19-5497

No. _____

ORIGINAL

Supreme Court, U.S.
FILED
JUL 25 2019
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

John Harold McGill — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

11th Circuit United States Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

John Harold McGill, Fed. Reg.# 65982-019
(Your Name)

F.C.C. Forrest City, P.O. Box 9000
(Address)

Forrest City, AR. 72336
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1. When a district court issues erroneous jury instructions that include (a) to consider conviction with less than guilt beyond all reasonable doubt and (b) instruction that contravenes the established Pattern Jury Instructions, crafted to address a particular charged offense, violate an American citizens Fifth and/or Sixth Amendment rights?

2. Does a district court seeking to secure a conviction that does not comport to the plain language nor Congressional intent of the statute, violate an American citizens Constitutional rights?

3. Does the absence of expert testimony in a jury trial deprive a defendant of their right to present a viable defense therefore violate their Sixth Amendment right?

4. Does the Eleventh Circuit Court's absence of the normal procedures followed by other courts set precedential producing opinions that is depriving inmates of a process that could reveal them to be wrongfully incarcerated?

LIST OF PARTIES

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

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

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TABLE OF AUTHORITIES

CASES

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OTHER

Exhibit A (Petitioners filing of Notice of Appeal in Appellate Court)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

[ ] reported at Case: 18-13941-C; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at Case: 1:14-cr-00167-AT-LTW; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

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

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was May 7, 2019.

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

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

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

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

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

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2422(b)

"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 persuades, induces, entices or coerces and individual who has not attained the age of 18 years, to engage in prostitution or 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."

AMENDMENT 5

Criminal actions - Provisions concerning - Due Process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Comes now, John Harold McGill, Petitioner in the above styled and titled action and his cause requests this Court to accept his Petition for Writ of Certiorari, and grant him his requested relief.

The Petitioner's prior arguments have claimed substantial denials of his Constitutional rights. These issues included ineffective assistance of counsel, prosecutorial misconduct, selctive prosecution, entrapment, erroneous jury instructions, lack of expert testimony, plain language or Congressional intent of the statute and the District Courts failure to address all issues presented in the Petitioners 2255 Motion.

The Petitioner will now present statements containing relevant facts material to the consideration of the questions presented to the Court.

The Petitioner was arrested, as a part of a sting operation conducted with the participation of a multi-agency law enforcement group, headed by the Georgia Bureau of Investigation and included the Federal Bureau of Investigation. Petitioner was arrested after having responded to an advertisement posted on Craigslist, for an adult woman seeking a man, indicated as WFM-35, (a woman looking for a man, indicating her age as 35). This advertisement was posted in the "Adult Only, Casual Encounters" section of Craigslist.

Petitioner has maintained throughout all proceedings that he only sought an encounter with an adult female as well as to proclaim his innocence of the charge leveled against him. The statute reads as follows: 18 U.S.C. 2422(b):

> "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 persuades, induces, entices or coerces and 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."

Facts material to question one presented are summarized as follows: As found within The Pattern Criminal Jury Instructions, Elements of the Offense for 2422(b), Instruction 64-11, (copy attached as Appendix E) opens with: "In order to prove the dedendant guilty of using a facility of interstate commerce to persuade (or induce or entice or coerce) an individual to engage in illegal sexual activity, the government must prove each of the following elements beyond a reasonable doubt." However, the instruction provided to the jury in Petitioner's case by the District Court Judge was as follows: "The government's proof of burden is heavy, but it doesn't have to prove a defendant's guilt beyond all reasonable doubt. The government's proof only has to exclude any reasonable doubt." The court then repeated the above phrase and substituted the word "reasonable" with "possible". (Trial transcript, page 275, lines 9-18).

The second issue of erroneous jury instructions presented by the court included the following: "It is not necessary for the United States to prove that the minor was actually persuaded, induced or enticed to engage in sexual activity. It is, however, necessary for the United States to prove that the defendant intended to engage in some form of unlawful sexual activity with the minor." (Trial transcript, page 268, lines 20-25).

