CASE NO. 23-1029

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	On appeal from the
vs.	)	U.S. District Court for the Western
	)	District of Michigan,
	)	Case No. 1:20−cr−00183−RJJ−2
BARRY CROFT, JR.,	)	
	)	
Appellant.	)	

On Appeal from the United States District Court
for the Western District of Michigan

APPELLANT BARRY CROFT, JR.'S BRIEF ON APPEAL

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Barry Croft, Jr. requests oral argument. See 6 Cir. R. 34 (a). This case involves a conviction for a "conspiracy" to commit federal kidnapping against the governor of Michigan and a "conspiracy" to use a "weapon of mass destruction," where the entire thing was a government-directed and -produced scam, no one was kidnapped, the "victim" was aware of the hoax, no weapon was used, and no one was hurt. The issues include whether the evidence is sufficient for conviction of the "conspiracy" offenses, whether the government met its burden to disprove entrapment, whether a Remmer/Phillips hearing was mandated on Croft's mid-trial claim of juror bias, and whether the trial court's evidentiary rulings denied Croft his rights to present a defense and a fair trial. The case presents important and recurrent issues. Counsel believes oral argument will assist the Court in considering these issues and determining the outcome of this case.

JURISDICTIONAL STATEMENT

This Court's subject matter jurisdiction is pursuant to 28 U.S.C. § 1291. The district court had jurisdiction under 18 U.S.C. § 3231. A notice of appeal was filed in the Western District of Michigan on January 7, 2023 (R.808, Notice (PageID#10666)), from the judgment of December 28, 2022. (R.804, Judgment (PageID#10648-55).)

STATEMENT OF ISSUES

1. Whether Croft's conspiracy convictions are based on evidence that is insufficient as a matter of law, in violation of his right to due process.

2. Whether any rational trier of fact could have found, beyond a reasonable doubt, that Croft was predisposed to commit the alleged "conspiracy" offenses.

3. When Croft presented a colorable mid-trial claim of a juror's bias and perjury, whether the trial court's refusal to provide a Remmer/Phillips hearing denied Croft a meaningful opportunity to demonstrate jury bias, thereby requiring a new trial.

4. Whether the trial court prejudicially denied Croft's constitutional rights to present a defense, to introduce supporting evidence, to confrontation and effective cross-examination, and to a fair trial, when it arbitrarily and in violation of the Rules of Evidence barred evidence which was critical to Croft's defense and limited his cross-examination of government witnesses.

5. Whether the trial court's erroneous evidentiary rulings, detailed in Issue 4, are structural errors which mandate a new trial without regard to prejudice.

STATEMENT OF CASE

A. INDICTMENT & BACKGROUND

Croft was one of five men charged in a superseding indictment on April 28, 2021. It alleged four counts including a conspiracy to kidnap the governor of Michigan in violation of 18 U.S.C. 1201(a), and to use a "weapon of mass destruction" in violation of 2332a(a)(2). Croft was also charged with possessing an unregistered destructive device. (R.172, Super. Indictment (PageID#961-76).)

The other defendants were Adam Fox, Kaleb Franks, Daniel Harris, and Brandon Caserta. (Id.) Another defendant, Ty Garbin, had been charged in the initial indictment in December 2020; however, on January 27, 2021, Garbin pleaded guilty to the alleged kidnapping conspiracy, and was sentenced to 75 months, later reduced to 30 months. (R.535, Plea Transcript (PageID#4144-82); R.757, PageID#9963.)

There were two trials in the Western District of Michigan. The first was in March/April 2022. On February 9, 2022, before that trial, Franks pleaded guilty to the kidnapping "conspiracy." (R.461, Plea Transcript (PageID#3403-41).) He got 48 months. (R.770, Judgment (PageID#10101-07).)

Trial 1 was from March 9 to April 8, 2022. Both Garbin and Franks testified for the government. The trial resulted in the acquittals of Harris and Caserta; but the

jury was unable to reach verdicts as to Croft and Fox, resulting in a mistrial.[1] (TT1-R.834, PageID#14098-100; R.622, PageID#6029.) Post-trial motions for judgment of acquittal were denied. (R.653, PageID#7816.)

Trial 2, against Croft and Fox, was on August 9-23, 2022. They were convicted of all counts. (TT2, PageID#16296).) Croft was sentenced to 235 months in prison; Fox got 192. (R.852, Trans. (PageID#16440-41); R.804, PageID#10648-54; R.801, PageID#10634-40).)

B. SUMMARY OF TRIAL EVIDENCE AS PERTINENT TO ASSIGNED ERRORS.

1. Croft's noisy, but harmless, shouts into cyberspace

The Spring of 2020 was a grim time for U.S. citizens; many were angry and disgusted. Covid lock downs and violent riots dominated news and emotions. Some reacted with angry words. In April 2020, Barry Croft—a 44-year-old from Bear, Delaware, who drove an Amazon truck—posted a message on Facebook: "All it's going to take, one state, hang a governor." And on May 25, 2020, he pondered on Facebook: "Which governor is going to end up dragged off and hung for treason first?" (TT2, PageID#15945-46.) The FBI had been watching Croft's posts for years, and knew they were reliably hyperbolic and protected speech—all talk, no action. (TT2, PageID#14713-16, 14795-99.)

[1] The transcript of Trial 1 ("TT1") is at R.817-835, PageID#10836-14106. The transcript of Trial 2 ("TT2") is at R.837-847, PageID#14139-16304.

But other citizens in Spring 2020 *really did* resort to violence. The same week as Croft's Facebook post, two lawyers in their 30's—after texting each other about blowing up the NYC police headquarters and courts—threw pipe-bomb explosives into a police car in Brooklyn, blowing it up. For those real acts of violence, they will serve, respectively, 12 and 15 months in prison.[2]

As of Spring 2020, Delaware's Croft had never actually met Michigan's Adam Fox. Fox, in his 30's, resided in Grand Rapids, in the basement of a vacuum store (the "Vac Shack"). Fox in the past had "liked" some of Croft's internet posts and they were Facebook "friends," cyberspace acquaintances, who had sometimes shared insta-messages via text/video. (TT2, PageID#14476-79, 14501, 15080-81; GX479/496 (Appx0133-0140)[3].)

Fox had anti-government leanings and enjoyed attending pro-2nd Amendment rallies, such as at Michigan's capitol building on April 30 and June 18, 2020. (TT2, PageID#14483-85, 14572-74, 15402, 15504-05.) There, he'd see members of a Michigan militia group: the Wolverine Watchmen. This included Dan

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[2] B. Feuerherd, *Molotov cocktail-tossing lawyer sentenced to 15 months for torching NYPD car*, N.Y. POST (NOV. 18, 2022) (at: https://nypost.com/2022/11/18/molotov-cocktail-tossing-urooj-rahman-gets-15-months-for-torching-nypd-car/).

[3] Trial exhibits cited herein which are in paper form are in the Appendix ("Appx."). Trial exhibits cited herein which are audio/video recordings have been submitted on flash drives (four copies) as detailed *infra* in the Designations (p. 80).

Chappel and Ty Garbin; never Croft, who wasn't a Michigander. (TT2, PageID#14543-44, 14680, 15205-06, 15504-05.) Fox later met more Watchmen, four of whom, including Garbin, became co-defendants: Franks, Harris, and Caserta.

Like other Michiganders then, the Watchmen loathed Governor Whitmer including because of the State's hypocritical and incoherent COVID policies. They talked trash about her, laced with hyperbole and violence. (TT2, PageID#15074-76; GX21 (Appx0116).) One Watchmen member, Chappel, became turned off by some of their "memes." He told police and then promptly, in late March 2020, signed up as a paid undercover FBI agent/informant. (TT2, PageID#14648-49, 14668.) In his role, **Chappel** (hereinafter the FBI agents/informants who worked in the coordinated effort to create these alleged "crimes" are in **bold**) immediately became the "executive officer" or "XO," of the Watchmen. **Chappel's** texts, chats, and phone calls were viewed in real time by the FBI, and he secretly recorded all his communications with his Watchmen friends. (TT2, PageID#14544, 14610-11, 15061-70, 15201-203, 15213-15, 15390-95.)

Ultimately, **Chappel** was paid some *$54,000*, mostly in cash by the FBI, for betraying his friends, plus a $4,000 laptop. His primary handling agent was FBI Special Agent Jayson **Chambers**, who ran the operation (with SA Henrik **Impola**). **Chambers** yearned for this gig to be approved as a "terrorism enterprise investigation," or "TEI," the highest level, which would enable **Chambers** to use all

FBI resources against fellow citizens. (TT2, PageID#14556-57, 14618-20, 14641-43, 14699, 14809-10, 15194-96, 15293-300, 15385-89, 16082; TT1, PageID#13745.)

Too bad for **Chambers**' plans, the Watchmen didn't like Fox; he was obnoxious and lacked military skills. Fox was thus never part of the Watchmen. (TT2, PageID#15243-45, 15587-88, 15622-23.) Fox instead became associated with another makeshift Michigan group, created by the FBI, called the Michigan Patriot III%, which was comprised of Fox and one other, Sean Fix, who falsely claimed he'd been a Navy Seal. (TT2, PageID#14963-65, 14986, 15014, 15622-23.) The FBI also recruited agents/informants as leaders of other state's III% militia "groups," including **Jennifer Plunk** (Tennessee) and **Steve Robeson** (Wisconsin). (TT2, PageID#14635-39, 14665-67, 14695, 14756-58, 14830-31, 14970; DX1174 (Appx0165-0167).)

***Croft* was never a member of the Watchmen or the Michigan III%.** From his home in Delaware, he harmlessly embraced an antigovernment philosophy and sometimes used III% symbols. He also had a III% tattoo on his hand and wore "boogaloo" Hawaiian shirts to show affinity for that pro-gun, anti-government group. (TT2, PageID#15086, 15179-83, 15702; GX91, GX332 (Appx0117, 0131).) Repulsive to some, but all protected First Amendment activity.

2. Dublin, Ohio

Fox and Croft might have never met in person, except for the FBI's orchestration of a meeting in Dublin, Ohio on June 6, 2020. **Robeson** had made himself president of the "national board" for III% Patriot Militia and was promoting Dublin as a national meeting. FBI agent **Kris Long** drove from Baltimore to Ohio to instruct **Robeson** on how to record the meeting, which **Robeson** did. (TT2, PageID#14521, 14578-81, 14717-23, 14751-55, 14835-46.) **Long** remained in Ohio to collect the recording.

Fox and Croft were among the attendees who engaged in stoned/drunken trash talk, including about taking a governor in exchange for a capitol building. Croft ranted about going into a bank and stripping employees naked, "rob[bing] the fu** out of [a] corporation," and blowing up "a yard full of police cars." (GX34(audio), GX39-40(audio); TT2, PageID#14725-28, 14771, 14846-57.) Croft was stoned on marijuana nearly all the time at the four events he attended in this case: Dublin, Peebles, Cambria, Luther. (TT2, PageID#14843-46, 14863, 15186, 15431-33.)

In addition to **Robeson**, the FBI deployed other agents/informants at Dublin, including **Plunk**. **Robeson** ran the meeting and, to incite attendees, did a lot of talking (much barred by the court's rulings). He told them they needed a plan. (TT2, PageID#14574-78, 14751-75, 14793, 14822-24, 14855-56, 15219-20; GX35 (audio).) But there was nothing but talk at Dublin. No plans.

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

Shortly after Dublin, Fox asked some Watchmen to visit him at the Vac Shack on June 20, 2020. The handful of attendees included Garbin and **Chappel**, the Watchmen's XO, who had been ordered by **Chambers** to maintain ongoing recorded contact with Fox. **Chappel** drove them to the Vac Shack on the FBI's dime; he wore a live wire to broadcast back to **Chambers**/**Impola** in real time, *plus* a recording device. (TT2, PageID#14558-59, 14621-24, 15227-30, 15283.)

This was the first time **Chappel** met Fox. (TT2, PageID#14621, 15081-85, 15402-04.) Fox was hoping to unite Michigan's militias and brainstorm. Fox discussed an idea to assault the Michigan Capitol with 200 individuals and execute the governor. There was also talk of firebombing Michigan police cars. (TT2, PageID#15081-85, 15223-24, 15506-07.) Their ideas were ridiculous and were going nowhere. Nonetheless, as **Robeson** had done in Dublin, **Chappel** pushed Fox to come up with an objective. (Id., PageID#15229-30.)

Despite the FBI's efforts, there was nothing but talk at the Vac Shack. (Id., PageID#15585.) As a result, following that meeting, **Chambers** texted **Chappel** that he had to get Fox "focused" on expressing specific plans. (Id., PageID#15230-32; DX1008-09 (Appx0141-0142).) What good is a TEI if the FBI can't get its targets to act like the "terrorists" the FBI is inciting?

Chappel thus began communicating *incessantly* with Fox at the FBI's direction, with dogged persistence, and at least daily! Most of **Chappel's** communications were on live wires to **Chambers** *and* secretly recorded; **Chappel** also exchanged thousands of text messages with Fox, which were also real-timed back to **Chambers**. (TT2, PageID#15226-29.) **Chappel** had only sent 50 texts to Fox in June; but he sent *300* in July, and *400* or more in each of August and September. (TT2, PageID#15241-47.) Most of these communications—which are government admissions under FRE 801(d)(2)(D)—were barred at trial by the judge's rulings.

