No. 18-8699 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

MARCKENSON CHERY,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR CERTIORARI

MARCKENSON CHERY (IN PRO SE)
#05166-104
Federal Correctional Institution
P.O. Box 1031
Coleman, FL 33521

PETITION FOR CERTIORARI

A

QUESTIONS PRESENTED FOR REVIEW

1.) Whether an indictment for violation of 18 U.S.C. § 2422(b) must identify the ''criminal offense'' element in order to meet the required nature of the accusation and double jeopardy clauses under the Sixth and Fifth Amendments of the United States Constitution.

2.) Whether the definition of '' Sexual Act'' found in 18 U.S.C. § 2246(2)(D) also defines the term '' Sexual Activity '' in 18 U.S.C. § 2422(b).

3.) Whether Relation-Back Doctrine pursuant to Fed.R.Civ.P. 15(C)(1)(B) prohibits the review of an amended claim which shares the same nature as an originally timely filed claim.

B

LIST OF PARTIES IN COURT BELOW

In compliance with Sup.Ct.R. 14(1)(b) Mr.Chery certifies that the the list set forth below is a complete list of persons and entities previously included on his and the United States Certificate of Interested Persons (C.I.P.) who have an interest in the outcome of this case. Persons in the court below:

A.A.

Chery, Marckenson

Dimitrouleas, Hon. William P.

Ferrer, Wifredo A.

Fisher, Joshua Loren

Gayles, Hon. Darrin P.

Greenberg, Benjamin G.

Hoffman, Andrea G.

Hunt, Hon. Patrick M.

Powell, Roger W.

Rubio, Lisa Tobin

Seltzer, Hon. Barry S.

Smachetti, Emily M.

Snow, Hon. Lurana S.

Viamontes, Framcos Ines

White, Hon. Patrick A.

Marckenson Chery

Sincerely

Marckenson Chery (IN PRO SE)
#05166-104
Federal Correctional Institution
P.O. Box 1031
Coleman, FL 33521

LIS PAR

C

CORPORATE DISCLOSURE STATEMENT

(Sup.Ct.R.29.6)

Marckenson Chery makes this corporate disclosure statement pursuant to Supreme Court Rule 29.6:

This is Marckenson Chery's original Corporate Disclosure Statement.

1. Marckenson Chery has no parent corporation.

2. No publicly held corporation owns 10 percent of more of the stock of Marckenson Chery.

Done This 7 Day Of November, 2018

Sign: Marckenson Chery

Marckenson Chery

Marckenson Chery (IN PRO SE)
#05166-104
Federal Correctional Institution
P.O. Box 1031
Coleman, FL 33521

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E

CITATION TO THE OPINIONS

The original decision of the United States District Court of the Southern District of Florida-Miami Division was set forth in the Report and Recommendation (CV-DE#39). The District Court adopted the report in full on March 28, 2017. The decision of the District Court was appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the denial on July 6, 2018.

CIT OPI

JURISDICTIONAL STATEMENT

F

On July 6, 2018 the Eleventh Circuit Court of Appeals denied the petitioner's appeal from the denial of a Motion To Vacate pursuant to 28 U.S.C. § 2255. On August 14, 2018 the appellate court denied the petitioner's Motion For Panel Rehearing. Pursuant to 28 U.S.C. § 1254(1), the Supreme Court has Jurisdiction to review the decision of the Court of Appeals. As required by Sup.Ct.R. 29.4(a), a copy of this petition has been served on the party listed below. Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W. Washington, DC 20530

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Federal Rule Civil Procedure

Rule 15(C)(1)(B)-Relation Back Doctrine '' the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out- or attempted to be set out in the original pleading''.

2. AMENDMENTS

Fifth Amendment-Due process of law, Double Jeopardy

3. Sixth Amendment-Nature and cause of the accusation, Assistance of Counsel

STATUTES

4. The statute under which Mr.Chery was prosecuted was 18 U.S.C. § 2422(b)-Enticement of A Minor which provides;

> '' Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or **any Sexual Activity for which any person can be charged with a criminal offense**, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.''

5. The statute under which Mr.Chery sought post conviction relief was 28 U.S.C.§ 2255: Federal Custody: Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed

in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

H STATEMENT OF THE CASE

On April 25, 2014 the petitioner Marckenson Chery was arrested at his home in Florida pursuant to a criminal complaint and arrest warrant for violation of 18 U.S.C. § 2422(b)- Enticement of A Minor. On May 8, 2014 a grand jury sitting in Fort. Lauderdale, FL issued a one count indictment for violation of § 2422(b) (CR-DE#14). On September 5, 2014 Mr.Chery entered a plea of guilty to the single count indictment (CR-DE#33,34). Mr.Chery on December 17, 2014 was sentenced to twelve years in prison followed by ten years of supervised release (CR-DE#53). No Direct Appeal was filed.

I COURSE OF PROCEEDINGS IN THE SECTION 2255 CASE NOW

Mr.Chery comes before the high court seeking a '' Writ of Certiorari'' from the Eleventh Circuit Court of Appeals denial of his 28 U.S.C. § 2255 appeal from denial by the United States District Court for the Southern District of Florida. On December 15, 2015 Mr.Chery being a laymen in law and without the aid of counsel fitted his initial § 2255 petition (CV-DE#1). Mr.Chery after the government's initial response (CV-DE#8) sought to Supplement his original pleading due to the discovery of new information (CV-DE#13,15). After being ordered to, Mr.Chery filed

an '' Amend Motion § 2255'' on June 6, 2016 (CV-DE#17). Soon after on August 1, 2016 he filed a '' Motion For Clarification'' (CV-DE#19). The Report of Magistrate (R&R) recommended to deny the petition on February 14, 2017 citing Fed.R.Civ.P 15(C)(1)(B)- Relation Back Doctrine (CV-DE#39). After receiving objections (CV-DE# 47), the district court on March 28, 2017 adopted the R&R and denied the petition. A notice of appeal followed. On November 30, 2017 the Eleventh Circuit Court of Appeals granted Mr.Chery a '' Certificate of Appealability'' concerning the relation back of his initial and amended involuntary guilty plea claims. On July 6, 2018, the appellate court denied his appeal finding that the two involuntary claims were separate conduct and occurrences in both time and type. Mr.Chery's '' Motion For Panel Rehearing'' was denied on August 14, 2018.

RELEVANT FACTS

The facts supporting the amended involuntary claim supported the original unknowingly nature of the initial claim. Both claims centered around attorney conduct during pre-trial, plea negotiations, and change-of-plea stages. Furthermore, both claims surrounded occurrences involving the Change-of-plea hearing on September 5, 2014. The guilty plea claims by there nature asserted deficient performance of counsel as by not insuring Mr.Chery received true notice of the crime against him, or its elements.

The high court has jurisdiction to decide this matter pursuant to 28 U.S.C. § 1254 (1).

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The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court. Ref. Mayle v. Felix, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) The core of operative facts asserted in the amended involuntary claim attempted to set out insufficient notice of his charge as the original claim set out. Not ever being informed of his predicate to § 2422 (b) criminal offense law, Mr.Chery could not prepare a defense, bar against exposure to double jeopardy, or make an informed decision on whether to stand trial or seek a plea. The §2255 proceeding throughout its entire duration depended on a incorrect relation back date of April 1st, 2016. While the Eleventh Circuit found that the amend claims asserted ''Failure To Investigate'', Mr.Chery first attempted to raise the failure to investigate claim/allegations in his Response To Government Response filing (CV-DE# 10 pgs 9-11) (" Counsel fell to make an **independent investigation** of facts and circumstances in the case''. ''Counsel fell to perform his duty to **investigate** movant's assertions fully thus providing **ineffective assistance of counsel**''.) Although in a inappropriate Responsive Pleading, Mr.Chery made a new allegation of a Constitutional violation prior to the expiration of his A.E.D.P.A. deadline of March 31, 2016. Document (CV-DE#10) was signed by Mr.Chery on the date of March 25, 2016, and placed into the prison internal mailing system. The item was marked by the post-master on March 29, 2016. Thereby, the correct date for setting relation back was March 25th 2016, the date he first attempted to raise a new claim (Failure To Investigate). Mr.Chery again raised the Failure to Investtigate claim in the Amend and Clarification pleadings (CV-DE# 17,19).