The relevant issue relating to the Second Element of the Offense: "that the defendant 'knowingly' persuaded (or induced or enticed or coerced) [name of individual] to engage in sexual activity (or prostitution)." Authority cited for the Eleventh Circuit is UNITED STATES v. DANIELS, 685 F.3d 1237 (11th Cir. 2012); Eleventh Circuit Criminal Jury Instruction, Offense Instruction 92.2. Additionally stated in Pattern Jury Instruction 64-13, Second Element - Persuasion to Engage in Sexual Activity reads as follows: "Section 2422(b) does not require that the defendant commit any prior crime or actually engage in any unlawful sexual activity with the minor. The conduct prohibited by the statute is the 'persuasion, inducement, enticement, or coercion'

of the minor rather than the sex act itself."

Relevant facts material to question two are presented and summarized as follows: The plain language of the statute has been presented in the quotation of the statute found on the first page of this statement of the case. The Petitioner's prior argument has presented numerous, relevant citations of case law that states the intent of Congress. The actual words of members of Congress are quoted within The Congressional Record, found in the original legislation (H.R. 3494) passed by the U.S. House in June, 1998. The Senate, after significant amendments, passed the legislation on October 9, 1998, with final passage by the House on October 12, 1998. The common colloqy presented by both houses may be summed up with an address to Senator Hatch, Mr. President: "Pedophiles who roam the Internet, purveyors of child pornography and serial child molestors are specifically targeted." Petitioner avers that the government never presented any evidence that he 'roamed the Internet in search of a child'. During the Initial Appearance of the Petitioner, AUSA Jessica Morris stated to the court that "in our investigation we have been unable to uncover any indications that petitioner has ever done anything like this before, and there was no evidence of child pornography possession or access as we see in most cases". (Initial Appearance, May 9, 2014, transcript page 8). Furthermore AUSA Morris stated in the governments response to Petitioner's 2255 Motion that, "McGill was not convicted of being a pedophile."

Petitioner served as a public school employee, teacher and administrator for a period of 35 years, and certainly never accused of being a child molestor.

Facts material to the consideration of question three are summarized as follows: Within the content of the Petitioner's 2255 Motion, he presented the significance of expert testimony and the critical necessity during a trial of this nature. Petioner cited the ineffectiveness of trial counsel for a lack of even attempting to secure expert testimony. Petitioner had requested, pre-trial, in regard to seeking expert testimony. Petitioner presented, within his 2255 Motion (page 4), citations

of numerous case law that expert testimony is critical in prosecutions in 2422(b) and key to any defense in this type of case. The governmnet, in their response to the issue of expert testimony stated: "McGill asserts that an expert witness could have educated the jury as to the modus operandi of a true pedophile." (Doc. 67 at 5, page 15 of 37). The government further stated: "It is unclear if this type of expert testimony would have been admissible at trial."

Expert testimony is admissible under Federal Rules of Evidence 702, if it will assist the jury "to understand the evidence or determine a fact at issue." The right of an accused to have compulsory process of obtaining witnesses in his favor stands on no lessor footing than his other Sixth Amendment rights of the United States Constitution.

Facts material to the consideration of question four are summarized as follows: The Petitioner, a pro se litigant, provided the court with 110 pages of definitive argument, case law citations, approximately 100 pages of exhibits to outline the significant violations of his Constitutional rights presented within the filing of his 2255 Motion. In Petitioner's reply to the governments response, he provided an additional 53 pages of relevant rebuttal argument as well as 15 pages of exhibits. The District Court denied the Petitioner's 2255 Motion on August 21, 2018. The Petitioner filed a timely Notice of Appeal, as well as a request to procede In Forma Pauperis with the United States District Court on August 31, 2018. Petitioner was notified that In Forma Pauperis status was GRANTED on October 24, 2018. However, a letter from the Appeals Court, dated October 30, 2018 (six days later) that stated that they had received a copy of the order of the district court declining to issue a certificate of appealability. The letter further stated that the Petitioner may file a Motion for a Certificate of Appealability with the Court of Appeals. Petitioner timely filed a Motion for a Certificate of Appealability with the Court of Appeals on November 5, 2018. The Court of Appeals issued an order on March 21, 2019, that denied Petitioner's Motion for a C.O.A. Petitioner

timely filed a Motion For Reconsideration on April 2, 2019. The Court of Appeals received Petitioner's Motion For Reconsideration on April 5, 2019. The Motion was denied (22 working days later) on May 7, 2019. All of these actions occured without benefit of representation by a court appointed attorney for the Petitioner, even though the I.F.P. had been granted on October 24, 2018. The judges listed on the unsigned order included the Honorable Charles R. Wilson and the Honorable Jill Pryor.