Chappel and **Chambers'** relentless snooping on Fox wasn't enough for the FBI's sharks looking to create "conspiracies." In late June, they deployed undercover agent **Mark Schweers**. Pretending to be "Mark Woods," **Schweers** approached Fox to be the third member of Michigan III%. (TT2, PageID#14906-15, 14939-40.) Like **Chappel**, **Schweers** made a pilgrimage to the Vac Shack, on July 3, and secretly recorded Fox ranting about his idea to attack Michigan's capitol. (TT2, PageID#14907-12, 14952-58.) **Schweers** had no knowledge of *Croft*; Fox didn't mention Croft, and **Schweers** had never heard of him. (Id., PageID#14969.)

In fact, Croft wasn't present at or knowledgeable about Fox's Vac Shack meetings, nor of nearly all activities of the Michiganders during June to October 2020. (TT2, PageID#14888-91, 15398-405.)

4. FTX in Cambria, WI

Croft *did* attend a summer FTX in Cambria, Wisconsin during the weekend of July 10-12, 2020. FTX's are traditional events of military/militia units, from ROTC to National Guard, and they often mix field training with weekend fun, and did here. The Cambria FTX was organized by the FBI, via **Robeson**, who had been promoting it since Dublin's event. (TT2, PageID#14585-86, 14693, 14729, 14758-59, 15250-53.)

Chappel drove Watchmen members Garbin, Harris, Franks, and Caserta to Cambria, and back afterwards, all on the FBI's tab. (Id., PageID#15255-57.) The FBI was concerned that Croft might not make it to the FTX; so, they had their agent/informant, **Plunk**, travel from Tennessee to Delaware to ensure he did. **Plunk** thus rode to Wisconsin with Croft and his three young daughters; she stayed in their hotel room. (Id., PageID#14857-62, 15427-28.) The FTX activities were recorded by **Plunk**, **Robeson**, **Chappel**, and **Schweers**. (Id., PageID#14859-60, 15029, 15084-87, 15252-53.)

FBI's **Robeson** led the FTX and addressed the group at the beginning. (Id., PageID#15250-52.) Some attendees participated in military exercises which included the use of a plywood-constructed "shoot house," a routine aspect of militia training and used in prior FTX's run by **Robeson**. (Id., PageID#14864-66.) Most of the FTX, though, was devoted to sunshine, cookouts, and family fun. (Id.,

PageID#14863-65, 15088-89, 15251-59, 16020-23.) Croft took a day trip with his three young daughters. (Id., PageID#16013-15.)

Croft enjoys tinkering with fireworks to make small explosives. He spent one of the afternoons, with ex-Marine Harris, trying to make a small explosive with a firework. But it didn't work. (Id., PageID#14740-42, 14788-89, 14868-69, 14875-76, 14918-20, 15703; GX97 (Appx097).)

Beginning at Cambria, and to facilitate the FBI's efforts to lure Fox and the Watchmen to the "conspiracy" the FBI was trying to create, **Chappel** and the other agents/informants were instructed to tell Fox and the targeted Watchmen that they could have free credit cards with a $5,000 limit. Agent/informant **Robeson** would be the one to provide the cards. (Id., PageID#15171-72, 15300-08, 15435-36.) **Robeson**, already a felon, was eventually terminated as an agent/informant in November 2020 due to his commission of still more felonies during the TEI. (Id., PageID#14690-92, 15537-38, 15811-20; R.396, USA Opp. at 9-10 (PageID#2728-29).)

After a day of sunshine and marijuana on Cambria's Saturday, many of the attendees went to dinner at a local restaurant. Amidst the intoxicated conversations, Croft is heard on one of the hidden recorders talking about wanting to arrest the governor and put her on trial for treason. (TT2, PageID#15092-95, 15258-60; GX93/106 (audio).) He talked ridiculously about "shoot[ing] down every air ship

that breaches the f***ing airspace" and "chop[ping] trees down at every f***ing road that crosses from Ohio and Indiana into Michigan." (GX106 (audio); TT2, PageID#15433-34.) Nonsensical talk; stoned out of his mind.

Croft went home after Cambria weekend. Despite the FBI's best efforts, there was no plan to do anything.

5. Peebles, Ohio

The next event—also promoted by the FBI—was on July 18 in Peebles, Ohio. It lasted a few hours, and there was a sign-in sheet, reflective of the attendees' naïve certainty that talking trash with likeminded Americans about politicians was protected speech. (TT2, PageID#15422-23; GX111 (Appx0119-0120).) Once again, **Robeson** ran the meeting; its purpose was for the FBI's assets to try to solidify a "plan" before the election. Croft was there for part of the event, and Fox was too, but their attendance overlapped only in part. **Chappel** and **Plunk** were there, with **Robeson**, to instigate and record. (TT2, PageID#14581-84, 14659-60, 14889, 15097-99, 15259-60, 15422-45, 15703-04.)

As ordered by **Chambers**, **Chappel** challenged the Peebles attendees that FTX's, while fun, are not enough: the group must get a direction! (TT2, PageID#15260-66, 15435-36.) Thus, as before, the FBI and its agents were seeking to lure these men from marijuana-infused trash talk to actually planning something that would destroy their lives. (Much of that evidence was barred, though).

But, lo and behold, **Chambers'** crime-instigators were disappointed again. Predictably, Croft raged about storming state capitols and blowing up police cars, blah, blah, blah, which was an absolute yawner to the FBI's assets who knew it was nonsense. (TT2, PageID#15512-14, 15703-04, 15771.) Fox babbled about courses of action that "us Michigan guys" might take against their governor, with "three routes," one of which would require "at least 300 fu**ing men" and was a tactical nightmare; another option was "her little fu**ing palace near Traverse City where she lifts all the fu**ing [Covid] bans and shit." (TT2, PageID#15102-04, 15514-15; GX113 (audio).) Because Fox had arrived late for Peebles, and Croft left early, Croft was gone by the time Fox made those statements. (TT2, PageID#15423-24.) Nonetheless, they went nowhere because, as **Chappel** admitted, the group was aimless and had no direction by Peebles' conclusion. (Id., PageID#15435.)

Indeed, **Chappel** testified that, until at least the first half of *August 2020*, there wasn't any plan or agreement among *anyone*. (TT2, PageID#15435-36.) As late as *August 9*, Fox told **Chappel** that an exercise against a governor would require a team of 7 to 8 "absolute operators," and **Chappel** agreed they only had "about four." (Id., PageID#15437; GX138 (audio).) And, as **Chappel** also admitted, *Croft wasn't one of the four*. At that mid-August point, per **Chappel**, the four—"the FBI Four"—were **Chappel**, **Schweers**, Fox, and Fix: i.e., two FBI assets, a fake Navy Seal, and Fox. (TT2, PageID#14988, 15040, 15056, 15437-38.)

This "TEI" was going *nowhere*, and **Chambers/Chappel and their team** thus accelerated their efforts to lure others to their FBI Four.

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

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

One of the FBI's problems was that Fox and the Watchmen *despised Croft* and were happy he remained in Delaware. For example, when the Watchmen conducted their fun-filled FTX's in Munith in June, Fowlerville in July, and Munith, Michigan again in August 2020, Croft was not present at, or invited to, any of those or similar Watchmen activities. (TT2, PageID#14703-08, 15392-421, 15590-92, 15610, 15655-59, 15746-78.) The **FBI** was at them, but not Croft.

Nor was Croft involved in the *incessant* texting/"chatting," including during July-September 2020, which occurred by and between **Chappel**, **Schweers**, **Robeson**, **Plunk**, Fox, the Watchmen (e.g., Harris, Caserta, Garbin and/or Franks), and others. They conducted their "chatting" on encrypted networks like "Wire" and "Threema." (TT2, PageID#14607-21, 14661-68.) As presented at Trial 1, FBI analysts logged thousands of those texts/chats; ***not one was to or from Croft***. (TT1-

R.826, PageID#12860-88; GX422 (Appx0105-0115).) Croft thus did not know what they were doing/saying in Michigan. (TT2, PageID#15416-21, 15783-85.) In fact, these much younger/fitter men dismissed Croft (in his mid-40's) as a "stoner pirate kind of whack nut looking dude." (TT1, PageID#13608.) The FBI's assets were even blunter: they called Croft "bonehead," "moron," "pussy." (TT2, PageID#14801-04, 16096.) Fox, especially, did not like or trust Croft, telling **Chappel** as late as ***September 7, 2020***, that he believed Croft was a "fed." (TT2, PageID#15442; GX215 (audio).)

Unknown to Croft, therefore, **Chambers**, **Schweers**, and **Chappel** were inciting Fox in July/August to express his wild ideas for FBI-involved chat rooms and recordings. (TT2, PageID#14610, 15319-20.) In one, on August 1, Fox told **Schweers** that he'd like to do a recon of Whitmer's locations in Lansing, Traverse City, and Mackinaw, and **Schweers** volunteered to check it out. (TT2, PageID#14925-27, 14991-97.) Fox also referenced sending "cupcakes," his slang for an explosive. To encourage Fox, **Chappel** contacted him on August 3 and volunteered to start digging up information; **Chambers** and **Impola**, champing at the bit, sent agents to Mackinaw to take photos for Fox. (TT2, PageID#14926-28, 15316-18.)

Many of Fox's ideas ranged from ludicrous to trivial, such as doing a "snatch and grab" of the governor from Mackinaw Island with a Black Hawk helicopter,

supposedly to be stolen from a military base by the fake Navy Seal. Or his idea to use two stolen boats, rendezvous in Lake Michigan and leave the governor in one, to make her endure a "massive inconvenience" before security picked her up. (TT2, PageID#14994-15008, 15057, 15646.) (Defendants' efforts to further expose these and other ludicrous "plans" were shut down by the court).

Seeing their big-deal TEI floundering, the FBI in August was reduced to ordering their agents/informants to build up Croft with the group and work at holding it together. **Long** ordered **Plunk** to "keep working to try to solve differences in the group," push for "compromises," and convince "them that they were brought together by Croft and he has good ideas." (DX1098-99 (Appx0163-0164); TT2, PageID#14876-88.) **Long** admitted: "we felt that if Mr. Croft was removed from the group the plan of *whatever they were planning* would fracture." (Id., PageID#14887.)

Woe to their TEI if the fake crimes they were creating—"*whatever they were*"—petered out on their own.

7. Daytime drive-by of the Michigan cottage on 8/29/20

Chappel and **Schweers'** idea to do a recon of the governor's cottage was front-and-center for **Chambers'** TEI for most of August. Croft had nothing to do with that "recon" and was not even aware of it. It was an FBI operation with Fox as patsy. (TT2, PageID#15317-23, 15414-15.)

Chambers ordered **Chappel** to start hounding people to get it lined up and he directed **Chappel** whom to invite. Nearly everyone **Chappel** asked—e.g., Harris, Caserta, Garbin—begged off. It wound up being only **Chappel**, Fox, and one other (Eric Molitor). (TT2, PageID#15314-35; DX1019-28 (Appx0143-0152).)

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

After the drive-by, **Chappel** purchased lunch for Fox and Molitor, at the aptly named Bull Tavern. During lunch **Chappel** gave Fox a pen and paper and told Fox to draw a map of where they'd been, all while the FBI photographed Fox from another booth in the restaurant, so they could use it against Fox at trial. (TT2, PageID#15329-31, 15439-41; GX187, DX1055-56 (Appx0127, 0159-0160).)

After lunch, **Chappel** drove Fox and Molitor to the boat launch—a small concrete slab, DX1059 (Appx0162)—across Birch Lake from the cottage. There, Fox smoked pot and enjoyed the afternoon with a young woman he met there.

Meanwhile, **Chappel** connived to take photos of Fox—stoned as can be, trying to make his ball cap work as a periscope—to be used against Fox when he was prosecuted for the FBI-orchestrated hoax. (TT2, PageID#15335-36, 15440-41; DX1058-59 (Appx0161-0162).)

The very next day, **Chappel** texted one of the purported "conspirators" (Garbin) to push the idea that they might want to get some explosives to "blow up" the bridge on I-31 in Elk Rapids, not far from the cottage; this would supposedly delay police response. (TT2, PageID#15340-43, 15594-97.) This was a genesis of the ridiculous "weapons of mass destruction" charge manufactured against two guys—Fox and Croft—who couldn't "blow up" a cardboard target if their lives depended on it, much less a concrete interstate bridge. (GX232 (Appx0129).)

That same day, **Chambers** instructed **Chappel** to have Fox post his pictures from the August 29 drive-by on their chat channels. (TT2, PageID#15341-43, 15438-39; GX175/178, DX1030 (Appx0123-0126, 0154).) Croft was never on those channels, so he was unaware of these activities. (TT2, PageID#15438-39, 15708-09.)

And with eyes likely on the election calendar, **Chambers** in August directed **Chappel** to start promoting with Fox the FBI's planned *nighttime* drive-by of the cottage. **Chambers** wanted this "overt act" to occur during FBI's long-planned FTX in Luther, Michigan on September 11-13. (TT2, PageID#15342-46; DX1031-32

(Appx0155-0156).) **Chappel** told Fox to invite Croft, all as part of **Chambers/ Chappel/Plunk's** efforts to overcome the group's distrust of Croft. (TT2, PageID#15344, 15442-44; GX215 (audio).)

