey*, 14 F.3d at 1560).

C. The Prosecutor's Improper Closing Argument Was Harmful

Taken together, the cumulative effect of the prosecutor's improper comments during closing argument prejudiced Unrein and deprived him of a fair trial. *See Blakey*, 14 F.3d at 1561 ("[s]tanding alone none of the comments in this case would require reversal, but taken together, their cumulative effect presents a different problem"). Accordingly, this Court should vacate Unrein's conviction and grant a new trial. *See, e.g.*, *Bla-*

key, 14 F.3d at 1559, 1562 (vacating conviction and ordering new trial because prosecutor called the defendant a "'professional criminal'").

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO SEVER THE ATTEMPTED CHILD ENTICEMENT CHARGE FROM THE POSSESSION OF CHILD PORNOGRAPHY CHARGE

It was an abuse of discretion when the District Court refused to sever the attempted child enticement charge from the child pornography charge. Any potential benefit of a joint trial was substantially outweighed by the compelling prejudice Unrein suffered.

"[D]etermin[ing] whether separate charges were properly tried at the same time" involves "a two-step analysis." *United States* v. *Hersh*, 297 F.3d 1233, 1241 (11th Cir. 2002) (citing *United States* v. *Walser*, 3 F.3d 380, 385 (11th Cir. 1993)). First, this Court must determine "whether the initial joinder of charges was proper" under Federal Rule of Criminal Procedure 8(a).[16] *Id.* Then, this Court must "determine whether the district court abused its discretion under [Rule] 14 by deny-

[16] Unrein acknowledges the charges were properly joined under Rule 8(a). *Cf. Hersh*, 297 F.3d at 1242 (holding "the child pornography counts and the travel and transport counts" were "'similar'" within Rule 8(a)'s meaning because they involve "the sexual exploitation of minors").

ing the motion to sever." *Id.* The District Court abused its discretion when it misapplied Rule 14 and denied the motion to sever.

"In order to demonstrate an abuse of discretion, the defendant must establish that the joint trial subjected him not just to some prejudice, but to compelling prejudice against which the district court could not afford protection." *United States* v. *Harper*, 680 F.2d 731, 733 (11th Cir. 1982); *accord Walser*, 3 F.3d at 386 (quoting *United States* v. *Harmas*, 947 F.2d 1262, 1269 (11th Cir. 1992)).

"The test for assessing compelling prejudice" accounts for "all the circumstances of a particular case." *Walser*, 3 F.3d at 386. Under those circumstances, the jury must be able to "follow a court's limiting instructions and appraise the independent evidence against a defendant solely on the defendant's own acts, statements, and conduct." *Id.* (citing *United States* v. *Silien*, 825 F.2d 320, 323 (11th Cir. 1987)). The jury must also be able to "render a fair and impartial verdict." *Id.* at 386-87. If these conditions are satisfied, severance is required. *Id.* Any "possible prejudice[,]" however, "may be cured by a cautionary instruction." *Id.* (citing *United States* v. *Jacoby*, 955 F.2d 1527, 1542 (11th Cir. 1992)).

Three specific types of prejudice may arise from the denial of severance. *United States* v. *Jordan*, 112 F.3d 14, 16 (1st Cir. 1997). First, "'the defendant may become embarrassed and confounded in presenting separate defenses.'" *Id.* (quoting *United States* v. *Scivola,* 766 F.2d 37, 41-42 (1st Cir. 1985)). Second, "'proof that [the] defendant is guilty of one offense may be used to convict him of a second offense.'" *Id.* (quoting *Scivola,* 766 F.2d at 41-42). Third, "'a defendant may wish to testify in his own behalf on one of the offenses but not another, forcing him to choose the unwanted alternative of testifying as to both or testifying as to neither.'" *Id.* (quoting *Scivola,* 766 F.2d at 41-42).

A "need for a severance exists [when] the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other." *Alvarez* v. *Wainwright*, 607 F.2d 683, 686 (5th Cir. 1979) (citation omitted).[17] The decision to sever charges, however, always "'remains in the sound discretion of the trial court.'" *Id.* at 685 (quoting *United States* v. *Williamson*, 482 F.2d 508, 512 (5th Cir. 1973)).[18]

[17] *See supra* note 7.
[18] *See supra* note 7.