Mr.Chery appearing before the court in **pro se** herein seeks a order granting his request for a '' Writ of Certiorari. The Eleventh Circuit's narrow construction of Rule 15(c) has allowed a infirm conviction which omits an entire element (criminal offense) to go under the rug of justice. The court of appeals erred in affirming that the involuntary claims were separate conduct and occurrences in time and type.

[QUESTION ONE]

Whether an indictment for violation of 18 U.S.C. §2422(b) (enticement of a minor) must identify the underlying '' criminal offense'' in the indictment in compliance with the Fifth and Six Amendments of the United States Constitution.

Whether or not an indictment for violation of § 2422(b) must identify the predicate criminal offense element in the indictment is a matter of federal law, which the federal courts are split throughout the country. It would be to the benefit of the entire country for the high court to decide the constitutional issue, and give much needed guidance. Several courts have ruled in support that a § 2422(b) indictment must identify the predicate offense. See. U.S. v. Lanzon, 2008 U.S. Dist LEXIS 60750 (S.D. Fla., Aug 8, 2008); U.S. v. Thompson, 141 F. Supp. 3d 188, 192-98 (E.D.N.Y. 2015); U.S. v. Peel, 2:14-CR-1-6. 2014 U.S. Dist. LEXIS 91992, 2014 WL 3057523 (E.D. Cal. July 7, 2014) ; U.S. v. Doyle, 2007 U.S. DIST. LEXIS 11429 n.7 (E.D. Wis. 2007) See also. Doe v. Epstein, 611 F. Supp. 2d 1339, 1345-46 (S.D. Fla, February 12, 2009).

However, other federal courts have reached the opposite conclusion, and held that there is no constitutional requirement to identify the specific state statute with which a defendant could be charged. See. Kozak v. U.S., 2018 U.S. Dist. LEXIS 17350 (M.D. Fla, February 2, 2018) The circuits to review the issue have insufficiently resolved the issue. Ref. U.S. v. Berk, 652 F. 3d 132, 138-39 (1st Cir. 2011) citing; U.S. v. Brand, 467 F. 3d 179,182 (2nd Cir. 2006); U.S v. Hicks, 457 F. 3d 838, 840 n.2 (8th Cir. 2006); See also. U.S. v. Davila-Nieves, 670 F. 3d 1, 8-9 (1st Cir. 2012) But see. U.S. v. Steele, 178 F. 3d 1230,

1233-34 (11th Cir. 1999) (concluding that an indictment must notify the defendant of the charges to be defended against). If not contained in the indictment, or identified in the criminal proceeding prior to the establishment of guilt, the § 2422(b) statute can be arbitrarily enforced upon a unknowing defendant.

Federal statute § 2422(b) reads in pertinent part; '' to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense ''. The terms contained in the pertinent section have plain and ordinary meaning. See. U.S. v. Panfil, 338 F. 3d 1299, 1302 (11th Cir. 2003). The statute contains an ambiguous/generic term in sexual activity, and a implict term in criminal offense. When one element of the offense is implicit in the statute, rather than explicit, and the indictment tracks the language of the statute and fails to allege the implicit element explicitly, the indictment fails to allege an offense. See. U.S. v. Foley, 73 F. 3d 484, 488 (2nd Cir. 1996) citing: U.S. v. Carll, 105 U.S. 611, 613 26 L. Ed. 1135 (1881) Indeed, where an indictment charges a crime that depends in turn on a violation of another statute, the indictment must identify the underlying offense. See Wayne R. Lafave and Jerold H. Israel, Criminal Procedure § 19.2 at 452 (1984); Charles Alan Wright, Federal Practice and Procedure; Criminal 3a § 124 at 549 (1999) The indictment in the case seeking review tracks the language of § 2422(b), but is silent to the ''Sexual Activity-act found by the grand jury. See.(CR-DE# 14) or Apx pgs.21-24. Additionally, the indictment does not expressly set forth the ''criminal offense element of § 2422(b). Ref. Hamling v. U.S., 418 U.S. 87, 117-118, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974) Chapter 117 of title 18 in the U.S.C. does not define the term '' sexual activity'', other than the inclusion of production of child pornography. See. (18 U.S.C. § 2427). See also. U.S. v. Paulsen, 591 Fed. Appx. 910, 913 (11th

Cir. 2015); U.S. v. Thompson, 141 F. Supp. 3d 188, 196 (E.D.N.Y. 2015); U.S. v. Taylor, 640 F. 3d 255, 257 (7th Cir. 2011) As the indictment included generic terms, it failed to descend to particulars, and assure that the elements were found or even presented to the grand jury. Ref. U.S. v. Cruikshank, 92 U.S. 542 , 558 23 L. Ed. 588 (1876) See also. Russell, v. U.S., 369 U.S. 749, 770 82 S. Ct. 1038, 1050, 8 L. Ed 2d 240 (1962) and Keck v. United States, 172 U.S. 434, 437 19 S. Ct. 254, 43 L. Ed. 505 (1899) In the case before the high court, the indictment by failing to allege the essential ''sexual activity-act'' or '' criminal offense-law'' in the indictment offended both the Fifth and Sixth Amendments of the United States Constitution. Ref. Russell, 369 U.S. at 760-61 The facial defects contained in the indictment cannot assure that Mr.Chery was tried on the evidence presented to the grand jury. They also failed to assure that the grand jury acted properly in indicting him. The violation of a § 2422(b) defendant's Fifth amendment right to indictment by grand jury circumvents the intervention of a grand jury as a substantial safeguard against oppressive and arbitrary proceedings. Ref. Smith v. U.S., 360 U.S. 1,9 79 S. Ct. 991, 3 L. Ed. 2d 1014 (1959) Such defective § 2422(b) indictments which do not particularize the sexual activity act or criminal offense law deprives the defendants from receiving proper notice of the true nature of the accusation against them from the grand jury who indicted them. Ref. U.S. v. Miller, 471 U.S. 130, 135 105 S. Ct. 1811, 85 L. Ed. 2d 99 (1985) Sexual Activity and Criminal Offense are the very core of criminality in a § 2422(b) prosecution, and are central to every conviction. The enticement of an individual under eighteen years old to engage in sexual activity with an adult is not criminal from state to state, unless contrary to law. Therefore, an indictment under § 2422(b) must show the predicate law. Keck, 172 U.S. at 434: Russell, 369 U.S. at 759 Indeed, the government in

order to obtain a § 2422(b) conviction do not need to prove that the defendant actually violated or attempted to violate the underlying state law. A conviction only requires that the sexual activity engaged in or attempted to be engaged in constitute a criminal offense of the state for which he could of been charged, if committed. See. U.S. v. Hite, 950 F. Supp. 2d 23,27 U.S. (D.O.C.) ; U.S. v. Wilkerson, 702 Fed. Appx 843, 850-51 (11th Cir. 2017); U.S. v. Lanzon, 639, F. 3d 1293, 1299 (11th Cir. 2011) ; U.S. v. White, 646 Fed. Appx. 890, 893 (5th Cir. 2016); U.S. v. Decarlo, 434 F. 3d 447, 456 (6th Cir. 2005) Liablity in § 2422(b) is contingent on the defendant's conduct (not speech) violating another law. See. U.S. v. Jockisch,857 F. 3d 1122, 1136 (11th Cir. 2017) citing; U.S. v. Meek, 366 F. 3d 705,718 (9th Cir. 2004) In the case seeking certiorari, a guilty plea was accepted without any specification pursuant to Florida statutes that the acts admitted in the Factual Proffer (CR-DE# 34) or Apx pgs. 33-35 as a whole constituted a criminal offense of Florida for which Mr.Chery could have been charged. The specificity of elements in an indictment are required to prevent the usurpation of power by the court and prosecutors in allowing a defendant to be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. Russell, 369 U.S. at 770 Sexual Activity between minors and adults is not criminalized the same from state to state. Thereby, the establishment of guilt under § 2422(b) depends so crucially upon such a specific identification of the criminal offense element that the indictment was required to do more than simply repeat the language of the statute. Russell, 369 U.S. at 753,764 . The necessity of the criminal offense element in the instant case was amplified by the facts that Mr.Chery and government witness A.A. communicated from opposite sides of the country, and neither traveled or arranged to travel to the others state. Ref. U.S. v. Tello, 600 F. 3d 1161, 1165-67 (9th Cir. 2010) (concluding