8. FTX in Luther, MI

The Luther FTX was on September 11-13. (TT2, PageID#15520, 15709.) It was planned by **Robeson** and **Chappel** back in July during **Robeson's** Cambria FTX, which was when they first invited Croft. (Id., PageID#15443-44.) Croft drove from Delaware with his girlfriend for another weekend of family fun and harmless militia training. (Id., PageID#14889-90, 15183-84, 15515-20.)

There were at least *five* of the FBI's scammers at Luther to egg on the FBI's floundering kidnapping plot against its cooperating pretend "victim." This included **Chappel, Robeson, Schweers, Plunk**, and FBI undercover agent **Tim Bates**, known as **"Red."** (TT2, PageID#14928-30, 15148, 15776-77, 15829-31.) **Long** directed **Plunk** to try and convince Croft to stay at the Luther site, and not a hotel, to help refute the belief that Croft was a "fed." (Id., PageID#14886-87.) It didn't work: Croft stayed at a Super 8 in Big Rapids, 45 minutes away. (Id., PageID#15148-49, 15190-91.)

As with other FTX's run by **Robeson** and the FBI, this FTX likewise had a "shoot house" to practice militia drills. (TT2, PageID#15514-18, 15642-45; GX135/172 (Appx0121-0122).) It used blue tarps to simulate doorways and walls;

it was makeshift and generic. Claims that it was a mock-up of the governor's cottage were nonsense. (TT2, PageID#15010-12, 15521-22, 15645, 15710-11.) Plus, there was no evidence *Croft* ever once used the Luther shoot house. (Id., PageID#14936, 15053-54).)

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

"Weapons of mass destruction." What a farce!

The FBI undercover agent **Bates**, pretending to be **Chappel's** friend **"Red,"** let the attendees know *he* could supply explosives. To lure Fox into the FBI's "WMD" hoax, **Chambers** et al. made a video for **Bates** which showed a small improvised explosive device (IED) blowing up a car. (TT2, PageID#15854-55, 15884-85; GX224-25 (video).) No one had asked **Bates** to do so, but he insisted on showing a group of attendees, including Fox and Croft, this FBI-made video on his cellphone. (Id., PageID#15522-24, 15829-37, 15883-87.) **Robeson** and **Plunk** loudly raved about it as per their instructions to lure their targets to talk for the secret recordings. (Id., PageID#15877-78.) The stoner Croft was described as "excited" to

see the video, albeit that alleged reaction was not captured on any recordings. (Id., PageID#15523-24, 15836-37, 15884-90; GX226-27 (audio).)

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

9. Nighttime drive-by of the Michigan cottage on 9/12/20

One of **Chambers'** goals for Luther weekend was to conduct the FBI's second preplanned drive-by of the governor's cottage, this one at night. The FBI's case team discussed their plan the night before. **Chappel** and **Chambers** had been planning it since before the FBI's first drive-by on August 29. (TT2, PageID#15342-46, 15890-91; DX1031-32 (Appx0155-0156).) As on August 29, the pole cameras were in place; **Chambers** would have again coordinated with the pretend "victim" and her "detail." (TT2, PageID#15320-23, 15971-73.)

Not wanting such a sparse turnout as August 29, the FBI arranged for *three* cars to participate this time, all driven by FBI assets or their associates. **Chappel** lined people up to go. (TT2, PageID#15046-48, 15524-27, 15602.) It took place at 10 p.m. on 9/12/20. The FBI's assets drove 45 minutes south from Luther to pick up Croft at the Super 8 and bring him back north for the excursion to Elk Ridge. All three people in the car which fetched Croft were FBI plotters: **Chappel, Bates, Robeson**. (TT2, PageID#15046-48, 15148-56, 15524-25.) Realizing this nighttime drive had been hurriedly arranged for all except FBI plotters and Fox, both **Robeson**

and **Bates** asked **Chappel** whether Croft knew what was happening. (Id., PageID#15448-49, 15891-92.)

Indeed.

The three cars met up at a VFW, where each was given a task. The car driven by **Chappel** was to go to the boat launch; the one driven by Brian Higgins (**Robeson's** right-hand from Wisconsin) was to drive past the governor's cottage; the one driven by **Schweers** was to drive around the area. (TT2, PageID#14931-33, 15047-49, 15148-56, 15363-69, 15443-47.) For his part, Croft was shuffled into the back seat of **Chappel's** car with **Robeson** and Fox; **Bates** was in the front seat with driver **Chappel**. As per the FBI's plan, **Chappel** stopped at the I-31 bridge, where **Bates** led Fox down a tourist walkway to the bridge's underside. **Bates** told Fox to bring his phone so he could take a photo, to later use against Fox at trial; they were there for a minute. (TT2, PageID#15150-58, 15363-69, 15842-45, 15863-64, 15892-93; GX230/232-33 (Appx0128-0130).) Croft never left the car's backseat as **Chappel** circled the block to pick up **Bates** and Fox. (TT2, PageID#15150-51, 15444-47.) **Chappel** then drove to the boat launch per the FBI's plan.

The car with Higgins, Garbin, and Franks tried to find the cottage, but they had the wrong address and never did. That made the trip a "waste of time." (TT2, PageID#15526-31, 15719.) Nonetheless, **Chambers** also wanted them to flash a flashlight to see if **Chappel** and his passengers, at the boat launch across the small

lake, could see the light. At least that part of the excursion worked, as of course it would because, at that late hour, a flashing light could be seen for miles. (TT2, PageID#14627, 15150-54, 15363-65, 15526-29, 15717-23, 15842-51, 15865-70.) After this failed excursion, Croft went to his hotel for bed.

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

Some of the FBI's agents/informants, Fox, and others—but not Croft, whom they thought was a "fed"—talked about having another FTX in November. They disagreed about whether that would be before or after the election. (TT2, PageID#15162-64.) Later in September/October, they continued those discussions in their texts/chats. But Croft was never part of those chats. (TT2, PageID#15451-55, 15655-56, 15729; GX443 (Appx0132).)

10. The ruse to buy gear; the arrests.

Following the failure of the September 12th "drive by," **Chappel** and **Chambers** enhanced the pressure to avoid collapse of their incipient "kidnapping" scheme, as exemplified to them by apathetic and distracted Croft. Croft was back home in Delaware. Summer over, his daughters were in school and he was driving

his truck. He had no plans to be in Michigan again, much less to "kidnap" anyone. (TT2, PageID#15163-71.) *If* there were *any* communications with Croft, after Luther, they were trivial. (Id., PageID#15451-54.)

Thus, by the end of September 2020, with the air rushing out of the FBI's plan, **Chambers** instructed **Chappel** to have Fox meet soon with **Bates/"Red"** in Ypsilanti, Michigan, with the hope Fox would bring **Bates** a small "good faith" deposit for the explosive **Bates** had promoted. (TT2, PageID#14631-34, 15166-67, 15370-74, 15455-57; GX276 (audio); DX1034/1037 (Appx0157-0158).) To lure Fox to Ypsilanti, **Chappel** told Fox that **Bates/"Red"** would provide free tactical gear for the men and they'd get free lunch/beers at BW3. (TT2, PageID#15455-57.)

On October 7, **Chappel** drove Fox (and Garbin, Franks, Harris) to Ypsilanti to collect the free gear. (TT2, PageID#14631-34, 14709-12, 15163-71, 15370-77, 15455-58.) Instead of free gear and chicken wings, Fox, Garbin, Franks, and Harris were arrested. (TT2, PageID#15168-71, 15460-62, 15558-60.) They didn't make *any* payments to **Bates/"Red"** or receive *any* "explosive" from **Bates/"Red."** (Id., PageID#14635-36, 14710-12, 15377.)

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

The day after the arrests, the politicians bragged about the trap they'd set for these Americans. The FBI's purported "victim," Whitmer, who was never in danger, knew about the FBI's "kidnapping" hoax and received regular updates for months. She blamed President Trump.[4]

SUMMARY OF ARGUMENT

This "kidnapping" and "WMD" farce was a government operation from start to finish. The FBI and its tightly controlled paid informants orchestrated the whole thing. Like a Broadway show, government agents served as producer, director, script writer, choreographer, photographer, principal actors, and dancers. Even the supposed "victim" was in on the act.

Produced as a purported "conspiracy," this show flopped as to Barry Croft under the hornbook law its producers disregarded. Despite getting a *second* run, following Trial 1's acquittals of Harris and Caserta, the government failed to meet its burden of proof on essential elements of the two "conspiracy" counts against Croft.

[4] T. Barrabi, *Michigan Gov. Whitmer was aware of kidnapping plot, state AG says*, FOX NEWS (Oct. 9, 2020) (at: https://www.foxnews.com/politics/michigan-gov-whitmer-aware-kidnapping-plot-militia); E. Lawler, *Whitmer Knew of Kidnapping Plot for Weeks*, MLIVE (Oct. 9, 2020) (at: https://www.mlive.com/public-interest/2020/10/whitmer-knew-of-kidnapping-plot-for-weeks-she-tells-cnn.html).

The government's own witnesses testified that mid-August 2020 was the earliest there was any alleged "agreement" to "kidnap" anyone, and *that* "agreement" was only among government agents and one or more of the Michiganders (two of whom were *acquitted* in Trial 1). The record is devoid of evidence that Croft was a party to that August "agreement" or even knew of it, including because his involvement with the Michiganders was limited to only the four events, and three of them (Dublin, Peebles, Cambria) had long *predated* the alleged August "agreement." Croft's attendance at the Luther FTX on September 11-13, and his innocuous activities there, do not suffice to make him a participant in whatever "agreement" was allegedly formed in August 2020, nor did Croft become a "conspirator" by being in the backseat of one of the FBI's cars during the FBI's drive-by on September 12th.

Due to these and other deficiencies, the evidence is insufficient to prove any alleged "conspiracy" against Croft. Nor did the government meet its burden to overcome Croft's defense of entrapment. No rational trier of fact could have found that Croft was predisposed to commit the alleged "conspiracy" offenses. All five factors the Court evaluates for determining predisposition support Croft's defense.

Aside from the insufficient evidence, Croft's trial was grossly unfair and his constitutional rights repeatedly denied. On the second day of testimony, Croft presented a colorable and plausible claim that one of the jurors was biased, had

prejudged Croft's guilt, and was bent on subverting the trial's fairness. The trial court failed to take seriously these credible allegations, thereby injecting structural error. It conducted superficial *ex parte* review, refused to dismiss the juror, and failed to grant a Remmer/Phillips hearing at which the juror and other witnesses could be questioned under oath by Croft's counsel. The court thereby failed to afford Croft any meaningful opportunity to demonstrate jury bias, mandating a new trial.

Finally, having been unwittingly ensnared by such overwhelming government resources directed *at him*, Croft sought to defend in part by demonstrating the oppressive government inducement and his lack of predisposition for the "conspiracy" scam the FBI and its agents pushed. He wanted to present, for example, numerous relevant texts, recorded statements, and other communications by and between **Chambers**, **Impola**, **Schweers**, **Long**, **Bates/"Red," Chappel**, **Robeson**, and/or **Plunk**, and likewise between these agents/informants and the alleged "conspirators," all as admissions of the government and for truth under FRE 801(d)(2)(D). The trial court shut down much of that evidence and thereby, in that and other ways, prejudicially denied Croft's constitutional rights to present a defense, to confrontation and effective cross-examination, and to a fair trial.

ARGUMENT

I. CROFT'S "CONSPIRACY" CONVICTIONS ARE BASED ON EVIDENCE THAT IS INSUFFICIENT AS A MATTER OF LAW, IN VIOLATION OF DUE PROCESS.

A. Standard of review.

The Due Process Clause protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. Jackson v. Virginia, 443 U.S. 307, 315 (1979). The test is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the elements of the crime beyond a reasonable doubt. The sufficiency issues were raised via Croft's Rule 29 motions (TT2, PageID#16033-42, 16141-44), and are reviewed *de novo*.

B. The evidence was insufficient for conviction.

1. The kidnapping "conspiracy"

The essence of any conspiracy is an "agreement" between two or more people to commit an unlawful act. Iannelli v. United States, 420 U.S. 770, 777 & n.10 (1975). Where the statute requires an overt act—as here, with kidnapping under 18 U.S.C. 1201—the government must prove three elements: (1) the existence of an agreement to commit an unlawful act, i.e., the federal offense of "kidnapping"; (2) the defendant's knowledge and intent to join the conspiracy; and (3) an overt act to

effect the conspiracy and constitute actual participation in it. United States v. Blackwell, 459 F.3d 739, 760 (6th Cir. 2006).

The government failed to prove essential elements of its alleged "kidnapping conspiracy." As to Croft, the core requirement of an "agreement" is lacking. The government's own witnesses conceded that there was no agreement to do anything until at the earliest the middle of August 2020. But that did *not* include Croft as they also conceded: only at most **Chappel**, **Schweers**, Fox, Fix, and maybe one or more of the Watchmen, two of whom were acquitted in Trial 1 (Harris and Caserta) and the other two chose to plead guilty for their own reasons (Franks and Garbin). **Chappel** testified that, as of that time in mid-August, "**we** were building up a plan of action to present to Barry Croft." (TT2, PageID#15438.) Yet, despite thousands of hours of recordings, there is no evidence that **Chappel** or anyone presented a "plan" ***to Croft*** or that he agreed. (Id., PageID#15438-39.)