Unrein moved to sever the charges so he could freely exercise his right to testify about one charge and remain silent about the other. Doc. 64 at 4. He may have wished "to testify regarding how the images of child pornography ended up on his computer" and remain silent about attempted child enticement. Doc. 64 at 3. Such "testimony could only come from the individual or individuals who may have downloaded the images or Mr. Unrein himself." Doc. 64 at 4. As to attempted enticement, however, he may have wanted to rely solely on cross-examination of the undercover officers who conducted the sting. Doc. 64 at 4.

Conversely, Unrein may have wished to testify regarding the attempted child enticement charge and remain silent as to the child pornography charge. Doc. 64 at 4. But because "testifying about one alleged criminal offense [would have] expose[d] [Unrein] to cross-examination on the other," he did not testify. Doc. 64 at 4. By denying Unrein's motion to sever, the District Court effectively forced Unrein to pursue the "'unwanted alternative'" of remaining silent about both charges. *Jordan*, 112 F.3d at 16 (quoting *Scivola,* 766 F.2d at 41-42); *see also* Doc. 64 at 4. As such, the District Court's denial of severance violated Unrein's

right to present a defense, *see* Argument I.B, caused prejudice, and was an abuse of discretion.

Additionally, "[i]t [was] unfairly prejudicial to try the two charges together because one is an alleged attempted touching offense and the other is possession of child pornography, which can be classified as a non-touching offense." Doc 64 at 5. Both offenses involve the sexual exploitation of children, so the evidence could easily have confused the jury. For that reason, the jury may have impermissibly considered "'proof that [Unrein] [was] guilty of'" possession of child pornography "'to convict him of'" attempted child enticement, or vice versa. *Jordan*, 112 F.3d at 16 (quoting *Scivola,* 766 F.2d at 41-42). Therefore, the District Court's denial of severance impeded the jury's ability to "render a fair and impartial verdict" and was an abuse of discretion. *Walser*, 3 F.3d at 386-387.

Lastly, Unrein became "'confounded'" by the District Court's denial of severance. *Jordan*, 112 F.3d at 16 (quoting *Scivola,* 766 F.2d at 41-42). Due to the joinder of charges, the jury likely convicted Unrein on a "where there's smoke there's fire" theory. *United States* v. *Foutz*, 540 F.2d 733, 739 (4th Cir. 1976) (district court abused its discretion when

it refused to sever charges arising from two separate bank robberies). In other words, the jury may have impermissibly concluded that "because Mr. Unrein [had] been charged with two counts of sexual offenses involving minors he must be guilty of at least one of them." Doc. 64 at 5. Since this type of evidentiary spillover is a judicially recognized type of prejudice, *Jordan*, 112 F.3d at 16, this Court should vacate the convictions and afford Unrein "new, separate trials," *Foutz*, 540 F.2d at 739.

The District Court's erroneous denial of the motion to sever (Doc. 64) was harmful. CFA Gaertner obtained the evidence introduced against Unrein to prove the possession of child pornography charge by accessing Unrein's hard-drive through a write-block device. Docs. 175 at 110; 176 at 27. Supposedly, this device prevented CFA Gaertner from being able to transmit data onto Unrein's computer. Docs. 175 at 110; 176 at 27. Had the District Court granted the motion to sever, however, Unrein would have testified that he did not download child pornography onto his hard-drive, so somebody else must have transferred the images to his computer. Because "[h]armless error review . . . does not require [this Court] to view witness' credibility in the light most favorable to the government," Unrein could have contradicted CFA Gaertner's testimony

regarding the write-block's effectiveness and how or whether it was used during the examination. *Hands*, 184 F.3d at 1330 n.23.

For the same reason, Unrein also could have contradicted his ex-girlfriend's, ex-girlfriend's daughter's, ex-wife's, son's, and daughter's denials that they had accessed child pornography on his laptop. *See* Doc. 176 at 53, 65, 71, 80, 87. But the denial of severance rendered him unable to testify to that effect without subjecting him to cross-examination on the attempted enticement charge. Therefore, the District Court's denial of the motion to sever was harmful error.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN, OVER OBJECTION, IT ADMITTED INTO EVIDENCE CRAIGSLIST PERSONAL ADVERTISEMENTS WHICH WERE IRRELEVANT, UNFAIRLY PREJUDICIAL, AND IMPROPER CHARACTER EVIDENCE

It was an abuse of discretion when, over objection, the District Court admitted into evidence Unrein's 21 Craigslist advertisements and the "strictly platonic" posts to which he had responded, soliciting nipple sucking and biting, toplessness, nudism, swinging, adult movies, casual sex, mutual blow jobs, and mutual masturbation from consenting men and women, including transvestites. Gov't Exs. 34B, 34C. Those posts were irrelevant to Unrein's charges, unfairly prejudicial, and impermissibly related to his character.