In the publication, "Lead Reports"August 8, 2018, these same two judges publically critisize their own Eleventh Circuit procedures. (Copy attached as Appendix F). The judges expressed "dismay that the court has recently begun making precedent in the absence of the normal procedures followed by other courts." The panel held that "the court's dispositions of such applications, often made without the benefit of counsel, are precedential." Judge Wilson wrote, "that decision means we have the worst of three worlds in this Circuit." This publication stated that "The Eleventh Circuit publishes more dispositions of these applications than any other circuit, but unlike other circuits it adheres to a strict 30-day time limit for making the decision." He further expressed his belief that "We should not elevate these hurriedly-written and uncontested orders in this matter."

A second concurrence written by Judge Beverly B. Martin and joined by the other two, said the court has turned "a mere screening duty into a rich source of precedent-producing opinions that is depriving inmates of a process that could reveal them to be wrongfully incarcerated." The article closes with the statement that "these decisions will affect "scores of people serving long sentences in Alabama, Florida and Georgia."

REASONS FOR GRANTING THE PETITION

Petitioner will now present compelling reasons for the exercise of the Supreme Courts discretionary jurisdiction as requested in Section XIII of the procedure to petition this court for a Writ of Certiorari. This presentation will address the decision as to why the decision(s) of the district court were erroneous as well as the national importance of having the Supreme Court decide the questions involved.

ISSUE 1(a): The district court issued jury instruction to consider conviction utilizing a standard of less than proving each element of the offense beyond a reasonable doubt.

Argument:

The district court, on August 21, 2018, issued an order that adopted the Magistrate Judge's Report and Recommendation that the instant pro se motion to vacate brought pursuant to 28 U.S.C. 2255 be denied.

Petitioner had presented, within his 2255 Motion, and Reply to the government's response, extensive evidence of erroneous jury instructions. Petitioner is unable to find any mention or response in the district judges order, to the issue raised in the 2255 Motion concerning the use of erroneous jury instruction given to the members of the jury at his trial. The district court's direct instruction to the jury included the following statement: "The government's proof of burden is heavy, but it doesn't have to prove a defendants guilt beyond all reasonable doubt."

As U.S. Supreme Court Justice Scalia noted in 'Sullivan' in considering harmlessness vel non of an improper instruction on reasonable doubt, the constitutional right to a jury verdict comprehends the constitutional right to a jury verdict free of the influence of violations of other constitutional rights. In view of 5th Amendment Due Process Clauses requirement of proof beyond a reasonable doubt, 'jury verdict required by the 6th Amendment is a jury verdict of guilt beyond a reasonable doubt'; accordingly, a jury verdict

reached at level of certainty less than beyond a reasonable doubt is not a valid verdict under the Sixth, as well as the Fifth Amendments and must be replaced by verdict under both amendments."

ISSUE 1(b): The district court issued jury instructions to consider conviction that contravenes the established Pattern Jury Instructions utilized by federal courts to address the particular charged offense.

Argument:

The Pattern Jury Instructions to be utilized in U.S.C. 2422(b) cases includes the statement that "in order to prove the defendant guilty of using a facility of interstate commerce to persuade (or induce or entice or coerce) an individual to engage in sexual activity the government must prove each of the following elements beyond a reasonable doubt."

Also cited within the Pattern Jury Instructions, 64-13, Second Element: Section 2422(b) "does not require that the defendant actually engage in any unlawful sexual activity with the minor. The conduct prohibited by the statute is the 'persuasion, inducement, enticement, or coercion' of the minor rather than the sex act itself." Additionally cited: "that the defendant knowingly persuaded (or induced or enticed or coerced" [name of individual] to engage in sexual activity (or prostitution)." However, the District Court in Petitioner's case provided erroneous jury instructions that required the jury to consider conviction by stating: "It is not necessary for the United States to prove that the minor was actually persuaded, induced or enticed to engage in sexual activity."It is however, necessary for the United States to prove that the defendant intended to engage in some form of unlawful activity with the minor." (Trial Transcript, page 268, lines 20-25).