The only possible evidence of Croft's involvement, after mid-August, is that he attended the FBI's Luther weekend, on September 11-13, at the invitation and encouragement of FBI agents/informants. The only other three events in which Croft had participated were Dublin (June), Peebles (July), and Cambria (July), but all those took place long before the mid-August timeframe which is the *earliest* the government's own evidence suggests there was *any* kind of "agreement" among some "conspirators" (but not Croft). Nor did Croft participate, during *any* relevant

time, in any of the thousands of encrypted texts/chats and other communications, largely instigated by the FBI and its agents/informants **Chappel**, **Robeson**, and **Plunk**, with Fox, Garbin, Franks, Harris, Caserta, etc., much less did Croft do so from August 1 through Luther on September 11-13; nor did he do so from September 11-13 until the arrests on October 7/8, 2020. There is, therefore, amongst those communications, no evidence of Croft's alleged "agreement" to commit "kidnapping" (or a "WMD" offense). He also wasn't involved in, or even *aware of*, the FBI's August 29 drive-by of the cottage and the shenanigans to lure *Fox* to the boat launch.

That leaves *only* Luther weekend. But here, too—and remembering the standard is *beyond a reasonable doubt*—the evidence is insufficient as to Croft. He stayed in a hotel 45 minutes away, despite the FBI agents/informants' efforts to lure him to the Luther site. As at Cambria, Croft participated in the camaraderie of militia culture and he got one of his firecrackers, with some pennies attached, to harmlessly go "boom." His activities that weekend were completely innocuous. There were at least five FBI agents/informants at Luther—**Chappel**, **Robeson**, **Plunk**, **Schweers**, **Bates/"Red"** (TT2, PageID#15776-77)—and yet there are no recordings of Croft supposedly agreeing to the "kidnapping" plan which **Chappel** claimed they were working up with Fox.

The evidence, indeed, was that Fox and his alleged non-FBI confederates (Franks, Garbin, Harris, Caserta) did not like or trust Croft including because they thought he was a "fed." Only the *FBI's deceivers* were keen on Croft, and that was because they wanted to lure him into an FBI-concocted crime against a pretend "victim." This dynamic further refutes that Croft made any "agreement" with any of the alleged "conspirators," and vice versa, and explains the absence of such evidence as to Croft. To be sure, Croft socialized with them and they expressed together some of the same like-minded antigovernment hyperbole including against Whitmer. However, "[m]ere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy, without an intention and agreement to cooperate in the crime" is not sufficient to make one a conspirator. United States v. Williams, 503 F.2d 50, 54 (6th Cir. 1974); United States v. Falcone, 311 U.S. 205, 207 (1940). "A conspiracy cannot be thrust upon a member, but instead must be purposely and voluntarily joined; there 'must at some point be a meeting of the minds in the common design, purpose, or objects of the conspiracy.'" United States v. Nall, 949 F.2d 301, 306 (10th Cir. 1991) (quoting United States v. Butler, 494 F.2d 1246, 1249 (10th Cir. 1974)). Conspirators will also have a degree of mutual trust attendant to their shared stake in the venture. Direct Sales Co. v. U.S., 319 U.S. 703, 713 (1943).

No such credible evidence was presented as to Croft, not at *any* point in time in 2020 and thus not after mid-August's date of the **Chambers/Chappel**-incited

alleged "agreement" by some. Croft's purported "co-conspirators" did not like or trust him. He was not included in most of their events and in none of their texts/chats; and, although they tolerated his presence at the two FTX's, they generally viewed him with derision. ***There is no evidence Croft ever reached a "meeting of the minds" with anyone, as essential for the alleged "kidnapping" "conspiracy."***

Croft's presence during the FBI's 9/12/20 nighttime drive-by, during Luther weekend, is typical of his peripheral status. He was there *only* because the FBI insisted on driving 45 minutes out of the way to Croft's hotel and thereby ensure that Croft was in the backseat of one of the FBI's cars—like it or not—when **Chappel** drove by the bridge. Croft never left the backseat, never "set eyes" on the bridge (only **Bates** and Fox walked down), and, for all *that* evidence shows, Croft may have been *asleep* from his day of partying. Yet it is supposedly relied upon as evidence of "conspiracy." It is not; at most, it shows that Croft was present during an "overt act" to effect an agreement which **Chappel** and Fox (and maybe some Watchmen) may have formed by that 9/12/20 date, but not Croft. An accused's mere presence at one or more alleged "overt acts" is "insufficient to sustain a conspiracy conviction," Williams, 503 F.2d at 54, in the absence of proof that such person had already purposely and voluntarily agreed to be part of that alleged "conspiracy." Marino v. United States, 91 F.2d 691, 695 (9th Cir. 1937) ("[A]n accused must join in the agreement to be guilty [under the conspiracy statute], for even if he commits an overt

act, he does not violate the statute unless he joined in the agreement."); United States v. Hirsch, 100 U.S. 33, 34 (1879).

Under that same rule and hornbook conspiracy law, *any* alleged act—of *any* so-called "conspirator"—which occurred *before* the formation of an actionable conspiracy agreement by such persons, is not an overt act for these purposes. The alleged conspiratorial agreement necessarily must be independent of and prior to an "overt act" which seeks to effect that alleged unlawful agreement; this rule eliminates, as "overt acts" in this case, any acts of Fox and the Watchmen which occurred *before* mid-August 2020, and also of Croft at *any time* because he was never part of that alleged mid-August agreement or *any* agreement. See, e.g., Hall v. United States, 109 F.2d 976, 984 (10th Cir. 1940) ("The overt act must be a subsequent independent act following the conspiracy and done to carry into effect the object thereof."); Wilson v. United States, 275 F. 307, 314 (2nd Cir. 1921); Pearlman v. United States, 20 F.2d 113, 114 (9th Cir. 1927). That is also the import of the plain language of the kidnapping statute: it requires proof of an "overt act to *effect the object* of the [foregoing actionable] conspiracy." 18 U.S.C. 1201(c).

Even assuming, *arguendo*, that the law would allow an "agreement" to be found from Croft's presence during the FBI's 9/12/20 drive-by, or his presence during Luther weekend to, for example, view and express excitement about **Bates/"Red's"** "bomb" video, that "agreement" is not independent of these same

alleged overt acts, and thus fails the independence requirement. Plus, it is at most an agreement between Croft and government agents—i.e., **Chappel/Robeson/Bates** who dragged Croft along on the drive-by, and **Bates/"Red"** as to the "explosive." An agreement that is exclusively between Croft and government agents cannot establish an actionable "conspiracy" as to Croft. See, e.g., Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965).

Finally, the alleged kidnapping "conspiracy" fails at another basic level: there is no proof of federal kidnapping's essential element of the target's lack of consent. "The victim's lack of consent is a fundamental element of kidnapping." United States v. McCabe, 812 F.2d 1060, 1061 (8th Cir. 1987). See Chatwin v. United States, 326 U.S. 455, 464 (1946). The jury was so instructed. (TT2, PageID#16164.)

Without sufficient proof of the target's absence of consent, a purported "kidnapping" is not an unlawful act. As such, a "conspiracy" *premised* on such a "kidnapping" fails for lack of the requisite "unlawful act." Salinas v. United States, 522 U.S. 52, 65 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense.").

In Love v. People, 160 Ill. 501, 43 N.E. 710 (1896), the court said:

> It is safer law and sounder morals to hold that, where an owner arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act and others to be led into and encouraged in its commission by acting in concert with such owner, no crime is thus

committed.

Id. at 508-09. For certain crimes, including kidnapping, "consent to the criminal act by the person injured eliminates an essential element of the offense." State v. Burnette, 242 N.C. 164, 170-71, 87 S.E.2d 191, 195 (1955). See also Connor v. People, 18 Colo. 373, 377, 33 P. 159, 160 (1893) (for crimes where lack of consent is an element, and "supposing the consent really to exist," "there is no legal crime committed, though the doer of the act did not know of the existence of the circumstance which prevented the criminal quality from attaching").

These principles apply here. The government's own evidence shows that the purported "victim" was involved with the "kidnapping" hoax and, at least through her agents, cooperated with its planning, execution, and performance. The alleged "overt acts" of the 8/29/20 and 9/12/20 drive-bys of the governor's cottage were done only with the prior approval of, and coordination with, the governor and her detail. As **Chappel** testified, the 8/29 event was entirely dependent on when it was convenient for them (TT2, PageID#15320-23), such that the "victim" was "arranging to have a crime committed against [her] property or [herself]." Love. When a purported "kidnapping" plot has this level of coordination with the supposed "victim"—who did not testify—the government failed to meet ***its burden*** to prove lack of consent. Its evidence suggests the opposite.

2. The WMD "conspiracy"

The WMD "conspiracy" fails for many of the same reasons. There is no evidence of an "agreement" involving Croft to obtain or use a WMD against the bridge or anyplace else; no agreement before mid-August and none after.

Croft's viewing of the FBI video and showing "excitement" when watching it (as claimed by **Bates** and Garbin), is innocuous and insufficient to prove an agreement. His presence for the 9/12/20 drive-by is at most attendance at an overt act of a "conspiracy" he never joined, which, as detailed above, is not sufficient to make him a "conspirator" absent sufficient proof of his meeting of the minds with the persons alleged to be "conspirators." What is more, Croft never contributed so much as a nickel to the FBI's WMD lark, and he was not part of the "ruse" trip to Ypsilanti. He was again on the periphery—in the backseat—uninformed about what the Michiganders were being incited to do by **Chambers/Chappel/Robeson** et al.

3. Entrapment

Even assuming *arguendo* there is sufficient proof of "conspiracy" against Croft, the government *still* failed—where the court submitted Croft's entrapment defense to the jury—to meet its burden to prove that Croft was "disposed to commit the criminal act prior to first being approached by Government agents." Jacobson v. United States, 503 U.S. 540, 549 (1992). The defendant's burden of *production*, for entrapment to go to the jury, has two parts—inducement and predisposition. But

predisposition is the "'principal element' of entrapment. Inducement is merely the threshold inquiry for whether 'the defense of entrapment is at issue.'" United States v. Cabrera, 13 F.4th 140, 147 (2nd Cir. 2021) (quoting Jacobson at 549 and Mathews v. United States, 485 U.S. 58, 63 (1988)).

No rational trier of fact could have found, beyond a reasonable doubt, that Croft was predisposed to commit the alleged "conspiracy" offenses. United States v. Anderson, 76 F.3d 685, 690 (6th Cir. 1996). There are five factors the Court evaluates for determining predisposition. United States v. Nelson, 922 F.2d 311, 317 (6th Cir. 1990). All five strongly show that Croft was entrapped.

The first—Croft's character and reputation—favors Croft. At all relevant times, Croft was a truck driver raising three young daughters. He had a modest criminal record (not in evidence in Trial 2), which involved offenses from decades ago when he was 19-21 years old, and for which Delaware's governor pardoned him. (R.773, PSR ¶¶ 125-30 (PageID#10184-88).) Now in his 40's, he enjoyed his unconventional—but constitutionally protected—political views. And he would freely express them, as at Peebles and Dublin, sometimes to include provocative and lusty statements of hatred, animosity, criticism, and political hyperbole about politicians including Whitmer. All of his speech in those respects is at the *core* of First Amendment protection no matter how "vehement, caustic[,] and sometimes unpleasantly sharp." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). "Strong

and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases," NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982), and may lawfully include "crude," "abusive," "inexact," and "violent" rhetoric, even against *the president*. Watts v. United States, 394 U.S. 705, 708 (1969). Nonetheless, Croft's raucous rhetoric did not credibly suggest that he was threatening violent acts that were *likely to occur*. In fact, he was 44 years old when arrested on October 8, 2020: He had never in his life engaged in violent action against the government. Nothing but talk.

That leads to the second factor—whether the suggestion of *criminal* activity was made by the government—which is also strongly supportive of Croft. Until the FBI got involved, via the likes of **Chambers**, **Impola**, **Long**, **Chappel**, **Robeson**, **Plunk**, **Schweers**, **Bates**, **etc.**, Croft's political speech would have remained that: Talk. The FBI had been infiltrating Croft's life, with its secret agent/informants, since at least 2019. (TT2, PageID#14677-79.) These purported "law enforcers" knew Croft's words were empty "words," because, if they actually believed Croft was making true threats of "kidnapping" or worse, Croft could have been arrested and prosecuted for such threats under 18 U.S.C. 875(c), to a five-year sentence if convicted. United States v. Coss, 677 F.3d 278, 289-290 (6th Cir. 2012). But the authorities knew Croft's rhetorical excesses were not "true threats." The FBI's scammers thus sought to escalate Croft's political speech into a prosecutable

"conspiracy" by inciting Croft and the others to declare an "objective," to get a "plan," to overcome "division," and to *act* and not just talk. They were behind every key event—including all four attended by Croft, as well as both drive-bys and the "WMD" nonsense with **Bates'** video—and they incited the men at every opportunity. It was *the FBI's* "conspiracy" to "kidnap" and use "WMD," not Croft's.

As to the third factor, there was no "profit" or financial benefit sought or obtained by Croft with his protected speech and/or his occasional enjoyment of the camaraderie of militia weekends, an old soul in the new world. The FBI's agents/informants, by contrast, had an enormous profit motive to entrap.