Only relevant evidence is admissible. Fed. R. Evid. 402. "Relevance," however, "is a low standard, requiring only that the evidence in question 'have *any* tendency to make a fact [of consequence] more or less probable than it would be without the evidence.'" *United States* v. *Sumner*, 522 Fed. App'x 806, 810 (11th Cir. 2013) (quoting Fed. R. Evid. 401);[19] *United States* v. *Tinoco*, 304 F.3d 1088, 1120 (11th Cir. 2002). Hence, "[r]elevant evidence is admissible unless a specific exclusionary rule," such as Federal Rule of Evidence 403, "applies." *Sumner*, 522 Fed. App'x at 810 (citing Fed. R. Evid. 402).

Rule 403 permits courts to "exclu[de] relevant evidence when its 'probative value is substantially outweighed by a danger of unfair prejudice.'" *Old Chief* v. *United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 650 (1997); *accord United States* v. *King*, 713 F.2d 627, 631 (11th Cir. 983). "'Unfair prejudice' . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Old Chief*, 519 U.S. at 180, 117 S. Ct. at 650 (quoting Fed. R. Evid. 403 cmt.). For that reason, a sister circuit "accept[ed] without need of extensive argument that implications of child molestation, ho-

[19] *See supra* note 2.

mosexuality, and abuse of women unfairly prejudice a defendant." *United States* v. *Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993).

Ultimately, exclusion under "Rule 403 is an extraordinary remedy which should be used sparingly," and district courts are "accorded broad discretion" in "making the Rule 403 determination[s]." *King*, 713 F.2d at 631 (citation omitted). Yet "[t]here is . . . no question that propensity [is] an 'improper basis' for conviction." *Old Chief*, 519 U.S. at 182, 117 S. Ct. at 651.

Federal Rule of Evidence 404(a)(1) prohibits the admission of "[e]vidence of a person's character or character trait . . . to prove that on a particular occasion the person acted in accordance with the character or trait." Relatedly, Rule 404(b)(1) prevents the prosecution from introducing evidence of the defendant's prior "crime[s], wrong[s], or other act[s]" to "prove [his or her] character in order to show" propensity. Fed. R. Evid. 404(b)(1); *accord Old Chief*, 519 U.S. at 181-82, 117 S. Ct. at 651; *Williams*, 816 F.2d at 1531. "The rule," does however, "[provide] . . . that such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or

absence of mistake or accident." *Williams*, 816 F.2d at 1531 (citing Fed. R. Evid. 404(b)(2)).

The Federal Rules of Evidence offer "'no mechanical solution'" for determining "'whether to exclude on grounds of unfair prejudice.'" *Old Chief*, 519 U.S. at 184, 117 S. Ct. at 652 (quoting Fed. R. Evid. 403 cmt.). But the Advisory Committee's Note on Rule 404 is instructive regarding the proper treatment of "evidentiary item[s] that [have] the dual nature of legitimate evidence of an element and illegitimate evidence of character." *Id.* at 184, 117 S. Ct. at 652. The Note indicates Rule 403 determinations concerning such evidence "'must be made. . . in view of the availability of other means of proof and other facts appropriate for making decisions of this kind.'" *Id.* at 184, 117 S. Ct. at 652 (quoting Fed. R. Evid. 404 cmt.).

Unrein's Craigslist advertisements were not relevant to the conduct alleged in the superseding indictment. *See* Doc. 53 at 1-2. It charged Unrein with attempted child enticement and possession of child pornography. Doc. 53 at 1-2. Both offenses involve the sexual exploitation of children. Doc. 53 at 1-2. Soliciting casual sex from consenting adults through Craigslist advertisements, however, is lawful and in no

way related to the exploitation of children. The postings were thus irrelevant to proving Unrein committed the offenses charged in the superseding indictment. Because irrelevant evidence is inadmissible, Fed. R. Evid. 401, the District Court abused its discretion by admitting the postings.

Furthermore, the Craigslist postings served as impermissible character evidence, and the District Court should have excluded them. Fed. R. Evid. 404(a)(1) & (b)(1). The Craigslist interactions Unrein moved in limine to exclude involved the solicitation of casual sex from consenting adult men and women, including transvestites. Doc. 92; Gov. Exs. 34B, 34C. The Government used this evidence of Unrein's sexual proclivities "to show that" Unrein had a sexually deviant "character" that he "acted in accordance with" when he committed the acts alleged in the indictment. Fed. R. Evid. 404(b)(1). Rule 404's language plainly prohibits the use of evidence for this purpose.