Cited in Brand, 467 F. 3d at 202, "A conviction under 2422(b) requires a finding of an attempt to entice or an intent to entice, not an intent to perform the sexual act following the persuasion." An alternative basis for conviction, as presented in JOSEPH, 542 F. 3d 13; (2nd Cir. U.S. Court of Appeals, September 9, 2008), AND here in Petitioner's case, does not reflect the requirement of an

intent to entice. The challenged language permitted conviction even if JOSEPH did not intend to entice (the purported minor) into engaging in a sexual act with him." Additionally stated: "But the offense remains enticing - the absence of an intent to entice is not a crime. Because the jury charge permitted conviction on an invalid basis and because the risk that the jury grounded its verdict on that basis is not insubstantial, the defendant is entitled to a new trial." This decision renderd in the JOSEPH case included the opinion of U.S. Court of Appeals Judge Sotomayor.

The District Court's erroneous jury instruction failed to require proof of each element of conviction thus affecting Petitioner's substantial rights. See UNITED STATES v. GAUDIN, 515 U.S. 506, 511 S.Ct. 2310, 132 L.Ed.2d 444 (1995). "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all elements of the crime with which he is charged."

The national importance of having the Supreme Court decide the questions presented may be found within the Pattern Jury Instructions, Comment section: As found within Instruction 64-13.1 Third Element - Illegal Sexual Activity. "There is a significant question with respect to this element, so the court should exercise caution in charging it. Section 2422(b) uses the phrase 'sexual activity for which any person can be charged. While the terms 'sexual act' and 'illicit sexual conduct are defined in Title 18, 6 the term 'sexual activity' is not, leaving open the question whether the terms 'sexual act' and 'sexual activity' are synonymous or whether one is broader than the other. Thus, as all of the conduct included in the definition of 'sexual act' in section 2246(2) requires physical contact between the defendant and the victim, 'sexual activity for which any person can be charged' applies only to criminal offenses that involve such contact. In UNITED STATES v. TAYLOR (7th Circuit) determined that "as a result, the underlying criminal offense crime charged did not qualify under this definition and the conviction was reversed. However, in UNITED STATES v. FUGIT (4th Circuit), disagreed with TAYLOR.

In KOTTEAKOS, 328 U.S. at 765. (See UNITED STATES v. LANE,474, U.S. 438, 450 and n. 13 (1986) "errors occuring during trial courts

instructions are more important than ones during lengthly presentation of evidence"; KOTTEAKOS, 328 error not harmless, because error 'pervaded the entire jury charge."

The Supreme Court has explained, "the influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him." U.S. v. WISECARVER 598 F.3d 982 (CA 2010).

As cited in UNITED STATES v. NEAR, 708 Fed. Appx. 590, September 5, 2017, U.S. Court of Appeals for 11th Circuit, "Few tenents are more fundamental to our jury trial system than the presumption that juries obey a court's instruction."

It is patently clear that the district court issued jury instructions that did not provide valid instructions to the jury so that they understood the issues. These erroneous instructions misled the jury as they did not accurately reflect the law. This error seriously affected the Petitioner's substantial rights, including the violation of his Fifth and Sixth Amendment, Constitutionally protected rights. The jury instructions permitted the jury to convict for a non-offense of 2422(b). The errors seriously affected the fairness and integrity of Petitioners trial, and could have meant the difference between conviction and acquittal.

There are thousands of individuals charged in 2422(b) cases across the country every year, primarily through efforts of the Internet Crimes Against Children (ICAC) Task Force groups, at a tremendous cost to the taxpayers of this country, and for those wrongfully accused and erroneously convicted - a price to pay that is unconscionable.

The Office of Juvenile Justice Delinquency Prevention at the Department of Justice reported funding for the ICAC program in 2014 that totaled $27,049,000 to support task forces, training and technical assistance. The funding in FY 2009 was $75,000,000. The OJJDP released an article on the DOJ website June 22, 2015, that stated an ICAC task force arrested 1,140 from 41 states in a two month, nationwide investigation. They additionally reported that 61 ICAC task forces participated with more than 3,000 federal, state and local law enforcement agencies participating. Other facts pre-

sented included that more than 54,000 individuals have been arrested to date.