that in order to be charged with a crime under California law a defendant must commit an act from within its state lines). The grand jury clause is intended to prevent a federal prosecution begun by arms of the government without the consent of fellow citizens. quoting; U.S. v. Williams, 504 U.S. 36, 47 112 S.Ct. 1735, 118 L. Ed 2d 352 (1992) Without a criminal offense statute predicating a § 2422(b) prosecution, the court cannot ascertain that the charges are valid. Ref. Russell, U.S. 369 at 767-69 In order to determine probable cause and return a true bill, all elements of the offense must be contained in the indictment. The failure of the indictment or factual proffer to give minimum notice as to the criminal offense element allowed the federal statute to permit a standardless sweep by policeman and prosecutors in case to pursue their personal predilections by determining what conduct qualified as sexual activity. Ref.Kolender v. Lawson, 461 U.S. 352, 358 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983) Congress in stating '' for which he can be charged'' in § 2422(b) intended that only individuals engaging in criminal conduct be subject to prosecution. See Panfil, 338 F. 3d at 1302. Indeed, prosecutions of 2422(b) are limited to situations where the defendant could actually be charged. See. U.S. v. Dhingra, 371 F. 3d 557, 565 (9th Cir. 2004); U.S. v. Dwinells, 508 F. 3d 63, 72 (1st Cir. 2007); U.S. v. Patten, 397 F. 3d 1100, 1103 (8th Cir. 2004); U.S. v. Gordon, 2017 U.S. App. LEXIS 19652 (6th Cir. 2017) This limitation disappeared in the instant case. Mr.Chery was ajudicated guilty without any verification of Florida statutes that his conduct as a whole constituted a sexual activity law of the state, for which he could have been charged. The plain language of § 2422(b) as well as the Eleventh Circuit Pattern Jury Instructions Offense Instruction No. 92.2 (2016) D.E. 60 at 238 do not support that Congress intended that judges and prosecutors determine what conduct amounts to sexual activity, and whether that conduct was chargeable

under state law, without any reference to that law on the record. It is for Congress and state legislators to say what shall be a crime, and how that crime shall be punished. Courts should not make law in Congress stead. See. Taylor, 640 F. 3d at 260.

The high court has already held that not all indictment defects are jurisdictional. Cotton v. United States, 535 U.S. 625, 152 L. Ed. 2d 860, 122 S. Ct. 1781, 1785 (2002) While the Cotton omission went only to the **legality** of the defendant's sentence, the omission in the § 2422(b) indictment implicated the courts statutory power to decide the case. Ref. U.S. v. Mclntosh, 704 F. 3d 894, 902 (11th Cir. 2013) Absent a finding that the conduct engaged in or attempted to be engaged constituted a sexual activity criminal offense for which he could of been charged, the government may not constitutionally prosecute a § 2422(b) case. Ref. Menna v. New York, 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975) The absence of the criminal offense from an entire criminal proceeding under § 2422(b) is a fundamental defect. This inherently results in a complete miscarriage of justice, and is an omission inconsistent with rudimentary demands of fair procedure. Ref. Reed v. Farley, 512 U.S. 339, 114 S. Ct. 2291, 129 L. Ed. 2d 277 (1994) See. In re Winship, 397 U.S. 358, 364 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970) (holding that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. A § 2422(b) defendant not informed of the criminal offense charge cannot prepare a defense. Ref. Berger v. United States, 295 U.S. 78, 82 55 S. Ct. 629, 630 79 L. Ed. 1314 (1935) Indeed, as this high court has stated, '' statutes should be construed so that no clause, sentence, or word shall be **superfluous**, void, or **insignificant**''. See. TRW, Inc v. Andrews, 534 U.S. 19, 31 122 S. Ct. 441,

141 L. Ed.2d 339 (2001) Congress in stating '' for which he can be charged with a criminal offense'' in § 2422(b). said what it meant , and meant what they said. It would indeed be problematic if the statute permitted the prosecution of a defendant under the law of any jurisdiction, regardless of where the criminal conduct occurred or whether a charge could legitimately be brought. But the plain language of the statute limits its application to situations in which an individual could actually be prosecuted. Quoting; U.S. v. Dhingra, 371 F. 3d 557 at 565 (9th Cir. 2004) If the government is permitted to obtain such standarless convictions being devoid of any guidelines as to the criminal offenses of the state, than indeed the sky will begin to fall. The United States Constitution affords a criminal defendant both a Fifth and Sixth amendment right. While a guilty plea waives all constitutional violations prior to the entry of that plea, it does not waive the claim that the violation itself rendered the plea involuntary. See. McMann v. Richardson, 397 U.S. 759, 771 90 S. Ct. 1441, 25 L. Ed.2d 763 (1970) Prosecutions of § 2422(b) are not going away. In fact, enticement of a minor is the second largest category of federal prosecutions in child explotation cases on the rise. Between 1998-2011 over 30, 000 people have been arrested since Internet Crimes Against Children Task Force (ICAC) were first formed in 1998. In FY 2011 alone, (ICAC) task forces were involved in 5,700 arrest across the country. Reported by;www.projectsafechildhood.org and www.justice.gov/psc/fact-sheet.html. Given the rise in prosecutions across the country of § 2422(b), the requirements of the Fifth and Sixth Amendments, the relation between state and federal law implicated, and the splits between the federal courts on the issue, the high court should give much needed guidence to the entire country.

Whether the insufficiency of an indictment assumes a jurisdictional dimension when the only facts it alleges, and which a subsequent guilty plea is based, describe conduct that is not proscribed by the charging statute was not addressed in U.S. v. Cotton, 535 U.S. 625 (2002). The high court however has made clear that the purpose of Fed.R.Cri.P. 11(b)(3) is to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. See. McCarthy v. U.S. , 394 U.S. 459, 466-67 22 L. Ed.2d 418 89 S. Ct. 1166 (1968) Furthermore, that it is a violation of due process for a court's acceptance of a plea to which the elements of the crime charged are not understood. at id. As verified by the Change-Of-Plea (C.O.P.) transcript Apx pgs. 36-45 during Mr.Chery's hearing the indictment was not read, nor was its reading waived. Additionally, Mr.Chery was not asked if he had the opportunity to read it, or if his counsel assisted him in reading it. He was not asked if he had any questions about the indictment. He was not asked if he understood the charge or charges against him, or the **elements** of the offense. No person at the hearing delineated the elements of § 2422(b) to Mr.Chery. No notice either orally or written was given to him concerning the criminal offense he would face should he elect to go to trial. While the court discussed the reading of the plea agreenment (which tracked the languge of the staute), the document itself omitted any crimnal charge of Florida predicating the § 2422(b) offense. See. Plea Agreement (CR-DE# 33 pgs 1-6) or Apx pgs. 27-32. Likewise, the Factual Proffer failed to set forth the criminal offense element. (CR-DE# 34 pgs 1-3) or Apx pgs. 33-35. There can be no dispute that a defendant must understand the elements of a charge in order for a guilty plea to be constitutionally vaild. See. U.S. v. Maye, 582 F. 3d 633, 627 (6th Cir.2009) citing; Bousley v. U.S. 523 U.S. 614, 618-619