Moreover, the sexually explicit content of the postings had an "undue tendency to suggest decision on an improper [emotional] basis." *Old Chief*, 519 U.S. at 180, 117 S. Ct. at 650 (citation and internal punctuation omitted). The Government argued the postings would negate

Unrein's defense that his intent while surfing online was innocent because he met the agent in Craigslist's "strictly platonic" section. Doc. 106 at 2. Because "implications of child molestation [and] homosexuality . . . unfairly prejudice a defendant," *Ham*, 998 F.2d at 1252, defense counsel did not want the jury exposed to "extrinsic acts [that] are 'likely to incite a jury to an irrational decision,'" *Hands* v. *United States*, 184 F.3d 1322, 1328 (11th Cir. 1999) (quoting *United States* v. *Church*, 955 F.2d 688, 702 (11th Cir. 1992). *See* Fed. R. Evid. 403.

To address this concern, Unrein's counsel indicated he would not contend Unrein lacked criminal intent because he met the agent-mother in the "strictly platonic" section. Doc. 174 at 195-97. This compromise would have rendered moot the Government's need to counter Unrein's potential intent argument.[20] Absent such a need, the postings could no longer have been considered "legitimate evidence of an element," and the District Court should have excluded them as "illegitimate evidence of character." *Old Chief*, at 184, 117 S. Ct. at 652.

[20] And if Unrein's board-certified criminal defense lawyer did not keep that promise, the Government could have always recalled a witness or introduced this evidence during rebuttal.

Additionally, Rule 403 required the District Court to determine whether the postings' "probative value" was "substantially outweighed by a danger of . . . unfair prejudice," Fed. R. Evid. 403, "in view of the availability of other means of pro[ving]'" Unrein's intent, *Old Chief*, 519 U.S. at 184, 117 S. Ct. at 652 (quoting Fed. R. Evid. 404 cmt.).

Much evidence established Unrein's intent, including the recorded phone calls (Gov't Exs. 3-10) and the emails between Unrein and the agent-mother (Gov't Exs. 2A, 2B). But the District Court admitted the postings nevertheless (Docs. 174 at 15-16, 196-97; 176 at 198), and Unrein never argued the postings' location evinced his lack of intent. Accordingly, the District Court abused its discretion when it admitted the Craigslist postings.

Furthermore, the District Court's error was harmful. This Court "review[s] the prejudicial effect of *all* evidentiary errors . . . in the aggregate." *United States* v. *Baker*, 432 F.3d 1189, 1203 (11th Cir. 2005) (citing *United States* v. *Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978)).[21] And it "will . . . reverse if the cumulative effect of the errors is prejudicial, even if the prejudice caused by each individual error was harm-

[21] *See supra* note 7.

less." *Id.* (citing *United States* v. *Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983). Determining whether the evidentiary errors prejudiced a defendant involves resolving whether, "viewing the trial as a whole, [he] received a fair trial." *Blasco*, 702 F.2d at 1329.

Here, the admission of the posts exposed the jury to Unrein's unusual sexual proclivities. It is highly likely that at least some jury members considered these unusual appetites (e.g., seeking relations with other men, including transvestites) to be deviant. As such, the jurors were especially susceptible to convicting Unrein "on their emotional response to" his lawful deviant "behavior, rather than the evidence introduced at trial." *Hands*, 184 F.3d at 1333.

For example, a juror who found Unrein's proclivities to be deviant could have readily concluded that because Unrein engaged in lawful deviant behavior, he was guilty as charged. Accordingly, the posts had an "'undue tendency to suggest decision on an improper basis'" and their admission into evidence was unfairly prejudicial. *Old Chief*, 519 U.S. at 180, 117 S. Ct. at 650 (quoting Fed. R. Evid. 403 cmt.).

This Court should therefore vacate the judgment due to this evidentiary error and remand for further proceedings. *See Hands*, 184 F.3d

at 1329 (the "introduction of the domestic violence evidence" required reversal because it was "unfairly prejudicial" and "not harmless").

CONCLUSION

For the foregoing reasons, the Court should reverse or vacate the judgment and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 13,981 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

August 1, 2016

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 1st day of August, 2016, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 1st day of August, 2016, to:

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AUSA Germaine Seider

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