To the Petitioners knowledge, a 2422(b) case has never been heard by the United States Supreme Court. As found within the Pattern Jury Instructions, their are significant discrepencies in the interpretations of the various courts across the country. Significant case law suggests that convictions have been permitted with a standard of less than guilt beyond all reasonable doubt, as well as erroneous jury instructions in these cases that permitted conviction even if the defendant did not intend to entice. The offense remains enticement - the absence of an intent to entice is not a crime.

ISSUE 2: The district court sought conviction that does not comport to the plain language of the statute nor Congressional intent.

Argument:

In CONN. NATIONAL BANK v. GERMAIN, 503 U.S. 249, 253-54 (1992) the Court has instructed time and again that courts presume Congress "says in a statute what it means and means what it says there." Courts "are not at liberty to rewrite the statute to reflect a meaning we deem desirable." ALI v. FEDERAL BUREAU OF PRISONS, 552 U.S. 214, 228 (2008). Courts "must instead give effect to text Congress enacted" Id. These comments were attributed to Judge Neil Gorsuch, prior to appointment to the U.S. Supreme Court. As stated in AMERICAN TOBACCO CO. v. PATTERSON, 456 U.S. 63, 68 (1982): "The starting point when constructing a statute is the language of the statute. As in all cases including statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used."

As found in Pattern Jury Instruction 64-13 Second Element - Persuasion to Engage in Sexual Activity, (page 2) in the 'comment' section: "In the District of Columbia Circuit has reversed a conviction where the district court charged the jury that the defendant need not speak directly with the child as long as he or she believed that he was communicating with someone who could 'arrange' for the

child to engage in unlawful sexual activity." The problem with the instruction, in the court's view, was that the defendant or the intermediary must have acted with the intent of 'transforming or overcoming the minor's will' and the term 'arrange' does not accomplish that requirement. UNITED STATES v. HITE, 767 F.3d 1154, 1160, 1166-1167 (D.C. Cir. 2014)."

Included in the Petitioner's 2255 Motion, page 69, was a quotation taken from the Trial Transcript, page 230, lines 13-18, in closing statements of the prosecutor, AUSA Traynor, to the members of the jury: "This, as you have seen, is a case about a man who wanted to have sex with a 13 year-old girl, and he did everything he could to make it happen. He 'arranged' it with the mom."

Prosecutor's closing remarks - insinuating 'bad character' cannot be used to argue that the defendant committed the crime for which he is being tried, or had the propensity to commit the crime. Federal R. Evidence 404(a)."May be found to commit prosecutorial misconduct." COOK v. BORDENKIRCHER, 602 F. 2d 117, 120 (6th Cir. 1979).

The Petitioner presented evidence throughout his 2255 Motion of the fact that he never communicated with a child, testified that he didn't believe a minor was even there. As defense counsel questioned the officer that had interviewed the Petitioner immediately after the Petitioners arrest, as the officer was giving testimony at the trial: "And during your interview of him, didn't he tell you multiple times that he never thought there was a minor involved?" Officer Drew responded, "Yes." Defense Counsel: "And he told you multiple times he never intended to have sex with a minor?" The officer responded: "Yes." The prosecutor also questioned the officer during the course of the trial and asked: "Did he ever say he didn't think there would be a child there?" Officer Drew responded: "He did, He did say that." Trial transcript page 157, lines 15-17.

In the denial of Petitioner's 2255 Motion, the District Court erroneously claimed that "the movant's text were not induced or otherwise prompted by the government agent." A review of the trial

transcript reveals the intent of the government agent and the exchange of text between the Petitioner and the undercover agent were, in fact, induced or otherwise prompted by the government agent. Trial Transcript, page 120, line 14, testimony of Case Agent Nicholson being questioned by defense counsel: "And then at 10:59 and shortly thereafter, you had indicated that you had already essentially broached this with her and talked with her about it and she was fine with it?" Agent Nicholson responded: "Yeah." In Trial Transcript page 121, beginning with line 19, Defense Counsel: "You (case agent) said, "She would know what to expect. Actually was planning for this weekend, but so far nothing has been able to be worked out?" Agent Nicholson responds: "That's correct."