118 S. Ct. 1604, 140 L. Ed.2d 828 (1998) Counsel's misadvice concerning the no relation of Florida law to § 2422(b) in Mr.Chery's case rendered his decision to plead guilty involuntary. Thereby, Mr.Chery was deprived of a trial proceeding altogether. Ref. Lee. V. U.S.. 582 U.S. ___, 137 S. Ct. 1958, 1965 198 L. Ed.2d 476, 2017 U.S. LEXIS 4045 (2017) The complete omission of a essential element from Mr.Chery's case or in any guilty plea conviction strips the proceeding of the voluntariness required under due process. Such an omission cannot constitute true notice of the charged crime. Ref. Smith v. O'Grady, 312 U.S. 329, 334 61 S. Ct. 572 574 85 L. Ed. 859 (1941) It is only Congress, and not the courts, which can make conduct criminal. Quoting; Bousley at 620. Whenever the Rule 11 disclosure is incomplete, there is a possiblity of a misunderstanding. Where some of the elements of the offense remain unstated, misunderstandings are likely to occur. Quoting; U.S. v. Roberts, 187 U.S. App. D.C. 90, 570 F. 2d 999, 1011 (D.C. Cir. 1977) See also. U.S. v. Bradley, 381 F. 3d 641, 647 (7th Cir. 2003) (holding when there is no evidence that the requisite elements of the charged offense were comprehended by any party to the proceeding, confidence in the defendant's understanding of that charge certainly is undermined.) ; U.S. v. Mccreary-Redd, 475 F. 3d 718, 722-27 (6th Cir. 2007) citing; Henderson v. Morgan, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976) at 727. During Mr.Chery's C.O.P. hearing, the paraphrase of ''enticement of a minor'' omitted the substantive gloss of § 2422(b) , which required that he could have been charged with a criminal offense. Ref. U.S. v. Szymanski, 631 F. 3d 794, 799 (6th Cir. 2011) As plain and oridinary as the elements of § 2422(b) may be, the C.O.P. hearing omitted any criminal offense notice of Florida. Ref. U.S. v. Leach, 2017 U.S. App. LEXIS 10276 No. 16-15114 (11th Cir. 2017) (explaining the criminal offense element of Florida during C.O.P. hearing pursuant to § 2422(b) violation. Mr.Chery did not possess

an understanding of the law in relation to the facts of his case, and a defective unread indictment offered no assistance in understanding the ture nature of § 2422(b).

(Direct Appeal)

While the involuntary plea could of been raised on direct appeal, former attorney Joshua Fisher's abandonment of Mr.Chery's case for purpose of appeal left him without counsel during the critical time period to appeal. See Sentencing Transcript (CR-DE# 65) pages 15-16 or Apx pgs 72-74 Mr.Fisher on May 12, 2014 entered a permanent appearance as counsel in Mr.Chery's case. See (CR-DE# 15,16)(Appearance Of Counsel) or Apx pgs. 25-26 Mr.Chery had a constitutional right to counsel in his case through direct appeal (or the first appeal). See. Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) During sentencing, Mr.Fisher stated;'' I would like to be able to withdraw for appellate purposes''. My representation will continue for the restitution hearing **but not for the appeal**''. The court stated; '' Okay. I will appoint the Federal Defender for the purpose of appeal''. (CR-DE# 65 pgs 15-16) or Apx pgs. 73 While the court announced on the record that counsel would be appointed to Mr.Chery for appeal, no such appointment was made. At the conclusion of the restitution hearing no mention of appeal was made. See (CR-DE# 62) (Restitution Order) or Apx pgs.75-79 See also (CV-15-DE# 10 pg 9) ''Response To Government Response To § 2255 (timely raising new claim of attorney abandonment for direct appeal). Mr.Chery being denied of his right to counsel for appeal purposes attacked his involuntary plea collaterally. See. Bousley v. U.S., 523 U.S. 614 at 629 (1998) Indeed, Mr.Chery during his prosecution relied on incorrect advice from prior counsel in deciding to plead guilty to a crime that he did not commit. Thereby, he continued to assume that § 2422(b) had no relation to Florida

law during the time for taking appeal. He also assumed that the appeal issue would return once restitution was entered, and he would be appointed a federal defender. This high court has previously held; ''Withdrawal, whether proper or improper, terminates the lawyer's authority to act for the client. His act or omissions therefore cannot fairly be attributed to the client''. See. Maples v. Thomas, 565 U.S. 266, 181 L. Ed.2d 807, 822 132 S. Ct. 912, 2012 U.S. LEXIS 905 (2012) This case involves the violation of not just a single constitutional right, but several rights. The lower courts in turning a blind eye to the defective guilty plea and indictment have seriously affected the fairness and integrity of the judicial system. Ref. McCreary-Redd, 475 F. 3d at 726-27 In order to safeguard the constitutional rights afforded to criminal defendants, this high court should accept this writ of certiorari. The government cannot be allowed to circumvent notice and due process requirments in obtaining convictions, less arbitrary prosecutions and convictions override the constitution across the country. While it is not practice for an appellate court to address merits that a district court did not address, § 2255 allows for the review of the entire record for any reversible or prejudicial errors therein.

[QUESTION TWO]

Whether the definition of '' Sexual Act'' found in 18 U.S.C. § 2246(2)(D) also defines the term '' Sexual Activity'' in 18 U.S.C. § 2422(B).

Over the better part of at least a decade, federal courts and circuits have been in conflict in determining what Congress intended when they substituted the term ''Sexual Act'' in § 2422(b) with '' Sexual Activity'' in 1998. H.R. Rep.No.105-557, at 10,20 (1998) , reprinted in 1998 U.S.C.C.A.N. 678,679, 688. See. Taylor, 640 F.

3d at 259. The circuit conflict has not reached the Supreme Court, which has given rise for the opportunity for zealous prosecutors around the country to stretch the criminal statute beyond its proper boundaries. In certain cases this has been fule by the inevitable and active collision of technology and preexisting law. A decision on the issue by the highest court in the land would not only give much needed direction to the rest of the country, but would also halt the abuse of the statute by federal prosecutors who stretch the statute to punish conduct not particularized by Congress as illegal, or listed in the indictment as constituting a criminal offense of the state. The current body of the United States Supreme Court has been very vocal in recent time in addressing cases involving technology and old laws, as well as matters of exspansive interpretation of federal terms. The instant case provides yet another meaningful opportunity to give guidance to the entire country on the three points. Without intervention from this court, many citizens in this technological age will continue to engage in behavior that could make them felons.

The Supreme Court in 1985 stated;'' when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strickly to determine the scope of the conduct the enactment forbids''. See. Dowling v. U.S., 473 U.S. 207, 213 87 L. Ed.2d 152, 105 S. Ct. 3127 (1985) Federal statute § 2422(b)'s language is plain. See. U.S. v. Korfhage, 683 Fed. Appx. 888,891 (11th Cir. 2017) The statute however does not define the term ''Sexual Activity''. Therefore the phrase should be given its ordinary meaning. See. Johnson v. U.S., 559 U.S. 133, 176 L. Ed.2d.1 2010 U.S. LEXIS 2201 130 S. Ct. 1265 (2010) (applying ordinary meaning to the phrase ''Physical Force'') citing;Bailey v. U.S., 516 U.S. 137, 144-45, 116 S. Ct. 501, 133 L. Ed.2d 472 (1995) Furthermore, the Eleventh Circuit has held that the elements of § 2422(b) have the same meaning in

legal usage as they do in the course of routine usage. See. U.S. v. Leach, 696 Fed. Appx. 419,423 (2017) To determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance. See. CBS v. Primetime 24 J.V., 245 F. 3d 1217,1223 (11th Cir. 2001) citing; U.S. Gonzales, 520 U.S. 1,5 137 L. Ed.2d 132, 117 S. Ct. 1032 (1997) See also. Stein v. Paradigm Mirasol, LLC, 586 F. 3d 849,854 (11th Cir. 2009) (noting that a term that is undefined in a statute carries its ordinary meaning and turning first to the dictionary to determine that meaning).

Black's Law Dictionary defines '' **sexual activity**'' as follows: 1. Sexual intercourse. -Also termed carnalis copula. 2. Physical sexual activity that does not necessarily culminate in intercourse. Sexual relations usually involve the touching **of another's** breast, vagina, penis, or anus. **Both** persons (the toucher and the person touched) are said to engage in sexual activity. also termed Sex Act. Black's Law Dictionary 10th ed. The definition makes no reference to the age of the participants.