Croft's reluctance to commit the two alleged "conspiracy" offenses—the fourth factor—is most apparent by his apathy about and utter disinterest in these claimed "conspiracies" and "conspirators." He only attended the four events and was otherwise uninvolved with the Michiganders. He was not part of their thousands of chats, they thought he was a "fed," and they generally did not like or trust him. Back home in Delaware by September 13, Croft would not likely have been back to Michigan again in the foreseeable future. He was not there on October 7 for the "ruse" trip to Ypsilanti and had no knowledge of it. *But for* the *government's* incitement and planning, these "conspiracies" were stillborn.

Finally, the fifth factor—the nature of the inducement or persuasion offered by the government—confirms Croft's entrapment. Inducement requires something

more than merely affording an opportunity for the commission of the crime; it requires "'an opportunity plus something else—typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive.'" United States v. Dixon, 396 F. App'x 183, 186 (6th Cir. 2010) (quoting United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994)).

It is staggering the extent to which the FBI and its agents/informants used excessive pressure, exploited the anger from COVID lockdowns and destructive summer riots, and manipulated emotional issues among vulnerable and excitable citizens. This included: nearly *constant* real-time monitoring of FBI's communications with Fox, plus thousands of government-initiated texts/chats; the deployment of multiple paid agents/informants who sought to elicit and encourage extremist and violent behavior; and the FBI's instigating, planning, promoting, and conducting of nearly all key events including both FTX's attended by Croft, both cottage drive-bys, the "boat ramp" detour, the Bull Tavern "map" making, the "WMD" lark, the escorting of Fox to walk under the bridge, and the "ruse" Ypsilanti trip.

The FBI's excessive pressure also included such outrageous tactics as deploying **Plunk** to ride and room with Croft to ensure he attended the Cambria FTX, the allowance and encouragement of **Robeson's** "free money" scam, the

production of the "bomb" video and its display and promotion by **Bates/"Red,"** and the allowance of "otherwise illegal activities" by its agents/informants. One vivid example is the FBI's farcical activities in obtaining a rifle from **Robeson** in Wisconsin, the FBI driving that rifle to Delaware, giving it back to **Robeson** there, supposedly so that felon **Robeson**—now with "OIA" permission—could deliver it to Croft, but when Croft didn't want it, using **Plunk** to make the effort, and, when she failed, taking the rifle back to **Chappel** in Michigan. (TT2, PageID#14452, 14831-35, 14882-83, 16110-15).) A confederacy of the absurd.

No rational trier of fact could have found that Croft was predisposed to commit the alleged "conspiracy" offenses. For that reason, and because the "conspiracy" charges were not proven against him in any event, Croft's "conspiracy" convictions violate due process. He must be discharged.

II. When Croft Presented a Colorable Mid-Trial Claim of a Juror's Bias and Perjury, the Trial Court Denied Croft a Remmer/Phillips Hearing and Thereby Failed to Afford any Meaningful Opportunity to Demonstrate Jury Bias.

A. Standard of review.

This Court reviews for abuse of discretion lower court decisions of whether to conduct a hearing on possible jury bias/misconduct and whether to grant a new trial based on it. United States v. Lanier, 870 F.3d 546, 549 (6th Cir. 2017).

B. Background facts.

On the morning of August 11, 2022, before the second day of testimony, the court had an in-camera hearing to address a report of a juror's bias and misconduct. (R.848, Sealed Trans. 8/11/22(a.m.) (PageID#16307-11); R.711, Order (PageID#8980).) Croft's counsel explained that he had received a phone call the previous evening from a person who said he was a co-worker of a seated juror. The caller gave the juror's name and physical description and other corroborating details. (R.848, PageID#16307.) Based on the caller's description—and other reliable information—Croft's counsel determined the caller was speaking about seated Juror A.[5] (R.848, PageID#16307-08.)

Croft's counsel continued:

[5] The juror's actual number is not being used because the lower court ordered all such identifying information to be redacted/sealed, and this Court has access to all those unredacted/sealed filings.

> [The caller] said they worked together for a number of years, and [Juror A] has been . . . telling people that he had been summoned for jury duty in federal court and he was hoping to get on the Whitmer jury because he already made up his mind as to a verdict in the case. Frankly, he said that he had already determined that the Defendants were guilty and he was going to hang them is what was reported to me. . . .

(Id., PageID#16307-09.)

Both Croft and Fox asked for permission to voir dire the panel and Juror A. (Id., PageID#16310-11). The trial court refused, stating it was in "investigation mode." (Id.) The trial went forward with the day's testimony.

While the trial was progressing, the court's "jury clerk coordinator" "investigated" T.B.'s report by having a phone call with T.B. (Id., PageID#16310; R.856, Sealed Trans. 8/11/22(p.m.) at 6-12 (PageID#16547-53).) ***None*** of the parties or their counsel were invited to, or did, participate in this so-called "investigation," despite their request to do so.

After this cursory "investigation" by the clerk, the court reported to the parties during a second in-camera conference after testimony concluded on August 11. (R.856, Sealed Transcript, PageID#16542-53). The court told counsel that the clerk had interviewed T.B. (Id., PageID#16548). The court related the following as a result of that interview:

> (1) T.B. was a co-worker of Juror A but the juror did not make the statements to T.B.

> (2) During a work break Juror A told another colleague, in the break room, that he was selected for jury service and Juror A said "things like what we heard this morning. . . [T]hose guys are going to hang. I'll make sure they are guilty." The unidentified co-worker related this information to T.B., who then reported it to Croft's counsel.
>
> (3) T.B. told the clerk that the coworker who had related this information did not want to be identified, and T.B. did not want to be involved either for fear of losing his job. They both feared for their jobs "for reasons they did not describe to [the clerk]."

(Id., PageID#16547-48).

The court announced it would conduct an *ex parte* interview of Juror A, but not until after *another* day of testimony. (Id., PageID#16548). Croft's counsel objected. Among other things, he urged that Juror A's questioning must be done with all counsel present, and that the lawyers must be permitted to participate, and clients allowed to attend under Fed. Crim. Rule 43(a). He also urged that counsel be allowed to voir dire the panel. (Id., PageID#16549-50). He later filed objections. (R.707, Brief (PageID#8959-63).)

The court denied Croft's requests. (R.711, Order at 4 (PageID#8982); R.856, PageID#16550-51.) After another full day of trial on August 12, the court had its *ex parte* meeting in chambers with Juror A. (R.849, Sealed Trans. 8/12/11, PageID#16313-19). Five people were present: the judge, the jury clerk, the case manager, the court reporter, and Juror A. None of the attorneys were there. Juror A was informed it was a "private meeting" that was being transcribed and a copy might

be provided to counsel. ***The juror was not placed under oath.*** Some of the court's questions to Juror A were minimally focused on the allegations but, instead were leading yes/no questions as to whether the juror, ***since he was sworn as a juror***, has and will continue to follow the court's admonitions. (Id., PageID#16314-15).

After the court reiterated to Juror A that he already swore an oath in voir dire to follow the court's admonitions *and understood* that oath (id., PageID#16315), the court then told Juror A about the allegations. But even here the court minimized the allegations, telling Juror A "it's not like I have [it] on tape." The court asked if Juror A "***remember[s]*** making statements like that at any time." Juror A replied "none." (Id., PageID#16316). Juror A denied speaking with co-workers about his service, other than to allegedly say: "I have jury duty." (Id.)

On August 14, two days after the *ex parte* meeting, the court issued its order rejecting any hearing and retaining Juror A. (R.711, Order (PageID#8979-89).) Juror A was on the jury which convicted Croft. (TT2, PageID#16295).

Later, after trial was over and the verdict returned, Croft sought a new trial on grounds of Juror A's bias/misconduct and again requested a hearing. He presented an investigator's affidavit with additional evidence to support the initial claim. This included that another co-worker heard of Juror A's comments, that Juror A's mother also works for this same employer in an important position, and that the employees are afraid to get involved for fear of their jobs. (R.745/749, Motion & Aff.

(PageID#9726-57).) The court refused any hearing and denied a new trial. (R.779, Order (PageID#10218-45).)

C. Croft presented a colorable claim of juror bias and perjury which, at a minimum, mandated a Remmer/Phillips hearing at which Croft's counsel was entitled to participate.

The Sixth Amendment guarantees the right to trial by an impartial jury. "The presence of even a single biased juror deprives a defendant of [their] right to an impartial jury." Williams v. Bagley, 380 F.3d 932, 944 (6th Cir. 2004). And here, more than just "partiality" was alleged; the report by T.B. suggested that Juror A had lied under oath in jury selection and was bent on subverting the trial's fairness. Such misconduct is "presumptively prejudicial." Remmer v. United States, 347 U.S. 227, 229 (1954). See also Smith v. Phillips, 455 U.S. 209, 215 (1982).

Under Remmer and Phillips, "a prima facie showing of juror bias entitles a defendant to an evidentiary hearing." Cunningham v. Shoop, 23 F.4th 636, 652 (6th Cir. 2022). Phillips is unambiguous: "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Phillips, 455 U.S. at 215. Cunningham reiterated that right.

The trigger for an evidentiary hearing is "*only* a prima facie (i.e., colorable) claim" of juror bias. Cunningham, 23 F.4th at 651. See also United States v. Lanier, 988 F.3d 284, 294 (6th Cir. 2021). Mere *speculation* is not sufficient to require a hearing, United States v. Owens, 426 F.3d 800, 805 (6th Cir. 2005); but the required

prima facie showing, by its nature, is otherwise easy to meet. Barnes v. Joyner, 751 F.3d 229, 248 (4th Cir. 2014) ("minimal showing").

In the juror bias context, the minimal prima facie standard is met when a *credible* allegation of bias/prejudice (or other misconduct) is presented. A credible allegation is a plausible one. United States v. French, 977 F.3d 114, 119 (1st Cir. 2020). The prima facie standard does not require defendant to prove the claim, or even present testimony. Hearsay is *routinely* sufficient to meet the threshold prima facie burden—so long as the allegation is credible and plausible. Cunningham, 23 F.4th at 650-51 (investigator affidavit, which contained hearsay reports of interviews with jurors, sufficient for prima facie standard). As this Court stated in Cunningham **"'*allegations* of juror partiality' suffice."** Cunningham, 23 F.4th at 651-52 (quoting Phillips). See also Williams v. Taylor, 529 U.S. 420, 442-44 (2000).

A criminal defendant's colorable allegation of a sitting juror's bias and perjury thus mandates a hearing at which the defendant is afforded an opportunity to demonstrate the juror's partiality and/or misconduct. Phillips, 455 U.S. at 215; Lanier, 988 F.3d at 294-95. Croft presented a colorable allegation of juror bias and perjury. The information reported by T.B. was specific, precise, and plausible. It was unsolicited by any party. T.B. credibly identified the subject juror as someone T.B. has worked with for several years. T.B. provided the context, work-place location, and substance of statements the juror recently made to more than one person ("he

has been telling people"). The substance of the juror's statements were described and are flatly disqualifying.

T.B.'s allegations were *corroborated* during the *ex parte* "investigation" conducted by the court's clerk. The clerk's unrecorded interview with T.B. confirmed that Juror A made his disqualifying biases and intentions known to other co-workers and was doing so openly. T.B.'s report to the clerk—that T.B. had not himself heard the subject disqualifying statements, and that they had been reported to him by another co-worker—only enhanced T.B.'s credibility. It did not diminish the gravity of Juror A's alleged statements or render T.B.'s report any less credible. Most alarming—and further enhancing the credibility—is that T.B.'s co-worker apparently did not want to be identified or involved, and that T.B. was likewise reluctant, for fear of losing their jobs by coming forward. Yet T.B. *did* come forward anyway, trying to do the right thing.

D. The court failed to provide the required hearing and any "meaningful opportunity" for Croft to demonstrate juror bias.

Because the court was thus presented with a credible and plausible allegation that a sitting juror had openly, and recently, stated a strong bias against the defendants and an intention to sabotage the trial, the court had two options:

(1) Discharge Juror A and substitute an alternate, of which there were *five* available (and *four* by the *end* of the trial) (TT2,

PageID#14388, 14407-09, 16279); or

(2) Conduct a hearing at which the parties by counsel could question, under oath, the necessary persons including at least Juror A, T.B., Juror A's other co-worker(s) as referenced by T.B., and the other sitting jurors.

The court failed to take either course, thereby abusing its discretion and denying Croft's rights to due process and a trial before an impartial jury. Cunningham, 23 F.4th at 661.

The *minimum* requirements of a constitutionally sufficient hearing have been amply detailed by this Court. The district court must provide the presumed-innocent accused with a "meaningful opportunity" to demonstrate the communications' "circumstances," their "impact[,]" and whether the juror is biased. All interested parties must be allowed to "participate" at the hearing. Remmer, 347 U.S. at 230; Phillips, 455 U.S. at 215-16; Cunningham, 23 F.4th at 649-51. The accused's attorney must be given the opportunity to question the witnesses and jurors individually and under oath. United States v. Corrado, 227 F.3d 528, 537 (6th Cir. 2000); Lanier, 988 F.3d at 295. The hearing must be "unhurried and thorough." United States v. Zelinka, 862 F.2d 92, 96 (6th Cir. 1988).

The district court, to be sure, has discretion to supervise the questioning and its scope, but the *allowance* of defense counsel's under-oath questioning of jurors

and witnesses, within a proper scope of inquiry, is a *bare minimum* of the "meaningful opportunity" which the constitution mandates. Lanier, 988 F.3d at 294-96; Oswald v. Bertrand, 374 F.3d 475, 481 (7th Cir. 2004). These minimum requirements are especially applicable in the Sixth Circuit because this circuit is the only one that places on the defendant the burden of proving bias at the Remmer hearing. Lanier, 988 F.3d at 295.