This testimony goes to a critical part of the entire issue as it offers definitive proof that the Petitioner **was not guilty** of bending the will, or attempting to bend the will of a minor through persuassion, inducement or enticement.

Criminal Law 21 - Entrapment: "Government agents may not originate a criminal design, implant in an innocent persons mind the predisposition to commit a criminal act, and then induce the commission of the crime so that the government may prosecute."

Extensive research of 2422(b) cases, repetitively cites the plain language of the statute and the Congressional intent of Congress. One of the most frequesntly quoted cases comes from the Eleventh Circuit in U.S. v. MURRELL, 368 F.3d at 1284-1285 (2004). The MURRELL case plainly stated: "Congress has made a clear choice to criminalize persuasion and the attempt to persuade." The MURRELL court explained: "2422(b) punishes persuasion, inducement, enticement or coercion of the minor."

The District Court, in their denial of Petitioner's 2255 Motion, erroneously ignored the broader and highly exculpatory content of this case.The relevant context is that in behavior typical of an adult male seeking a potential sexual encounter with an adult female, the Petitioner was emailing several different individuals on adult sections of websites, only one of whom was Agent Nicholson. Petitioner has maintained his innocence of the charge against him, as

he was ONLY searching for a potential encounter with an adult female, not for child sex. The F.B.I. obtained 1000's upon 1000's of pages of forensic data from electronic devices confiscated from the Petitioner upon his arrest, that absolutely and unequivocally supports Petitioner's position as their was NO child pornography, NO searches or contact for any interaction with a child for sex. However, there was extensive evidence that the Petitioner had sought a potential encounter with an adult female. This overwhelming evidence that corroborates the claims of the Petitioner was never presented to the members of the jury.

The plain language of this statute, as well as the intent of Congress has been quoted extensively in numerous cases and was often cited within the Petitioner's 2255 Motion. Congressional intent is quoted throughout the "Congressional Record" as the enactment of the legislation was being considered.

In LAUREYS, 653 F. 3d at 39-40, Judge Brown explained: "It is an open question in this circuit whether Section 2422(b) permits a conviction for persuasion of an adult. I say it is an open question only in the sense that we have never addressed it; the plain meaning of the statute leaves no room for doubt about the answer. Section 2422(b) is unambiguously directed at persuasion of a minor." Judge Brown observed that it is well settled that Section 2422(b) requires an attempt to bend the child-victims will." Id. at 40 and n. 3-4 collecting cases; see DWINELLS, 508 F. 3d at 71 (explaining that Section 2422(b) criminalizes an intentional attempt to achieve a mental state - a minor's assent). "Even courts that have accepted the government's "adult intermediary" theory have nonetheless "required proof that **the defendant** attempted to cause assent on the part of a minor, not an adult intermediary." It should be noted from the LAUREYS case that it was determined that lack of expert testimony prejudiced him by leaving him unable to rebut dubious, quasi-expert testimony of the undercover agent - Detective Palchak. The court determined that he met the burden to establish that he was denied his right to effective assistance of counsel by trial counsels failure to secure expert testimony. The court reversed judgement and

remanded the case.

The intent of Congress is well documented, and throughly presented within the Petitioner's 2255 Motion, Reply as well as this current petition. With the sheer number of individuals arrested and prosecuted to date, astronomical costs, documentation within case law, discrepencies and/or conflict of interpretation in the different districts - such as "it is an open question in this circuit" certainly provides credence of compelling reasons for the Supreme Court to finally hear a 2422(b) case. This need exists for this Petitioner as well as other thousands similarly situated.

ISSUE 3: The absence of expert testimony in the jury trial deprived the Petitioner of his Sixth Amendment right to present a viable defense.

Argument:

The Government, in their response to the Petitioner's initial filing of his 2255 Motion, erroneously stated: "it is unclear if this type of expert testimony would have been admissible at trial."

Cited within notes of the advissory committee on Rules for USC, January 2, 1975, P.L. 93-595, 1, 88 Stat. 1937: April 17, 2000, effective December 1, 2000; April 26, 2011, eff. December 1, 2011: "An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is an expert witness. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See F. Rules Evidence 703 to 705."