Congress defined '' **sexual act**'' pursuant to 18 U.S.C. § 2246(2)(D) as; '' the intentional touching, not through the clothing, of the genitalia **of another person** who has not attained the age of 16 years''. See. Taylor, 640 F. 3d at 258. Additionally, the Eleventh Circuit has stated; '' we believe that § 2246(2)(D) clearly indicates that Congress used the phrase ''any person'' when it meant to include the offender himself, as well as another individual, and the phrase '' another person'' when it meant to exclude the offender. See. U.S. v. Aldrich, 566 F. 3d 976,979 (11th Cir. 2009)

Florida law defines '' **sexual activity**'' as the oral, anal, or vaginal penetration by, or union with, the sexual organ **of another** or the anal or vaginal penetration

of another by any other object. Florida Statutes § 800.04(1)(a) See. U.S. v. Bilus, 626 Fed. Appx 856, 862-63 n.10 (11th Cir. 2015)

All definitions involve the touching of another person, not solitary sex acts separate in time and place. Ref. Taylor, 640 F. 3d at 259. Congress defined sexual act as excluding sex acts that do not involve the physical contact between two people. at id. The high court recently addressed a similar case involving the definition of Sexual Act in Esquivel-Quintana v. Sessions, 581 U.S. ____, 137 S.Ct. ____, 198 L. Ed.2d 22, 2017 U.S. LEXIS 3551 No.16-54 (2017) There, the honorable court referred to state criminal codes and dictionaries in defining generic federal terms. The Florida statute for sexual activity encompasses the elements of contact, attempted contact, and presence. None of those elements were present in the record of conviction in Mr.Chery's case. He never touched or sought assent to touch A.A., nor was he ever in her presence. Ref. Taylor, 640 F. 3d at 261. (discussing the meaning of the word presence) at id.; U.S. v. Navarro, 169 F. 3d 228, 235-36 (5th Cir. 1999) and U.S. v. Lawrence, 248 F. 3d 300, 303-04 (4th Cir. 2001) (noting a person's presence is not satisfied by video conferencing). The Factual Proffer (CR-DE# 34) or Apx pgs.33-35 did not present any assent to touching between two persons, but only solitary self touching in separate time and location. The cybersex behavior is not criminalized under § 2422(b). See. U.S. v. Joseph, 542 F. 3d 13,19 n.4 (2nd Cir. 2008) See also. Merriam-Webster's Dictionary and Thesaurus defining cybersex as; 1: online sex oriented conversations 2. sex-oriented material available on a computer (2006). Congress understood § 2422(b) as requiring more than merely engaging in sexually explicit converstation that engendered, encouraged, or incited thought of assent to possible sex; nor does it make criminal ''cybersex'' Quoting

U.S. v. Schell (2012, ACCA) 71 MJ 574, 2012 CCA LEXIS 352 The statute makes criminal attempts to pursuade minor to engage in illegal sexual activity. It does not make criminal attempts to persuade children to merely want to engage in sexual activity, or to merely gain assent of minor for sake of that assent. It is intended to address those who lure minor out to actually engage in illegal sexual activity, while it is not intended to address those who simply encourage or incite children to assent to the possibility of sex. It is a luring statute, not a corrupting statute. The solitary act of masturbation over a webcam for a viewer who the performer believes is a minor is not by itself sufficient to obtain a § 2422(b) conviction. Ref. U.S. v. Howard, 766 F. 3d 414,425 (5th Cir. 2014); U.S. v. Gladish, 536 F. 3d 646, 650-51 (7th Cir. 2008); and U.S. v. Lee, 603 F. 3d 904, 916-18 (11th Cir. 2010) Masturbation when not involving the touching between two persons is not sexual activity, or a sexual act in the statutory sense. Ref. Taylor, 640 F. 3d at 260. Indeed, the circuits are split concerning whether § 2246(2)'s definition of '' sexual act'' also defines '' sexual activity'' in § 2422(b). The Seventh Circuit has determined that sexual activity under § 2422(b) is synonymous with sexual act as defined in § 2246(2). See. Taylor, 640 F. 3d at 257-60. On the other hand, the Fourth and Ninth Circuits have explicitly rejected Taylor's holding and have concluded that the definition of sexual activity in § 2422(b) is not limited to the definition of sexual act found in § 2246(2). See. U.S. v. Shill, 740 F. 3d 1347, 1351-52 (9th Cir. 2014) and U.S. v. Fugit, 703 F. 3d 248, 254-56 (4th Cir. 2012) Mr.Chery notes that the case seeking review is distinguished from Shill and Fugit. In both those cases the defendants convictions properly included identification and allegation of criminal offense charges under state law for which they could have been charged. In the instant case, the entire record is devoid of the criminal offense element.

Although the Factual Proffer (CR-DE# 34) alleged masturbation, the act is not identified in the indictment, which gives no assurance that the grand jury considered it in indicting Mr.Chery. Furthermore, masturbation not done in the presence of another person or involving the touching between two persons is not criminalized under Florida law. The government alleged that Mr.Chery engaged in sexual conversations with a minor. See. Factual Proffer (CR-DE# 34) or Apx pgs. 33-35. There was no establishment or allegation of attempted enticement of government witness A.A. to **create or manufacture** any images of her engagged in sexually explicit conduct. Federal statute § 2422(b) is a crime distinctly different from 18 U.S.C. § 2252A (Child Pornography). Ref. Adams v. U.S., 2009 U.S. Dist.LEXIS 60412 (S.D.ILL. 2009) Black's Law Dictionary defines **production** as; 1. The act or process of making or growing things.esp. those to be sold< the production of consumer goods>.(10th Ed. 2009) It also defines the term **produce** as: 1. To bring into existence; to create. As the criminal record supports, Mr. Chery viewed images, but did not entice into the manufacturing of images. The Eleventh and Third Circuits have declined to reach this issue. See. Paulsen, 591 Fed. Appx. at 913 and U.S. v. Hilts, 632 Fed. Appx 699,704-05 (3rd Cir. 2015) In both cases evidence supported that the defendants sought touching between the minors and themselves. Both Paulsen and Hilt also made arrangements to meet, and traveled to engage in the sexual acts with the minors. The case before the court did not involve any such conduct. The Eleventh Circuit has used sexual activity interchangeably with sexual act. See. U.S. v. Baker, 647 Fed. Appx 1011; 2016 U.S. App. LEXIS 6702 (11th Cir. 2016) Whether sexual activity in § 2422(b) requires contact or not, Mr.Chery's record did not include any admission that he could of been charged under Florida or California law.

'' Legislative History ''

Subsection (b) was added to § 2422 in 1996 when Congress passed the Telecommunications Act of 1996. The 1996 version of the statute read:

> '' Whoever, using any facility or means of interstate or foreign commerce, including the mail.... knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or **any sexual act** for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both''.

See. Andriy Pazuniak's, A Better Way To Stop Online Predators: Encouraging a more appealing approach to § 2422(b), 40 Seton Hall L. Reve 691 (2010) See. also Taylor, 640 F. 3d at 258-259 (discussing the legislative history of § 2422(b). The proposed ''contact'' provision was rejected by the house and senate on October 13, 1998. See H.R. 3494, 105 Cong. § 2422 The provision was rejected because targeting attempts to make contact is like prosecuting a thought crime. Despite rejecting the proposed contact provision, Congress nonetheless indicated that the primary goal of § 2422(b) remained to target and punish sexual predators who interact with minors online**[and]**attempt to lure the minors into dangerous **encounters.]** 144 Cong.Rec. 25,239 In the case before the court, no arrangements to meet were made or discussed. See Interview Transcript San Francisco Police Department (CV-DE# 24 pgs.38/75) or Apx pgs. 2233 stating; ''He never said anything about meeting up''. With § 2422(b)'s language, history, and goal in mind, it is apparent that the statutes ''sexual activity'' term is in need of a **limiting construction.** Ref Skilling v. U.S., 561 U.S. 358 177 L. Ed.2d 619,658 130 S. Ct.

