No. 19-5497

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MCGILL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROSS B. GOLDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a certificate of appealability (COA) on his claim that the district court gave faulty instructions defining reasonable doubt and describing the elements of the charged crime.

2. Whether petitioner was entitled to a COA on his claim that the evidence was insufficient to support his conviction.

3. Whether petitioner was entitled to a COA on his claim that his counsel provided constitutionally ineffective assistance by not retaining an expert witness.

4. Whether the court of appeals procedurally erred in denying a COA.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ga.):

United States v. John McGill, No. 14-CR-167 (Feb. 9, 2015)

John McGill v. United States, No. 17-CV-805 (Aug. 21, 2018)

United States Court of Appeals (11th Cir.):

United States v. John McGill, No. 15-10611 (Dec. 9, 2015)

John McGill v. United States, No. 18-13941 (Mar. 21, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5497

JOHN MCGILL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. B1) is not published in the Federal Reporter. The order of the district court (Pet. App. D1-D8) is not published in the Federal Supplement but is available at 2018 WL 4002055.

JURISDICTION

The order of the court of appeals was entered on March 21, 2019. A motion for reconsideration was denied on May 7, 2019 (Pet. App. A1). The petition for a writ of certiorari was filed on July 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of attempting to persuade, induce, or entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b). Pet. App. D2. He was sentenced to 120 months of imprisonment, to be followed by a lifetime term of supervised release. Ibid. The court of appeals affirmed, 634 Fed. Appx. 234 (per curiam), and petitioner did not seek review in this Court. Petitioner later filed a motion under 28 U.S.C. 2255 to vacate his sentence. See Pet. App. D1. The district court denied that motion and denied a certificate of appealability (COA), id. at D8, and the court of appeals likewise denied a COA, id. at B1.

1. In February 2014, a law enforcement officer posing as the mother of a 13-year-old girl placed an advertisement on Craigslist seeking a "descreet," "disease free" man to provide "fatherly attention" to her "young teen daughter." D. Ct. Doc. 91, at 2 (Mar. 20, 2018) (citation omitted); see Pet. App. D1. Petitioner responded to the advertisement and exchanged emails and text messages with the "mother" in which they discussed petitioner having sex with the "girl." 634 Fed. Appx. at 235; Pet. App. D1-D2; D. Ct. Doc. 91, at 2-7. Petitioner asked the "mother" about "shar[ing] details of plans with [the child] so she would know what to expect"; explained his intentions to "tell her how pretty she is," "kiss her and hope that she got into it," and "kiss and

rub her body"; and asked the "mother" to "[t]ell her that when she showers to shower everywhere because we may go there." D. Ct. Doc. 91, at 5-7 (citations omitted; third set of brackets in original).

After approximately three hours of communication in which almost 200 messages were exchanged, petitioner drove to the "girl's" home. See D. Ct. Doc. 91, at 5, 7. He was arrested there, in possession of an unopened condom. Id. at 7-8.

2. On May 6, 2014, a grand jury in the Northern District of Georgia returned an indictment charging petitioner with attempting to persuade, induce, or entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b). Indictment 1. Petitioner proceeded to trial, where his defense was that "he was only seeking an extramarital affair with an adult female and never intended to have sex with a child." D. Ct. Doc. 91, at 9. Petitioner's evidence at trial consisted of his own testimony and a video recording of a portion of his post-arrest interview. Ibid.

In its instructions to the jury, the district court stated that "[t]he government's burden of proof is heavy, but it doesn't have to prove a defendant's guilty beyond all reasonable doubt. The government's proof only has to exclude any reasonable doubt concerning the defendant's guilt." Trial Tr. 261. The court immediately followed up by saying: "Let me say that again. The government's burden of proof is heavy, but it doesn't have to prove a defendant guilty beyond all *possible* doubt. The government's

proof only has to exclude any reasonable doubt concerning the defendant's guilt." Ibid. (emphasis added). The court then defined a reasonable doubt as "a real doubt based upon your reason and common sense after you have carefully and impartially considered all the evidence in the case. Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your affairs." Ibid.