As found in CURTIN v. U.S. , 588 F. 3d 993, 997 (9th Cir. 2009), addressed patterns of behavior identified "that virtually all of the defendants who have been convicted of crimes which the defendant was charged, 18 U.S.C. 2422(b), utilize the same basic approach." Such behaviors have been studied at length, as the Government itself regulary relies on them in order to establish probable cause for its search warrants in similar cases." Additionally: "Expert testimony

with respect to the psychiatric conditions (as defined by the Diagnostic and Statistical Manual of Mental Disorders) and patterns of behavior clinically associated with sexual attraction to children is critical in prosecutions under 2422(b)."

In CROSS v. UNITED STATES, 928 F. 2d 1030 (11th Cir., 1999) as well as ROMERO, 189 F. 3d at 584-85 "holding that expert testimony concerning child sex offenders was admissible and helpful to the jury in understanding how child sex offenders operate - something which most jurors would have little experience."

As cited in HOWARD v. WALKER, 406 F.3d, 114, 117, 135 (2d Cir. 2005), "denial of Howard's ability to call expert witness could not be deemed harmless because they undermined petitioner's ability to challenge the factual basis for the charges, or to lay a foundation for his affirmative defense to the charges."

The members of Congress, during the debates of legislation regarding U.S.C. 2422(b) during October of 1998, added an amendment under section 112: "Study of Persistent Sexual Offenders" to have the National Institute of Justice carry out a study of persistent sexual predators and report back to Congress and the President the results of such study. Included in this requirement was a synthesis of current research in psychology, sociology, law, criminal justice and other fields to identify common characteristics of such offenders.

The Congressional Record" (page H4491), June 11, 1998, cites that "law enforcement have also found a close relationship between child pornography and victimization by pedophiles." U.S. House Member Roukema, of New Jersey, addressed the entire House and was quoted as having said: "I want my colleagues to know, be assured, that knowledgeable professionals in the field, psychiatrists, psychologists, all know of the implicit, persisting compulsive behavior that leads to this type of violence against children." (page H4496). Also cited was the result of a national poll conducted in the United States that revealed that child pornography is the tool of choice used by child molestors and pedophiles to entice young children into sexual activity. They are also unaware that most sexual pedophiles, sexual predators, possess child pornography that is usually on their person or found

in their homes."

Congress also included in their required report from the National Institute of Justice to report back to the House and Senate Judiciary Committees and make recommendations on technological tools and law enforcement procedures to help investigators prioritize scarce resources to those cases where there is actual hands-on abuse by the suspect. Congress furthermore provided that indigent defendants are entitled to the assistance of a mental health expert if necessary for adequate representation. See 18 U.S.C. 3006A(e).

Petitioner contends that expert testimony would have shown a reasonable probability that the result of the proceedings would have been different but for the defense counsel's ineffective assistance of counsel by not seeking the authority of an expert witness. The District Courts erroneous decision to acknowledge the overwhelming, numerous failures of defense counsel, that included the fact that the Petitioner had asked him to pursue the assistance of an expert witness, could not be deemed harmless.

As cited in LAUREYS, "Unsurprisingly, courts have found ineffective assistance arising from counsel's failure to offer expert mental health testimony where it was necessary to an adequate defense. See, e.g. GRAY v. BRANKER, 529 F.3d 220, 229-32 (4th Cir. 2008); DANDO v. YUKINS, 461 F.3d 791, 798-800 & n.3 (6th Cir. 2006); AINSWORTH v. WOODFORD, 268 F.3d 868, 875-76 (9th Cir.); MAULDIN v. WAINWRIGHT, 723 F. 2d 799, 800-01 (11th Cir. 1984). Also in LAUREYS, "The record shows that trial counsel lost sight of how (the expert witness) could have placed his client's conduct in a clinical context and mitigated the effects of evidence offered by the government and the defendant himself. Indeed, there was some indication that trial counsel failed altogether to appreciate the benefits of the relevant and appropriate mental health testimony which could have bolstered LAUREYS' defense. Within the LAUREYS case it was also stated that, "trial counsel's failure to secure expert testimony cannot properly be excused as a 'reasonable, calculated choice." This case is cited as having drawn from such precedent as Judge Kavanagh's masterful opinion in United States v. Nwoye, 824 F.3d 1129, 1139-40 (D.C. Cir. 2016), recognizing need for expert testimony on the battered woman

syndrome. In the summation of this case, the court stated that "trial counsel's error led to the complete failure to provide expert mental health testimony, thereby depriving Laureys of an adequate defense.