Rather than provide Croft with these minimal due process protections, the court engaged in a superficial inquiry which largely *excluded* Croft and his counsel in violation of Rule 43(a) and controlling law. Juror A's reported statements revealed unmistakable bias and prejudgment on the ultimate issue, which therefore mandated a searching inquiry. Lanier, 988 F.3d at 295-96. If Juror A had or expressed the views which T.B. related, Juror A's bias would be structural error in the event his service continued and Croft was convicted (as happened). Cunningham, 23 F.4th at 660 n.9. Given the stakes and the certainty of a disqualifying bias apparent in Juror A's alleged statements, the court was recklessly indifferent to Croft's constitutional rights by so cavalierly dispensing with Croft's colorable allegation of a biased juror.

The court, in fact, did not itself conduct critical aspects of the investigation; it delegated the duty of interviewing T.B. to a non-lawyer clerk, outside the judge's presence. And that interview was neither transcribed nor recorded; and the parties and their counsel were all excluded. Remmer requires the judge to determine the

circumstances, not the staff. Remmer, 347 U.S. at 229-30; United States v. Johnson, 954 F.3d 174, 180 (4th Cir. 2020).

Then, when that staff-conducted interview nevertheless *corroborated* the substance of T.B.'s report and revealed another critical witness (the additional co-worker), the court unreasonably failed to interview *that* co-worker too, much less allow Croft's counsel to do so at a Remmer hearing. Why? Supposedly because that co-worker was afraid that he/she would be fired if they got involved. But that only begs the question: What circumstances, and what kind of *employer*, would cause an employee to fear for his/her job for reporting to the federal court about a juror/co-worker's obvious expressions of disqualifying bias in such an important criminal trial? T.B. expressed a similar fear for his job, which only compounded the need for greater inquiry and a hearing, not the rapid *ex parte* wind-down which the court pursued. The post-trial affidavit cemented the requirement for a hearing, when it was revealed that the co-workers' fears about lost employment stemmed from the fact *Juror A's mom* also works for the same employer in an important position. The court imposed on Croft's counsel the impossible Catch-22 task of having to present evidence *beyond* the credible allegations in order to get a hearing, in circumstances where the witnesses were *afraid* to participate voluntarily, thereby necessitating the hearing.

Exacerbating the court's failures was its *ex parte* "interview" with Juror A.

The juror wasn't placed under oath and was treated with undue deference, conveying the message of an unfortunate inconvenience. The judge's questioning revealed attributes of a biased and predetermined inquiry. Important questions were leading, suggested the desired answer, and/or telegraphed the "correct" answer. The judge minimized the seriousness of the allegations and emphasized the lack of any recordings or similar hard evidence of the claimed statements. The judge's questioning was imprecise and allowed for evasions ("do you remember doing that?"). And the follow up was minimal, unduly deferential, and lacked the requisite skepticism of even minimally effective cross-examination.

Compounding the deficiency of the court's *ex parte* unsworn approach is its failure to recognize Juror A's obvious self-interested reasons for why he might *falsely* deny the allegations even if they had occurred exactly as reported. Juror A had already sworn in open court, earlier that same week, that he did not have any disqualifying biases, which the judge made a point to *remind* Juror A about. After that reminder, how many jurors will be willing or able to admit they lied? The court also completely disregarded the well-known fact that "[d]etermining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." Phillips, 455 U.S. at 221-22 (O'Connor, J., concurring).

That interest in concealment would be at its *greatest* when the juror is one

who, *as alleged here*, is bent on subverting the process in a high-profile case. This Court itself recognized in Cunningham that a juror's denial of improper communications—in that case, *made under oath*—does not "eliminate [the defendant's] entitlement to a proper Remmer hearing, and we must remand." 23 F.4th at 653-54. That is even more so here because Juror A was not under oath, his denials were not subject to cross-examination, and the court's *ex parte* inquiry was superficial.

Because the district court conducted a constitutionally inadequate inquiry which failed "to guarantee [Croft] a meaningful opportunity to demonstrate jury bias," "a new trial is in order." Lanier, 988 F.3d at 288, 298. Alternatively, the matter must be remanded for a constitutionally sufficient Remmer/Phillips hearing at which Croft shall be afforded a meaningful opportunity to demonstrate juror bias; and he shall be granted a new trial if juror bias is found.

III. THE TRIAL COURT PREJUDICIALLY DENIED CROFT'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO INTRODUCE SUPPORTING EVIDENCE, TO CONFRONTATION AND EFFECTIVE CROSS-EXAMINATION, AND TO A FAIR TRIAL, WHEN IT ARBITRARILY BARRED EVIDENCE CRITICAL TO CROFT'S DEFENSE AND LIMITED HIS CROSS-EXAMINATION OF GOVERNMENT WITNESSES.

A. Standard of review.

The trial court's errors at issue denied due process and multiple constitutional rights of the accused, in addition to being contrary to the Rules of Evidence and this Court's case law. This Court's review, therefore, is to make a de novo determination of whether Croft's constitutional rights were denied. United States v. Blackwell, 459 F.3d 739, 752 (6th Cir. 2006); United States v. Reichert, 747 F.3d 445, 453-54 (6th Cir. 2014). Moreover, a court's decision regarding whether evidence constitutes hearsay is reviewed de novo. United States v. Boyd, 640 F.3d 657, 663-64 (6th Cir. 2011).

These errors are structural errors which mandate a new trial without any showing of prejudice. Weaver v. Massachusetts, 582 U.S. 286 (2017). They are, in all events, not harmless, and the government cannot meet its burden to show harmlessness, including because of how weak the evidence is against Croft. United States v. Kettles, 970 F.3d 637, 643 (6th Cir. 2020) ("the government's burden for constitutional errors is 'considerably more onerous' than its burden for non-constitutional errors").

B. The trial court's subject evidentiary rulings denied Croft his constitutional rights in addition to violating the Rules of Evidence.

The U.S. Constitution guarantees the criminally accused a meaningful opportunity to present a complete defense and to effective cross-examination and confrontation, all as essential to due process and a fair trial. Chambers v. Mississippi, 410 U.S. 284, 294 (1973); Holmes v. South Carolina, 547 U.S. 319, 324 (2006). These fundamental concepts were disregarded in Croft's trial.

At issue are three evidentiary rulings which individually and in combination prejudicially denied Croft these fundamental concepts of justice and denied him a fair trial. These are: **(1)** the barring, as supposedly inadmissible hearsay, of numerous texts, recorded statements, and other communications by and between FBI agents/informants **Chappel**, **Plunk**, and/or **Robeson**, on the one hand, and the FBI employee-agents who controlled them, on the other; **(2)** the barring, as supposedly inadmissible hearsay, of numerous texts, recorded statements, and other communications by one or more of these agents/informants (**Chappel**, **Plunk**, and **Robeson**) with Fox, Croft, and other alleged "conspirators" on relevant matters; and **(3)** the arbitrary time limitations imposed by the court on defense counsel in their cross-examinations of government witness Franks. These are addressed below.

1. Chappel, Plunk, and Robeson's respective relevant communications by and between Chambers and other FBI handling agents should have been admitted.

Critical to Croft's defense were the numerous and frequent communications––primarily by text and cell phone—between **Chambers** (and also **Impola** and other handling agents) and the FBI-selected agents/informants, primarily **Chappel**, but also **Robeson** and **Plunk**. These communications—to include *both* **Chambers'** side of the conversations, but also that of **Chappel** and/or the other agents/informants—constituted relevant evidence of the shocking degree to which **Chambers**, **Chappel** and the other FBI agents/informants orchestrated this scam and generally engaged in incessant and oppressive inducement. For example, just as to text messages between **Chappel** and **Chambers**, from March 16, 2020 to October 8, 2020, there were ***3,236 messages, or some 16 messages a day.*** (R.666, Brief in Support MIL at 2 (PageID#8385); R.383/383-1, Def. Motion (PageID#2554-2620).)

Chambers routinely communicated directions to **Chappel** such as:

> "good to suggest a group conversation on wire with Adam as well" (6/30/20),
> "got to get Adam focused" (6/23/20), and
> "get him in a leadership chat." (6/23/20)

(R.666, Brief at 2-3 & Exh. A (PageID#8385-86, 8389-92).) **Chambers** would even communicate to **Chappel** his goals for the workday. For example, on August 28,

2020, he texted to **Chappel**: "I have a few goals for today." (Id., Exh. D, PageID#8386, 8401.)

Chappel, in turn, frequently asked for direction from **Chambers** such as:

> "Should I see if some of the guys want to carpool with me?" (5/26/20),
> "Introduce to group?" (6/23/20), or
> "Want me to reach out if he gets back with about Adam or you gonna be monitoring." (6/27/20)

(Id., Exh. B, PageID#8386, 8394-97.) The FBI paid **Chappel** exorbitantly for his work with **Chambers** on the Whitmer case. (TT2, PageID#15385-89.)

Robeson and **Plunk** also had close relationships with the FBI in the Whitmer case. They were both closely supervised by two handling agents each, their supervision included occasional FBI approval to *break the law* (engage in "otherwise illegal activity"), and they both acted under the constant and repeated direction and control of the FBI to perform *numerous* assigned tasks in the investigation. (TT2, PageID#14574-96, 14649-51, 14684-96, 14718-21, 14729-34, 14751-52, 14765-72, 14810-12, 14855-56, 14969-71, 15034-48, 15093-93, 15148-50, 15252, 15303-04, 15359-60, 15435-36, 15555, 15587, 15628-29, 15640-41, 15769-70, 15877-78, 16108-30, 16139-41.) That only ended, as to **Robeson**, when he was fired by **Chambers/Impola** for cause in November 2020 because of **Robeson's** ongoing criminal behavior; but that was *after* **Robeson** helped run the Luther FTX and the 9/12/20 nighttime drive-by. (TT2, PageID#14690-92.)

Prior to the first trial, Croft and Fox filed a motion to ensure that all such relevant communications by and between **Chambers** and the other FBI handlers, on the one hand, and **Chappel**, **Robeson** and/or **Plunk**, on the other, would be admissible against the government as non-hearsay, and thus for truth, as vicarious party admissions under FRE 801(d)(2)(D). (R.383/383-1, Motion & Exhibits (PageID#2554-2620).) The government opposed the motion (R.396, Opp. (PageID#2720-51)), and the court denied it in large part via pretrial order. (R.487, FPT 1/18/22 at 40-64 (PageID#3692-716); R.439, Order (PageID#2996-3022).) That order permitted only those relevant statements which originated *from* **Chambers** and other FBI-employed special agents, but it barred such statements of **Chappel** and the other informants that were made *to* **Chambers** or the other FBI employees. (R.439 at 12-19 (PageID#3007-14).) The communications of, by, and originating with **Chappel** (or other agents/informants), including responses by **Chappel** *to* **Chambers'** texts, were barred as hearsay and not covered by 801(d)(2)(D). (Id.)

The defense raised the issue again in writing before the second trial. (R.665-66, Motion & Brief (PageID#8382-8506); R.670, Croft Joinder (PageID#8538-39).) The court again rejected the defendants' arguments to admit this evidence as non-hearsay and for truth under 801(d)(2)(D), and instead ordered that the evidence

would be handled per Trial 1's pretrial order. (R.692, Order 07/28/22 (PageID#8686-88); R.696, FPT at 12-15 (PageID#8721-24).)

The court's rulings were arbitrary and in violation of controlling law. An opposing party's own statements are not hearsay if offered against that party. See FRE 801(d)(2). Rule 801(d)(2) excludes admissions of a party-opponent from the definition of hearsay. The federal government is a party-opponent of the defendant in a criminal case. United States v. Branham, 97 F.3d 835, 851 (6th Cir. 1996); United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988).

Rule 801(d)(2)(D) provides, in relevant part:

> A statement is not hearsay if –
> (2) Admission by party-opponent – The statement is offered against a party and is…(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship….

Under 801(d)(2)(D), statements of government employees and non-employee agents, within the scope of their work, are admissible against the government for their truth in a criminal case. The paradigm of the non-employee agent "is the confidential informant who works with law enforcement agents in developing a case against a target." Anne B. Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 456 (2002). This Court held to that effect in Branham, 97 F.3d at 851, concluding that an informant was the government's "agent" under 801(d)(2)(D) with respect to statements he made in

order to establish a relationship with the target/defendant. See also United States v. Reed, 167 F.3d 984, 988-89 (6th Cir. 1999); Lippay v. Christos, 996 F.2d 1490, 1499 (3rd Cir. 1993).

Rule 801(d)(2)(D), as properly applied in Branham, admits the statements of the government's agent/informant for their truth as admissions of the government, even though the agent/informant is not authorized to speak, so long as the agent/informant is speaking about matters within the scope of the project. That rule is properly "applied against the government in criminal cases." Poulin, 87 MINN. L. REV. at 414-15. See also United States v. Morgan, 581 F.2d 933, 938 (D.C. Cir. 1978).

The application of the rule against the government is especially applicable where entrapment has been alleged by the defense. Branham, indeed, was an entrapment case. Moreover, the Supreme Court has held that, for purposes of entrapment, a confidential informant ***is*** an agent of the government. Sherman v. United States, 356 U.S. 369, 376 (1958); United States v. Luisi, 482 F.3d 43, 53 (1st Cir. 2007); Poulin, 87 MINN. L. REV. at 458 & n.326.