2896, 2010 U.S. LEXIS 5259 (2010) (limiting '' honest services '' fraud proscription in 18 U.S.C. § 1346 to bribery and kickbacks). To allow sexual activity to extend beyond its core meaning of touching between two persons, and include solitary sexual acts separate in time and in location would encounter a vagueness problem. Constructing the term in accordance with its core meaning would stop the abuse of the statute by zealous prosecutors who execute arbitrary, discriminatory, or oppressive prosecutions. Ref. Skilling v. U.S., 561 U.S. 358 pg 656-57 The advancement of technology has pushed federal prosecutors to stretch criminal law to prosecute citizens who they believe are exploiting or endangering other citizens. However, '' when Congress chooses to define a crime by state law, federal prosecutors cannot exceed the scope of the state law and seek to punish conduct that is not illegal under the statues listed [in] the indictment -even though the conduct is extremely disturbing''. Quoting; Taylor, 640 F. 3d at 264. If sexual activity in § 2422(b) is to be given a broad or general meaning exceeding its ordinary meaning, citizens will be convicted of an offense so generalized as to be , not suceptible of exact defintion. Ref. Edwards v. South Carolina, 372 U.S. 229, 9 L. Ed.2d 697 83 S. Ct. 680 (1973) It is up to Congress, not the courts, to decide which borderline conduct is to be criminally prosecuted and punished. The application of § 2422(b) and its subsequent conviction in the case by the government creates a substantial risk of prosecutorial abuse. Ref. U.S. v. Goyal, 629 F. 3d 912, 922 (9th Cir. 2010) The complete omission of the criminal offense element of § 2422(b) from a conviction stretches the criminal statute beyond its proper bounds. Indeed, the government overreached over the criminal offense element of the state in a structural due process error. If not corrected, this error may lead to a chain of § 2422(b) convictions across the country without any finding of the criminal offense

element required by Congress when enacting the section. The United States system of checks and balances depends on a vigorous judiciary and legislature serving as a brake on excessive prosecutorial zeal. When these zealous prosecutors are allowed to criminalize particular conduct through overly broad applications of federal statutes, the system of checks and balances breaks down. The criminal offense element was Congress's safety button on § 2422(b). With the button off, or as in the current case, completely removed, the government is enable to shoot § 2422(b) prosecutions at will, and hit the targeted convictions. The expansive interpretation of ''sexual activity'' or its **superfluous** application in a § 2422(b) case cannot be allowed. Sexual activity in the statute appears in company with the term prostitution. This gives further evidence that the term requires touching between two persons. '' A word is known by the company it keeps. See. Taylor, 640 F. 3d at 263-64. See also. McDonnell v. U.S. 579 U.S.____ 195 . L. Ed.2d 639,657 136 S. Ct.____ 2016 LEXIS 4062 (2016) (discerning the term offical act) Congress did not intend to broaden § 2422(b) by changing ''sexual act'' to '' sexual activity '', but merely wanted to achieve semantic uniformity of the substantively identical prohibitions. See. Taylor, 640 F. 3d at 258. When prosecutos have to stretch the law or the evidence to secure a conviction, it can hardly be said that such moral judgment is warranted. Quoting; Goyal, 629 F. 3d at 922. The Sixth Amendment does not require that counsel be perfect or exceptional. However, the error of Mr.Chery former counsel (Joshua Fisher) as to not ensure that his client was charged and thereby pled guilty to a legitimate violation of § 2422(b) fell outside the wide range of compotent performance demanded of attorneys. Mr.Cherys acts did not constitute sexual activity under federal or state law. Rather, the behavior more identified with lewd, obscene, or vicarious conduct, which § 2422(b) does not punish.

[QUESTION THREE]

Whether relation-back doctrine pursuant to Fed.R.Civ.P. 15(C)(1)(B) prohibts the review of an amended claim which shares the same nature as an originally timely filed claim.

Mr.Chery to the best of his ability as a layman in law without the aid of counsel on December 15th, 2015 fitted his initial § 2255 petition (CV-DE# 1). In ground two he listed the claim of '' Ineffective Assistance Of Counsel - Not Knowingly and Willingly Entering Into Plea Agreement''. In support of the claim, on pages 13-18 he proffered the following supporting facts and circumstances:

'' As I entered the court that morning and sat down Mr.Fisher told me '' here is your plea agreement''. In a unexpected frame of mind I glimpse at the small packet for the first time noticing it was only 3 pages. The first the factual proffer, second the forfeiture page, and third a signature sheet. Under oath during the rule 11 hearing the judge ask ask me multiple (questions) about the plea agreement and counsel's performance. I answered under the belief that the three papers presented to me by my attorney were in fact my complete plea agreement but later came to find out that Mr.Fisher had intentionally, maliciously, and deficiently withheld my real **complete** plea agreement from me in order to prevent me of my right to actually read it and dispute any factors before signing it. I was never provided the chance to fully review the plea agreement and terms prior to signing''.

After attempting to supplement his initial petition with new supporting information, Mr.Chery was ordered to amend instead. (CV-DE# 15) (Order To Amend § 2255) The Amend Motion was filed on June 6th, 2016 (CV-DE# 17), and raised two claims.

(1) Actual Innocence and (2) Selective Prosecution. The government and court later construed the Actual Innocence plea to Ineffective Assistance of Counsel in failing to observe that Mr.Chery conduct did not violate FL.STAT.§ 800.04. Mr.Chery wanting to clarify the individual claims in the body of the amend motion, filed a '' Motion For Clarification'' on August 1st, 2016 (CV-DE# 19). In claim four of the clarification motion, he once again asserted Ineffective Assistance of Counsel (hereafter I.A.C.) in Not Knowingly Entering his Plea Agreement/Guilty Plea. The Eleventh Circuit in issuing a Certificate Of Appealability from the district court's denial construed Mr.Chery initial unknowing claim as; '' exaggerating the potential sentencing exposure, withholding the terms of the plea agreement, and persuading Chery to plead guilty under false pretenses, rendering his guilty plea involuntary or unknowing''. The Eleventh Circuit determined that the initial and clarification involuntary claims were separate conduct and occurrences in both time and type. Furthermore, that the Amend and Clarification claims asserted '' Failure To Investigate''. The Eleventh Circuit in issuing its decision turned a blind eye to Mr.Chery defective plea colloquy and charging documents. In the instant case no prosecutor or court ever addressed or reached the merits of his amended involuntary claim. The claim is meritorious and sufficiently supported by the record, and constitutional law. Instead of a review of the merits of his claim, the officials only discussed the sufficiency of how the amended involuntary claim was pled. In doing so, they subjected him to the high standards of legal art and knowledge which might be exacted of members of the legal profession. Instead of addressing the fundamental errors presented in his proceeding, the lower courts took issue with his inartistically drawn petitions. Ref. Price v. Johnston, 334 U.S. 266, 290-294 92 L. Ed.

1356 (1948) The facts supporting Mr.Chery original involuntary claim surrounded his attorney's conduct during pre-trial, pre-plea negotiations, and change-of-plea stages. Furthermore, the attorney meetings and C.O.P. occurrence on September 5th, 2014. Inartfully pled in general terms, Mr.Chery in the Amend and Clarificaion motions further expanded the facts supporting the initial involuntary claim to those sufficiently supported by the record. The nature of the claim was that his guilty plea was involuntarily entered. In the amend involuntary claim he alleged further circumstances which rendered his guilty plea uknowing. Overlooking the due process violations caused by the omission of an essential element (criminal offense) the district court harmfully reconstrued the initial unknowing claim by completely disregarding the '' withheld terms'' allegation. That recharacterization effectively isolated the nature of the claim, and hindered the amended involuntary claim from establishing relation back. Mr.Chery in his proceeding ultimately sought to prove that his guilty plea was involuntary entered due to the transaction of his change of plea hearing. Instead of addressing the truth of the amended facts and claim, the lower courts centered on what he initially said. Mr.Chery being a layman in law and without counsel did not combine the facts supporting the involuntary claims. Rather, he supported the nature of the initial claim by proffering further circumstances (as they became known to him) which supported his involuntary claim. Those facts were shared in time and type being September 5th, 2014, and terms withheld from his plea documents. Rule 15 (C)(1) permits relation back when '' the claim or defense'' asserted in the amendment arises out of the same conduct, transaction, or occurrence set forth in the original pleading. That is, the same conduct, transaction, or occurences can support multiple, discrete claims for relief. Quoting; Mayle v. Felix, 545 U.S.