Many cases across the country cite the critical significance of securing expert testimony, as well as the disastrous consequences for failing to do so. Congress, during the debate of this legislation, demanded that a national study be conducted of the assistance of experts in the field report back to Congress and the President. It is readily apparent that the significane of expert testimony in these cases effects many thousands of defendants that are similarly situated to the Petitioners case. The absence of expert testimony deprives a defendant of their right to present a viable defense.

ISSUE 4: The Eleventh Circuit Court's absence of the normal procedures followed by other courts sets precential producing opinions that is depriving inmates of a process that could reveal them to be wrongfully incarcerated.

Argument: In the Petitioner's case, the district court judge granted his request to proceed at the appellate level with In Forma Pauperis status on October 24, 2018. The Application for a Certificate of Appealability was promptly denied, only SIX days later on October 30, 2018. Petitioner submitted a Motion to Reconsider the issuance of a Certificate of Appealability and within approximately 30 days, the Appellate Court issued an order denying the Petitioner a Motion to Reconsider. These actions were taken without the Petitioners benefit of representation by a court appointed attorney.

An article was presented in the publication "Lead Reports" Vol. 103, No.18 published August 8, 2018, and identified as "Eleventh Circuit Panel Criticizes Own Habeas Procedures." Three Eleventh Circuit judges comprised a panel that addressed a recent decision - made by another panel, holding that "the Court's dispositions of such applications, often made without the benefit of counsel, are precedential." The article, (A copy is attached as Appendix F), states that the "Eleventh Circuit publishes more dispositions of of these applications than any other circuit, but unlike other

Circuits, it adheres to a strict 30 day time limit for making the decision.

The article quotes Judge Beverly Martin, Judge Charles R. Wilson and Judge Jill Pryor joining the opinion of Judge Martin that the Court is "depriving inmates of a process that could reveal them to be wrongfully incarcerated." Ironically, it was Judge Reginald R. Wilson, joined by Judge Jill Pryor that hastily denied the Petitioner his opportunity to prove himself to be wrongfully incarcerated.

These Honorable Appellate Court Judges have admitted their own dismay at this procedure - not followed by other Circuits and the fact "these decisions will affect scores of people serving long sentences in Alabama, Florida and Georgia."

This admission of the Appealate Court Judges and revelation that the Eleventh Circuit does not follow the procedures of the other circuits is certainly a compelling reason for the United States Supreme Court to GRANT this Petitioners request to issue a Writ of Certiorari. The current practice of the Eleventh Circuit obviously effects this pro se litigant that has maintained his claim of innocence since day one. The current practice certainly has the potential to adversely affect "scores of people serving long sentences" in the Eleventh Circuit.

CLOSING

Because 2422(b)'s statutory text is clear and unambiguous, its plain meaning must be given effect. As cited in LAUREYS, 653 F.3d at 42 by Judge Brown: "Section 2422(b) is unique in targeting efforts to overbear the wills of children online. We have every reason to presume Congress meant what it said. Congress has not been reticent to amend 2422(b). . . If Congress wishes to expand 2422(b) . . . Congress does not need our help in rewriting the statute."

The district court's 2422(b) jury instruction in the Petitioners case - which permitted the jury to rest Petitioner's conviction on conduct 2422(b) does not proscribe - was inconsistent with the statutes plain language, Congress's intent in enacting the statute, its severe penalty, and federal attempt jurisprudence.

Petitioner's case presents issues of importance beyond the particular facts and parties involved. Compelling legal questions are presented that have created disagreements among lower courts that should be resolved through the acceptance and decision of the United States Supreme Court in this case.

CONCLUSION

The Petitioner requests and prays this Honorable Court will overturn the conviction, and vacate his sentence. It is for all these very reasons that Petitioner, John Harold McGill, respectfully requests this Court to accept his Petition for a Writ of Certiorari and grant him his relief.

Respectfully submitted,

John Harold McGill

Date: July 24, 2019