Chappel, **Robeson**, and **Plunk** were all agents of the government for any all purposes relevant to 801(d)(2)(D), and especially, but not only, as to Croft's entrapment defense. They were each under the close and continuous direction and supervision of at least two special agents of the FBI; they were all required to abide

by FBI rules and admonishments; they needed and received FBI approval to break the law in the course of their duties; they were important, active, and contributing members of the FBI's team; and they were compensated, and in Chappel's case exorbitantly. As to these three, it is not a close call that, at all relevant times, they were the FBI's agents/servants in the Whitmer/Watchmen/Croft/Fox investigation.

This conclusion is compelled by Branham, by the plain meaning of 801(d)(2)(D), and by the purpose and intent of that rule. The relevant statements of **Chappel**, **Robeson**, and **Plunk**, just like those of **Chambers** et al., are *all* admissible against the government under 801(d)(2)(D) because they were all agents/servants of the government at the time the statements were made and the statements related to matters within the scope of their duties. They are admissible even if not "approved" by the principal, and "even though contrary to the principal's interest, as party admissions often are." 87 MINN. L. REV. at 462. Their admission is also compelled because, under Rule 801(d), what's good for the goose is good for the gander. The government freely used, against Croft, 801(d)(2)**(E)**'s provision, which made the statements of his alleged co-conspirators admissible for truth against him on the theory that the declarant/co-conspirator is supposedly his agent. There is no coherent application of 801(d)(2)**(D)** which would then somehow *shield* admission against the government of statements by *its own* agents/informants on the same basis, especially when those agents/informants are the ones who were drumming up the

alleged "conspiracy" under which the 801(d)(2)(E) statements were admitted against Croft.

Rather than comply with Branham, the district court chose to follow case law from other circuits which have refused to give 801(d)(2)(D) the broad scope the rule commands. In addition to being contrary to Branham, the reasoning of those cases is "unsound," Poulin, 87 MINN. L. REV. at 417, especially where *entrapment* is the critical issue and where the law thus already holds that informants *are* the government's agents. Sherman, 356 U.S. at 376. The sheer volume of barred admissions was extensive, as detailed in R.383-1, PageID#2575-620. (See also R.487, FPT at 40-64 (PageID#3692-716).) And these are only the barred admissions which are *known* to the defense because reflected in texts/recordings. However, because the court precluded evidence of *all* admissions by the agents/informants to **Chambers**/**Impola**, Croft's defense was likewise barred from presenting to the jury the admissions which are *not* reflected in recordings or texts. The result was a trial about entrapment with defendants' hands tied behind their backs and the jury blindfolded to critical relevant facts.

It is precisely the type of arbitrary application of the Rules of Evidence which is prohibited under Chambers and violative of the right to present a defense.

2. Chappel, Plunk, and Robeson's respective relevant communications with and to Fox, Croft, and other alleged "conspirators" should have been admitted.

Relying on the same erroneous application of 801(d)(2)(D), the court also denied the defendants' request to admit, as admissions of the government and for truth, the numerous texts, recorded statements, and other communications made by **Chappel**, **Plunk**, and/or **Robeson** with and to Fox, Croft, and other alleged "conspirators" on relevant matters within the scope of each of the agent/informant's respective work in the case. (R.667-68, Motion & Brief (PageID#8507-36); TT2 at PageID#14583-84, 14598-99, 14760-63, 14996-98, 15019-21, 15338-40, 15368, 15997-99, 15601-02, 15811-13, 15904-06.) The only limited exception were those statements (if any) where the agent/informants "merely regurgitate[d] words that were fed by a government [employee-agent such as **Chambers**]." (R.439, PageID#3007-14.) All other communications of, by, and originating with **Chappel** (or the other agents/informants), and made to Fox, Croft, and/or other alleged "conspirators" were barred as hearsay and not covered by 801(d)(2)(D). (Id.)

That ruling thus unfairly permitted the alleged "defendant/co-conspirator's" side of such communications with the FBI's agents/informants to be admitted as non-hearsay against Croft/Fox under 801(d)(2)(E), but it barred the *FBI's side* of the same communication as made by its agents/informants (except for impeachment if they testified, as only **Chappel** did among these three). Once again, the sheer volume

of barred admissions was extensive, as detailed in R.383-1 (PageID#2575-620), and again that is only the admissions which were in recordings/texts and does not include other admissions by agents/informants that were not recorded.

Barred, for example, were admissions that, under FBI's control, the agents/informants:

- Planned, organized, and orchestrated key events including Peebles, Dublin, Cambria, and Luther (*the only four that Croft attended*), and both drive-bys on 8/29 and 9/12, and, on 9/12, arranged who went in which car and other details.

- Finagled leadership roles for themselves to have more control to effectuate the FBI's plans.

- Expressed their conclusion that the "conspirators" were divided and would never agree.

- Created the Michigan III% group for Fox to lead and created its Facebook page.

- Promoted the "free" money scam to "conspirators" to try to lure them.

- Aggressively pushed to overcome any "conspirator's" reluctance and resistance, encouraged radical views, and pushed for dates and plans.

- Resisted Fox's suggestion for "Spring" 2021 because "we're not going to have that long."

- Provided "conspirators" with weapons, ammunition, and other supplies.

- Pushed property and other crimes to salvage something from the floundering "kidnapping" plan.

- Suggested and encouraged the use of explosives, including providing potential suppliers, and planned the alleged "bomb" purchase.

- Organized the 10/7 ruse trip to Ypsilanti with lure of free gear/beer/food.

(R.383-1, Items 1-5, 8, 11-15, 23-29, 32-57, 73-94, 96-167 (PageID#2576-609).)

For the same reasons, the court's ruling here is also contrary to Branham and 801(d)(2)(D). **Chappel/Robeson/Plunk**, for example, were the government's primary agents for purposes of interacting with Fox, Croft, and Watchmen. Their statements of how they interacted with defendants are admissible, even if, for example, **Chappel/Robeson/Plunk** had been directed to not pressure defendants and/or to not suggest plans or violate law, and **Chappel/Robeson/Plunk** nonetheless disregarded those instructions. That is *exactly* the import of 801(d)(2)(D): to admit against the principal the statements of the agents/informants within the scope of their work, even if the principal did not approve, and would not have permitted, its agents' statements. See Poulin, 87 MINN. L. REV. at 462-63. "The Government cannot disown [**Chappel**, **Plunk**, and/or **Robeson**] and insist it is not responsible for [their] actions. [They were all] active government informer[s]." Sherman, 356 U.S. at 373.

The court's ruling completely hamstrung Croft in his defense and forced him to try a very different case—unable to use the government's admissions as such—than the one a proper application of the rule would have allowed.

Moreover, in addition to the required admission of such statements by **Chappel**, **Plunk**, and/or **Robeson** to Fox, Croft et al. for truth as admissions of the

government, such statements were also admissible, at the very least, merely for the fact that they were made, and regardless of truth, as directly relevant to Croft's entrapment defense. The court was required to admit them on at least that basis, as the defense urged, but it still refused on the groundless Catch-22 reasoning that, if not offered for truth, then they are "irrelevant" to entrapment. (R.439, Order of 02/02/22 at 17 (PageID#3012).) That reasoning disregards controlling authority. Branham, 97 F.3d at 851; Sherman.

3. The court should not have placed arbitrary time limits on the cross-examination of Kaleb Franks.

A key witness against Croft was Kaleb Franks, an alleged "co-conspirator" who had pleaded guilty to the "kidnapping" count in exchange for a light sentence, ultimately 48 months. Franks claimed to have been struggling with depression in 2020, and he supposedly joined his Watchmen friends in the "kidnapping" conspiracy in the hope he'd be killed. (TT2, PageID#15698-99.)

Franks testified on August 17, which was the trial's sixth day of testimony. Based on the parties' pretrial estimates, the court had informed the jury the trial would last ***2-3 weeks***, with trial days from 8:30 a.m. to 2:00 p.m. (R.837, TT2, PageID#14170; R.696, FPT at 37, 47 (PageID#8746, 8756).) Nonetheless, the parties were well ahead of schedule on August 17; they finished all witnesses two

days later on August 19 (TT2, PageID#16137, 153), for a total of ***8 days*** of testimony.

Thus, when Franks was slated to testify on August 17, the trial was progressing faster than expected. Nonetheless, as the AUSA got up to begin what would be a relatively short direct exam of Franks (44 pages), the court announced to defense counsel that "they ought to plan on the Bertelsman rule in effect for this witness." (Id., PageID#15694.) That was a reference to an approach to time limits once used by Judge William Bertelsman in United States v. Reaves, 636 F.Supp. 1575 (E.D. Ky. 1986); there, for cross-examination of a witness, Judge Bertelsman imposed, by *pretrial order* (thus, with prior notice), a *cumulative* time limit on all cross-examining parties that was equal to the amount of time used in that witness' direct. The court had previously referenced the rule to Croft's counsel. Now, the court was *imposing it*, without warning, as the government began Franks' exam.

As such, when the government's direct exam timed in at 50 minutes, the court mandated that counsel for Croft and Fox were together compelled to share that *same 50 minutes* for cross, which became 25 minutes each when counsel did not agree on a different division. (TT2, PageID#15738-39.) The defendants' objections, both before and after, and in a motion for new trial, were denied. (TT2, PageID#15738-39, 15788-808; R.745/749, MNT at 7-11, 19-23 (PageID#9732-48); R.779, Order at 13-28 (PageID#10230-45).)

The court enforced this "rule" only for Franks, not any other witness, and never for the *government's* exam of *its* witnesses. As a result, during the rushed cross of Franks, the court would interrupt to tell the defense lawyers and jury how much time was left. (TT2, PageID#15756, 15761, 15780, 15785, 15787.) The jury must have been wondering: Why is the court rushing the defense through *this* witness? Does the court think the defendants are guilty and we need to get this over with?

Exposing the rule's frivolity, the judge sent the jury home *early* (at 1:44 p.m.) when Croft/Fox's time for cross expired, only to then spend *49 minutes* (until 2:33 p.m.) so the defense could make a record of how their clients were prejudiced, among other issues. (TT2, PageID#15788-821.) In a *fair* trial that 49 minutes would have spent crossing *the witness*, not arguing about it. And the unfairness was stark. The other alleged "conspirator" who had flipped to avoid the threatened life sentence, and thus got *30* months, was Garbin. His direct testimony earlier that day was 53 pages; the combined cross was 100. (TT2, PageID#15499-531, 15550-661.) Now, for Franks, the government was again given as much time as it wanted (44 pages), but *defense counsel* were limited to 50 minutes, which became 48 pages. And they had to adjust on the fly with no advance notice.

Croft has the constitutional right to confront the witnesses against him and for effective cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986). And, although a trial judge has latitude to restrict cross-examination to address

legitimate concerns of "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," id. at 679, the trial court may not exercise that discretion with bias to favor the prosecution nor to impair defense counsels' effectiveness. Yet both those forbidden things occurred.

There were no legitimate reasons for the 50-minute limit. The trial was ahead of schedule. The jury had relatively light workdays. The absurdity of the rule is striking. Direct exams are easy, especially with a witness who is under the government and court's thumb, like Franks, who had not yet been sentenced and was hoping for a light one (and got it too). Little skill is needed, just walk the controlled witness through the already-rehearsed events; he knows what's expected. That it took an AUSA 50 minutes for that easy direct says *absolutely nothing* about how long an effective cross-examination, by two different defense lawyers, will or should take. Garbin's cross took 100 pages, coming off a similar-length direct; that is the *minimum* Croft/Fox should have been allowed with Franks, if time limits were being established.

These two flippers (Franks and Garbin) were weak witnesses, *especially* Franks with his "I wanted to be killed" garbage and his drug addiction which, after his arrest, caused him to use illegal opioids in jail. In part due to Franks' and Garbin's credibility-devoid testimony in Trial 1, and ***effective cross unburdened by arbitrary time limits***, their Watchmen friends Caserta and Harris were *acquitted* of this fake

kidnapping "conspiracy" (and Harris of the equally scammed-up "WMD"), and the jury was unable to reach verdicts as to Croft and Fox on any counts. (TT1, PageID#12188-390, 12407-541, 12543-636, 12650-788, 14097-098.)

Most significant with Franks was his outright lie—total fiction—that the three friends (Garbin, Franks, Harris) "agreed" to the alleged "conspiracy" during a "hike" they supposedly took on August 5, 2020, during a Watchmen event at Harris' parent's house in Lake Orion. (TT1, PageID#12578-80, 12697-704, 12759-60; TT2, PageID#15746-48, 15782-84.) This was the "Three Musketeers hike," wherein Harris supposedly said he wouldn't do anything without the other two friends. (TT1, PageID#12579-80, 12697-98.) Harris, the former Marine who'd enlisted at age 17, took the witness stand in Trial 1 and told the jury Franks' hike story was a lie; there was never *any* "agreement" or "Three Musketeers hike," and the jury agreed, acquitting Harris. (TT1, PageID#13576-77, 13625-27.) Garbin, for his part, did not recall such a "hike." Not in Trial 1 or 2. (TT1, PageID#12238-39; TT2, PageID#15609-10.) In fact, Garbin claimed in Trial 2 he didn't "agree" to participate in the so-called "conspiracy" until ***"mid-August"*** *2020*. (TT2, PageID#15610.) All fiction, whatever it would take to get his 30 months.