644, 669 (2005) The nature of the claim was that his guilty plea was entered unknowingly. While ultimately determining a statute of limitations bar, the lower courts overlooked the trial record as a whole for signs of requisite prejudice or reversible error. These errors included but were not limited to; (1) a defective indictment which failed to set forth the criminal offense element, (2) plain-error at the Change-Of-Plea Colloquy due to violations of Fed.R.Cri.P. 11(B)(3) and 11(B)(1)(G), and (3) abandonment of defense counsel for direct appeal purposes. Counsel in Mr.Chery case was deficient in ensuring that he received notice of all charges to be defended against should he stand trial. Ref. U.S. v. Lanzon, 2008 U.S. Dist.LEXIS 60750 (S.D.Fla 2008) citing; U.S. v. Steele, 178 F. 3d 1230, 1233-34 (11th Cir. 1999) (concluding that an indictment must notify the defendant of the charges to be defended against). Having never received notice of the criminal offense predicate supporing conviction under § 2422(b), Mr.Chery could not make an informed decision on whether to stand trial or seek a plea. This due process violation prejudiced him as his conduct as a whole did not qualify as ''sexual activity under the federal or state of Florida meaning, or constitute a sexual activity criminal offense for which he could have been charged. Furthermore, his acts were not punishable under California law, which he never entered or made arrangements to travel to. Ref. U.S. v. Tello, 600 F. 3d 1161, 1165-66 (9th Cir. 2010) (discussing under California law, a person intending to commit a crime may be charged with a criminal offense if the person commits any act **within** the state in partial execution of that intent).Cal Penal Code § 778a. Mr.Chery although charged under § 2422(b) in Florida, never invited A.A. to Florida or enticed her to engage in sexual activity or acts in Florida. See. Kozak v. U.S., 2018 U.S. App. LEXIS 15294 (11th Cir. 2018) (concluding that Kozak's claim that his counsel

was ineffective for failing to object to Count One of the indictment, which was insufficient or ambiguous because it was silent as to the particular sexual activity for which he could of have been criminally charged, was meritless because he failed to establish deficiency or prejudice).at id. In McGill, the defendant's § 2422(b) indictment challenge was related to trial evidence, not the facial validity of such an indictment when it fails to identify the criminal offense. U.S. v. McGill, 634 Fed. Appx. 234,236 (11th Cir. 2015) In Kozak, the defendant answered yes to the change of plea court's question as to whether he could of been charged with a criminal offense under Florida law if the activity would have occured. Ref. Kozak v. U.S., 2018 U.S. Dist.LEXIS (M.D. Fla February 2, 2018) (discussing culpability of defendants actions under Florida law for his enticing of female minor to engage in sexual activity in Florida for which he could of been charged with a criminal offense).at id.

The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his right or was **unaware** of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief. Quoting; Price v. Johnston, 334 U.S. 266, 292 92 L. Ed. 1356 (1948) See also. Mays v.Balkom, 631 F. 2d 48 at 51 (5th Cir. 1980) (holding a pro se applicant will more than likely not be aware of all the possible sets of facts which could result in a granting of relief.). Congress's enactment of A.E.D.P.A. in 1996 in mind, the lower courts have denied Mr.Chery the opportunity to have a meritorious claim heard and decided on the merits. Despite the fact that he filed his initial § 2255 without the aid of counsel, the previous courts have

held his filings to a high standard of sufficiency that is contrary to the mandates set by the high court concerning pro se habeas petitioners. In case of Schiavone v. Fortune, 477 U.S. 21,27 91 L. Ed.2d 18, 106 S. Ct. 2379 (1986) the high court noted that the spirit and inclination of the federal civil rules (Rule 15(C) included) favored decisions on the merits, and rejected an approach that pleading is a game of skill in which one misstep may be decisive. at id. That the principal function of procedural rules should be to serve as useful guides to **help not hinder**, persons who have a legal right to bring their problems before the courts. at id. His initial timely unknowing claim being submitted without counsel, the lower courts refusual to treat the allegations of apparent facts in the amended not knowing claim as part of the complaint effectively held Mr.Chery filings to a more stringent standard of sufficiency and knowledge. Ref. Williams v. Griswald, 742 F. 2d 1533, 1543 (11th Cir. 1984) citing; Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed.2d 652 (1972) As articulated in Mayle v. Felix, 545 U.S. 633, 675 162 L. Ed.2d 582, 125 S. Ct. 2562 (2005) , '' nearly all federal habeas petitioners commence proceedings without legal assistance''. Mr.Chery notably prior to his amend motion filing (CV-DE# 17) petitioned the court for appointment of counsel on April 1st, 2016, but was denied. See (CV-DE# 11) That withstanding, the Eleventh Circuit determined that the two I.A.C.-Not Knowing claims were separate conduct and occurrences in both time and type. Thereby because the amended claim was filed after March 31st, 2016, it was untimely. The allegations alleged in the amended involuntary claim were borne out by proof, and supported the initial unknowing claim. However, Mr.Chery although he did not have knowledge of the criminal offense omission during his initial filing was held to a higher standard of knowledge as that of a lawyer.

Ref. Gunn v. Newsome, 881 F. 2d 949, 961 (11th Cir. 1989)(en banc) citing; Price v. Johnston, 334 U.S. 266 (1948) The lower courts and prosecutors focused solely on the proceedural aspects of Mr.Chery amended involuntary claim, but never challenged or refuted its merits. Mr.Chery as judge Friendly asks, Is Innocence Irrelevant? See. Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970) The failure to raise the essential element claim in the proper time and procedure was ultimately the fault of prior counsel Mr. Fisher , not Mr.Chery. He had a right to effective assistance of counsel. This right was violated by counsel's error in not ensuring that Mr.Chery understood the required predicate criminal offense element of § 2422(b).Also that he received proper notice of what criminal offense of Florida he could have been charged with should he elect to go to trial, prior to making a decision on whether to seek a plea or stand trial. That single error was egregious and prejudicial. Mr.Chery could not present a defense to an unidentified charge, which he did not correctly understand itself. The failure of counsel to compel the essential element from the grand jury, government, or change of plea court withheld true notice of the charge against him from Mr.Chery. This fundamental unfairness was overlooked by the lower courts and prosecutors alike in favor of the finality of conviction, which Actual Innocence itself is an exception to the concept of finality. Ref. Herrera v. Collins, 506 U.S. 390, 438 122 L. Ed.2d 203, 113 S. Ct. 853 (1993); Murray v. Carrier, 477 U.S. 478, 496 91 L. Ed.2d 397, 106 S. Ct. 2639 (1986) citing; U.S. v. Cronic, 466 U.S. 648 , 657, n20, 80 L. Ed.2d 657, 104 S. Ct. 2039 (1984) Mr.Chery was charged with an **attempted** violation of § 2422(b), not a completed violation . See (CR-DE# 14 Indictment pg 1 of 4). Mr.Chery criminal

record is completely devoid of any allegation, evidence, or admission that he induced government witness A.A. to engage in any sexual activity or acts in Florida, for which he could have been charged. To the contrary, he never invited her to Florida, or made or discussed arrangements to meet in California. The record never included or alleged that Mr.Chery enticed A.A. to engage in sexual acts with him in Florida or California. They nor the grand jury ever claimed that Chery's conduct constituted a criminal offense under Florida law for which he could have been charged. !' The very nature of the underlying offense-persuading , inducing, or enticing engagement in unlawful sexual activity-necessarily contemplates oral or written communications as the principal if not exclusive means of committing the offense''. Quoting; U.S. v. Rothenberg, 610 F. 3d 621, 627 (11th Cir. 2010) In the instant case, the crimnal record does not include or present any communications by Mr.Chery to A.A. seeking assent into touching between them, or the creation-manufacturing of any images of her engaged in sexually explicit conduct. What Mr.Chery admitted to during the change-of-plea hearing (self-touching or Cybersex) did not as a whole **constitute** the crime of conviction. The district court in adopting the R&R construed Mr.Chery Factual Actual Innocence plea to that of Legal Innocence. Indeed, as a layman, Mr.Chery being denied counsel inartfully pled the actual innocence ground in the Amend Motion (CV-DE# 17). However, the ultimate point he attempted to set out to the best of his ability was not that the evidence was insufficient to sustain the conviction. It was that the admitted conduct as a whole did not constitute a violation of § 2422(b). Specifically, Mr.Chery record never established nor did he admit to attempting to engage in sexual activity or the production of child pornography for which he could of been charged with a criminal offense of Florida. This due process

violation left an essential element defense unasserted. Ref. Rozelle v. Sec'y, Fla Dep't of Corr, 672 F. 3d 1000, 1014-15 (11th Cir. 2012); citing Finley v. Johnson, 243 F.3d 215, 221 (5th Cir. 2001) (concluding that a showing of facts establishing an affirmative defense that would result in the defendant's acquittal constituted a sufficient showing of actual innocence to allow a petitioner to proceed with a procedurally defaulted constitutional claim) at id. Mr.Chery' conduct did not fall within the ambit of the plain meaning of '' sexual activity'' in the federal statute, or the state of Florida's meaning in FL STAT. 800.04(4)(a). Due to the misrepresentation of the enticement statute by his former attorney as punishing cybersex, Mr.Chery pled guilty to a crime that his conduct did not actually fall within its scope. Ref. McCarthy v. U.S., 394 U.S. 459, 467 (1969) Courts cannot assume that the defendant is entering the guilty plea with a complete understanding of the charge against him merely because the defendant, in response to the judge's remarks, states his desire to plead guilty and expresses his understanding of the consequences of such plea as explained by the judge. McCarthy v. U.S., 394 U.S. 459, 465 (1969) The Change-Of-Plea (hereafter C.O.P.) hearing in the case before the court did not provide any written or verbal notice of the ''criminal offense'' Mr.Chery would face should he of elected to go to trial. '' Where the court's inadequate address of one of the elements of the charge results in less than full compliance with Rule 11, there has been an entire failure to address a core concern, warranting automatic reversal of conviction''. Quoting; U.S. v. Punch, 709 F. 2d 889, 897-98 (5th Cir. 1983) citing; U.S. v. Dayton, 604 F. 2d 931, 937-38 (5th Cir. 1979) citing;McCarthy v. U.S., 394 U.S. 471-72 (1969) Mr.Chery misunderstood '' enticement of a minor'' to be the law to which his cybersex or self-touching

communications violated. If given proper understanding that the statute punished an intent to persuade an individual under eighteen years old to engage in sexual intercourse, touching between two persons, or the creation of child pornography, he would of never pled guilty. Given proper understanding of what the federal law actually prohibited, Mr.Chery would of insisted on trial. The record never presented or alleged that Mr.Chery sought assent of A.A. to engage in sexual acts with him, or produce sexually explicit images, nor did he admit to such conduct. He admitted to acts of self-touching and viewing A.A., conduct not punished under § 2422(b). Ref. Taylor, 640 F. 3d at 259. (holding that Congress elsewhere has defined '' sexually explicit conduct to include masturbation, but thats in a statute (18 U.S.C. § 2256(2)(A) that criminalizes films and videos of children masturbating). Prosecutorial zeal lead to the overlooking of federal statutes which may of appropriately address the conduct of the case. For example, 18 U.S.C. § 1470-Transfer Of Obscene Material To A Minor. See. Taylor, 640 F. 3d at 264. In a zealous state, prosecutors here overreached into the enticement statute on Mr.Chery in order to seek a higher term of imprisonment that an prosecution for the more related but less draconian statutes would warrant. In order to circumvent the sentencing exposure Mr.Chery would be subject to in the obtaining of a conviction, prosecutors overcharged the case conduct to reach the draconian 10 years to life penalty of § 2422(b). The conviction is fundamentally infirm at its root, and was obtained in violation of the due process requirement of the United States Constitution. Our Constitution includes a substantial number of procedural rights. However, all the procedural rights in the world are for naught if the defendant is unable to understand what it is for which he or she

stands indicted. Indeed, Rule 15(C)(2) relaxed, but did not obliterate the statute of limitations. Mr.Chery initial and amended involuntary claims shared a common core of operative facts. Both claims asserted that terms of his plea agreement were withheld from him. The amended claims specifically supported the the unknowing **nature** attempted to be set out in the initial claim. Thereby,both claims alleged insufficient notice of the charge against him. Both claims alleged deficient attorney conduct at the C.O.P. hearing on September 5th, 2014, and during plea negotiations. Furthermore, both claims by there nature concerned omissions in Mr.Chery's plea documents. A change of plea hearing is a critical stage, which defendants have a right to competent counsel. Having not being properly appraised of the § 2422(b) statute or it's predicate prior to pleading, Mr.Chery could not make an informed decision on whether to stand trial or seek a plea. As supported by the record, at no time during the C.O.P. hearing was it confirmed as to just what any of his plea pages contained. His charge was not read, nor was any page initial or signed by him, except the one he saw, the signature page. The government in its Amend Motion Corrected Response (CV-DE #32 pgs.9-10) stated '' the government will use(April 1st, 2016) as the date to determine relation back. They did not state that it was the correct date. Although in a response pleading, Mr.Chery first attempted being a **laymen** to amend his initial § 2255 by raising new claims in his ''Response To Government Response'' pleading (CV-DE# 10 pgs.9-11). There he attempted to raise claims of (1) Attorney Abandonment For Direct Appeal , and (2) I.A.C.-Failure To Investigate. Therefore, the correct date pursuant to Houston v. Lack to determine relation back was March 25th, 2016 (the date he executed it and dropped it in the mailbox) . As the government pointed out, his A.E.D.P.A. deadline was 3/31/2016. Mr.Chery's amended involuntary claim was timely, and warrants further review.

ARGUMENT FOR ALLOWANCE OF WRIT

The Court of Appeals erred in affirming the denial of Mr.Chery's § 2255 on the basis that his amended involuntary claim did not relate back to his initial unknowingly claim.

Mr.Chery by assertion claimed insufficient notice of his charge in his initial involuntary plea claim. He alleged terms concerning his plea documents were withheld from him. In support of his plea omissions ground, he further expanded the unknowingly nature of the claim by identifying the omitted essential element from his plea documents (criminal offense). Counsel was deficient in not ensuring Mr.Chery received true notice and have proper understanding of the predicate offense element of the § 2422(b) statute, or as it was known to him, the Enticement of A Minor charge. Former counsel failed to ensure that Mr.Chery received notice of **all** charges to be defended against.

This error predjudice Mr.Chery. He cound not prepare a defense to an illegitimate offense, or make an informed decision on whether to stand trial or seek a plea. Furthermore, his admitted acts as a whole did not fall within the scope of sexual activity offenses of Florida, or Florida's definition of sexual activity. Finally, Mr.Cherys Amend and Clarification pleadings (CV-DE# 17,19) both asserted '' Failure To Investigate'' Ineffective Assistance of Counsel claims, which he first attempted to raise **before** the expiration of his A.E.D.P.A. deadline of March 31, 2016. See (CV-DE#10 pgs 9-11) ''Response To Government Response''. Executed on March 25, 2016; Raising Failure To Investigate.

CONCLUSION

The judgment of the Eleventh Circuit is a unique departure from decisions of this court that permit relation back so long as a common core of operative facts unite the original and newly asserted claim. Furthermore, Mr.Chery timely (although in a responsive pleading CV-DE#10 pg 9-10) attempted to raise the ''Failure To Investigate'' claim prior to the A.E.D.P.A. deadline of March 31, 2016. Mr.Chery by signing and mailing that document prior to 3/31/16 timely attempted to raise it. Thereby, the government's selection of April 1, 2016 as marking his first attempt to Amend is incorrect. Therefore, Mr.Chery seeks an order by this court granting this Writ Of Certiorari.

Done This 7 Day Of November, 2018

Sign: Marckenson Chery

Sincerely

Marckenson Chery
#05166-104
Federal Correctional Institution
P.O. Box 1031
Coleman, FL 33521

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