Thus, for Trial 2, it was again *critical* for the defense to expose what a liar Franks is, and how easily the government manipulated him, for example, to conjure up the "hike" nonsense. The court was certainly aware from Trial 1 that addict

Franks was the most vulnerable of government witnesses to effective cross, and it would be compelled to instruct the jury to consider Franks' testimony with "more caution." (R.845, TT2, PageID#16177.) For the court to then *unilaterally* inject itself to protect that witness in Trial 2 was a gross injustice. The absurd 25-minute rule (per side) interfered with Croft's ability to *effectively* confront Franks, expose his lies, challenge his credibility, highlight his biases, and perhaps obtain admissions, all as detailed in Croft's objections. (TT2, PageID#15794-804.)

None of the cases the trial court relied on to justify this ruling support it. (R.779, Order at 13-28 (PageID#10230-45).) Franks was a critical witness in a *criminal trial*, an alleged "conspirator," who flipped to testify against his co-defendants and fabricated stories in doing so. The defendants faced life in prison. Defendants' rights to confrontation, effective cross, and to present a defense were prejudicially denied by this latest arbitrary ruling.

C. A new trial is required.

These errors are structural and require a new trial without regard to prejudice. Weaver, 582 U.S. at 294-96. The effects of denying the right to present a defense are too hard to measure; such errors will "always result[] in fundamental unfairness." Id. at 295-96. Chambers itself ordered a new trial without considering harmlessness. 410 U.S. at 302. They are in any event not harmless; they forced Croft to try a completely different case, unable to use the government's admissions against it and

burdened by court-imposed arbitrary barriers to defending himself. The government cannot meet its onerous harmlessness burden. Kettles, 970 F.3d at 643-44. Along with the other evidentiary deficiencies addressed above, Trial 1's result proves that.

CONCLUSION

Croft's convictions should be reversed. He should be discharged on both "conspiracy" counts. Alternatively, he is entitled to a new trial and/or remand for a Remmer/Phillips hearing.

Date: August 16, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief was prepared using a proportionally spaced type-face in Microsoft Word (Times New Roman 14 Pt), and that, according to the Microsoft word-count feature, there are 16,245 words in this brief, exclusive of the Table of Contents, Table of Authorities, Statement in Support of Oral Argument, Addendum, and Certificates of Counsel, and thus complies with this Court's order of July 20, 2023, permitting 16,250 words for Croft's Brief. See Fed. R. App. P. 32(a)(7)(B)(iii); 6 Cir. R. 28(b).

/s/ Timothy F. Sweeney

Timothy F. Sweeney
Counsel for Appellant Barry Croft, Jr.

CERTIFICATE OF SERVICE

This is to certify that on August 16, 2023, the foregoing APPELLANT BARRY CROFT, JR.'S BRIEF ON APPEAL was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Timothy F. Sweeney

Timothy F. Sweeney (OH 0040027)
LAW OFFICE OF TIMOTHY F. SWEENEY

APPELLANT BARRY CROFT, JR.'S DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellant Barry Croft, Jr., by and through counsel and pursuant to Rule 30 of the Sixth Circuit Rules, hereby states that the district court has an electronic record of all documents, pleadings, orders, notices, and transcripts that are relevant to this appeal, and all items listed in 6th Cir. Rule 30(f)(1) are included in that electronic record, with the exception of the paper/pdf exhibits cited in this Brief which were admitted as exhibits at the trial (but are not in the electronic record). These exhibits are included in Appellant Croft's Appendix filed contemporaneous with the Brief.

Copies of audio/video exhibits cited in this Brief, which were admitted as exhibits at the trial are being submitted on flash drives (4 copies) to the Court's record room as per 6th Cir. I.O.P. 10(d) and the case manager's instructions. These video exhibits are described below for ease of reference.

To facilitate the Court's reference to the district court's electronic record, Croft hereby makes his designation of relevant district court documents; see 6 Cir. R. 30(f)(1):

Record No.	PageID	Date of Entry	Description of item in district court's electronic record
86	#573-78	12/16/2020	Original indictment
172	#961-76	04/28/2021	Superseding Indictment
383, 383-1	#2554-2574 #2575-2620	12/29/2021	Def. Motion in limine re out of court statements, with detailed chart

(also at 366-1, 366-2)	#2352-72, #2373-2418	12/17/2021	
396	#2720-51	01/06/2022	USA Opp. to Def. Motion in Limine
439	#2996-3022	02/02/2022	Order on Motions in Limine
445	#3115-3133	02/07/2022	Kaleb Franks plea agreement
615, 615-1	#5892-5893, #5894-5911	04/08/2022	Notice of Verdict and Verdict forms from Trial 1
622	#6029	04/12/2022	Order of mistrial and denial of Rule 29 as to Croft and Fox
629	#6907-6918	04/22/2022	Croft motion for judgment of acquittal
642	#7126-7157	05/19/2022	Govt. opp. to motion for acquittal
653	#7816	07/01/2022	Order denying renewed motions for acquittal
665 666 661-1 to 666-6	#8382-83 #8384 #8389-8506	07/12/2022	Fox motion & brief re. motion in limine to allow the admission of CHS Dan's text messages to SA Chambers pursuant to Evid.R. 801(d)(2)(D) & Exhibits
667 668 668-1 to 668-6	#8507-08 #8509-8536	07/12/2022	Fox's motion and brief re motion in limine to allow the admission of CHS Dan's out of court statements pursuant to FER 801(d)(2)(D) & Exhibits
670	#8538-8539	07/12/2022	Croft's Joinder in Fox's motions at R. 665-668
692	#8686-8688	07/28/2022	Order re motions in limine
707	#8959-8963	08/11/2022	Croft brief re possible juror issue
709	#8976-8977	08/12/2022	Restricted access order re juror

			issue
711	#8979-8989	08/14/2022	Order re juror issue
712	#8990-9000	08/14/2022	Corrected order re juror issue
727 727-1 727-2	#9027-9028 #9029-9033 #9034-9038	08/23/2022	Order re filing of verdict forms and jury notes, and Croft verdict forms
729	#9040-9041	09/08/2022	Order re unsealing juror filings 707, 709, 711
745 745-1	#9726-9748 #9750-9757	09/06/2022	Croft motion for new trial and Remmer hearing, with attached Decl. of G. Gaudard (Restricted Access)
749 749-1	#9763-9764 #9765-9796	09/08/2022	Order attaching redacted version of Croft motion for new trial & Affidavit A (Decl. of G. Gaudard, (R. 745, 745-1))
757	#9963	09/16/2022	Order granting Garbin a reduced sentence to 30 months
758	#9964-9977	09/19/2022	USA Opp. to motion for new trial (Restricted Access)
770	#10101-07	10/07/2022	Judgment as to Kaleb Franks for 48 months
773	#10150-10200	11/10/2022	Croft Initial PSR (SEALED)
779	#10218-45	11/25/2022	Order denying motion for new trial and Remmer hearing
787	#10401-10460	12/12/2022	Croft Final PSR (SEALED)
801	#10634-40	12/27/2022	Judgment as to Adam Fox
804	#10648-54	12/28/2022	Judgment as to Barry Croft
808	#10666	01/07/2023	Notice of Appeal

		Date of Event	TRANSCRIPTS
Miscellaneous Transcripts			
349	#2161-97	08/25/2021	Ty Garbin sentencing
461	#3403-41	02/09/2022	Kaleb Franks' plea transcript
487	#3692-3752	01/18/2022	Transcript of FPT in Trial 1 and re pretrial orders
535	#4144-4182	01/27/2021	Garbin's plea transcript
696	#8710-8767	07/26/2022	Transcript of FPT in Trial 2
Transcript of Trial 1 ("TT1")			
817	#10836-11014	03/09/2022	TT1, day 2 (openings, Witnesses T. Reineck)
818	#11015-11236	03/10/2022	TT1, day 3 (Witnesses T. Reineck, L. Larsen, C. Long)
819	#11237-11462	03/17/2022	TT1, day 4 (Witnesses C. Long, M. Schweers)
820	#11463-11705	03/18/2022	TT1, day 5 (Witnesses M. Schweers, D. Chappel)
821	#11706-11920	03/21/2022	TT1, day 6 (Witnesses D. Chappel)
822	#11921-12163	03/22/2022	TT1, day 7 (Witnesses D. Chappel)
823	#12164-12404	03/23/2022	TT1, day 8 (Witnesses M. Keepers, T. Garbin)
824	#12405-12646	03/24/2022	TT1, day 9 (Witnesses T. Garbin, K. Franks)
825	#12647-12850	03/25/2022	TT1, day 10 (Witnesses K. Franks, B. Clark, J. Miller)
826	#12851-13090	03/28/2022	TT1, day 11 (Witnesses B. Bowman, T. Bates, J. Jaskulski, M. Chuy-Horn, E. Bowers, R. Huizinga, M. Jacobs, M. Yauk, A.

			Ayriss)
827	#13091-13356	03/29/2022	TT1, day 12 (Witnesses A. Ayriss, T. Syzmanski, J. Kelso, C. Carter, A. Resendez, D. Phelps, A. Cowan, C. Williams, G. Mrozek)
828	#13357-13565	03/30/2022	TT1, day 13 (Witnesses K. Martinez, C. Knight, T. Hunt, R. Gillette, K. Van Arsdale, Rule 29, C. Kuester, L. Cowan, M. Cooley)
829	#13566-13793	03/31/2022	TT1, day 14 (Witnesses D. Harris, J. Chambers)
830	#13794-14016	04/01/2022	TT1, day 15 (Jury Instructions, closings)
831	#14017-14042	04/04/2022	TT1, day 16 (Deliberations, jury questions)
832	#14043-14057	04/05/2022	TT1, day 17 (Deliberations, jury questions)
833	#14058-14069	04/06/2022	TT1, day 18 (Deliberations, jury questions)
834	#14070-14082	04/07/2022	TT1, day 19 (Deliberations, jury questions)
835	#14083-14106	04/08/2022	TT1, day 20 (Verdict)
Transcript of Trial 2 (“TT2”)			
837	#14139-14404	08/09/2022	TT2, day 1 (voir dire)
838	#14405-14603	08/10/2022	TT2, day 2 (openings, T. Reineck)
839	#14604-14816	08/11/2022	TT2, day 3 (T. Reineck, K. Long)
840	#14817-15025	08/12/2022	TT2, day 4 (K. Long, M. Schweers)
841	#15026-15272	08/15/2022	TT2, day 5 (M. Schweers, D. Chappel, C. Knight)
842	#15273-15547	08/16/2022	TT2, day 6 (D. Chappel, J. Robertson, M. Keepers, T. Garbin)

843	#15548-15825	08/17/2022	TT2, day 7 (T. Garbin, K. Martinez, B. Clark, K. Franks)
844	#15826-16065	08/18/2022	TT2, day 8 (T. Bates, M. Yauk, J. Jaskulski, M. Chuy-Horn, T. Szymanski, C. Williams, K. Van Arsdale, M. Anderson, C. Kuester, Rule 29)
845	#16066-16186	08/19/2022	TT2, day 9 (L. Hastings, M. Cooley, J. Penrod, C. Baumgardner, W. Moorian, Jury instructions)
846	#16187-16288	08/22/2022	TT2, day 10 (closings)
847	#16289-16304	08/23/2022	TT2, day 11 (verdict)
848	#16305-16312	08/11/2022	SEALED Trans. 8/11/2022 (a.m.)
849	#16313-16320	08/12/2022	SEALED Trans.
856	#16547-53	08/11/2022	SEALED Trans. 8/11/22 (p.m.)
Sentencing			
852	#16389-16445	12/28/2022	Croft sentencing transcript

AUDIO/VIDEO EXHIBITS CITED IN APPELLANT'S BRIEF
(4 sets submitted to Court on flash drives)[6]

Exhibit Name	Identified /admitted	Description
GX34 (& GX34-T)	TT2, PageID #14723-24	Audio excerpt from Dublin, 6/6/20
GX35 (& GX35-T)	#14724	Audio excerpt from Dublin, 6/6/20
GX39	#14725-26	Audio excerpt from Dublin, 6/6/20

[6] **NOTE**: The exhibits labeled "-T" are the transcripts of each audio recording which were used as guides with the jury during trial but not admitted as substantive evidence. See, e.g., TT2, PageID#14723-28, 16026-28, 16178.

(& GX39-T)		
GX40 (& GX40-T)	#14726-27	Audio excerpt from Dublin, 6/6/20
GX93 (& GX93-T)	#15093	Audio excerpt from Cambria 7/11/20
GX106 (& GX106-T)	#15094	Audio excerpt from Cambria 7/12/20
GX113 (& GX113-T)	#15102	Audio excerpt, 7/18/20
GX138 (& GX138-T)	#15108	Audio excerpt, 08/09/2020
GX215 (& GX215-T)	#15145-46	Fox/Chappel audio 09/07/2020
GX224	#15834-36	FBI-produced video
GX225	#15834-36	FBI-produced video
GX226 (& GX226-T)	#15837-39	Audio excerpt from Luther, 9/12/20
GX227 (& GX227-T)	#15837-39	Audio excerpt from Luther, 9/12/20
GX276 (& GX276-T)	#15167-68	Audio excerpt re ruse trip, 9/30/20

Respectfully Submitted,

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