Petitioner objected to the instruction. Trial Tr. at 275. The court responded that it would issue the instruction again, and petitioner stated that doing so would be "satisfactory." Ibid. The district judge then told the jury that he "might have gotten tongue-twisted on one of the instructions, and so I want to give that to you again. So this is your instruction on the definition of reasonable doubt." Id. at 276. The court then instructed the jury:

> The government's burden of proof is a heavy one, but it doesn't have to prove a defendant's guilt beyond all possible doubt. The government's proof only has to exclude any reasonable doubt concerning the defendant's guilt.
>
> A reasonable doubt is a real doubt based upon your reason and common sense after you have carefully and impartially considered all the evidence in the case.
>
> Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs.

Ibid. Both petitioner and the government explicitly declined the opportunity to object following that corrected instruction. Ibid.

On the elements of the charged offense, the district court instructed the jury, as relevant here, that "[i]t 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 Tr. at 268. The court explained that "[i]t is not necessary for the United States to prove that the defendant communicated directly with the minor," but that the defendant must have "knowingly and willfully communicated with someone, such as a person believed to be the minor's parent, in an attempt to stimulate or cause the minor to engage in unlawful sexual activity with him." Id. at 269. Finally, the court informed the jury that petitioner was charged with an attempt, meaning that the government had to prove that he "knowingly intended to commit the crime of using a facility of interstate commerce to induce a minor to engage in unlawful sexual activity and [his] intent was strongly corroborated by his taking a substantial step toward committing the crime." Ibid. No one objected to those instructions.

The jury found petitioner guilty. Pet. App. D2. The district court sentenced petitioner to 120 months of imprisonment, to be followed by a lifetime term of supervised release. Ibid.

3. The court of appeals affirmed. 634 Fed. Appx. 234. As relevant here, the court of appeals rejected petitioner's

contention that the evidence was insufficient to sustain a conviction because "it showed only that he communicated with the fictitious mother and not directly with the fictitious daughter." Id. at 235. The court applied the "well-settled" rule that direct communications with a minor are not necessary under the text of 18 U.S.C. 2422(b). 634 Fed. Appx. at 237. Instead, contacts with a "fictitious parent in order to 'cause the minor to engage in sexual activity'" may be sufficient to prove that "the defendant had the necessary specific intent to induce the minor to engage in unlawful sexual activity." Ibid. (quoting United States v. Murrell, 368 F.3d 1283, 1287 (11th Cir.), cert. denied, 543 U.S. 960 (2004)). Petitioner did not seek certiorari review.

4. On March 3, 2017, petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his conviction and sentence. D. Ct. Doc. 67, at 1-6 (Mar. 3, 2017). As relevant here, petitioner contended that his counsel provided constitutionally ineffective assistance by not retaining an expert witness on pedophilia, D. Ct. Doc. 67-1, at 2-10 (Mar. 3, 2017), and by not making certain sufficiency arguments, id. at 12-13. Petitioner also argued that the district court gave faulty instructions on reasonable doubt and the elements of Section 2422(b). Id. at 7-8, 10, 101-103.

A federal magistrate judge recommended that petitioner's motion be denied. D. Ct. Doc. 91, at 1-51. As relevant here, the magistrate judge rejected petitioner's argument that counsel was ineffective for failing to retain an expert witness to opine that

petitioner was not a pedophile. Id. at 43-44. The magistrate judge found no "reasonable probability that such evidence would have changed the jury's verdict" because petitioner "was not charged with being a pedophile or having a history of pedophilia," and was instead "charged with a specific unlawful act that occurred on a specific occasion, and the evidence was more than sufficient to support his guilt as to that crime." Ibid.

As to the sufficiency of the evidence, the magistrate judge observed that the court of appeals had already considered this question and had found that the evidence "amply supported all the elements of a § 2422(b) offense under the attempt clause." D. Ct. Doc. 91, at 45 (citation omitted); see 634 Fed. Appx. at 237 & n.2. On an "independent review of the evidence," the magistrate judge agreed, and determined that defense counsel would have lacked any basis to move for a judgment of acquittal. D. Ct. Doc. 91, at 45. The magistrate judge also rejected petitioner's contention that the district court had erroneously instructed the jury on the elements of Section 2422(b), explaining that the court's instructions were consistent with the "attempt" charge in this case and with Eleventh Circuit precedent. Id. at 47.

The district court subsequently adopted the magistrate judge's report and recommendation over petitioner's objections. Pet. App. D1-D8. In rejecting petitioner's objections, the court explained that petitioner's sufficiency-of-the-evidence claim was also procedurally barred: "Once the Eleventh Circuit has decided

an issue on appeal, 'it cannot be relitigated in a collateral attack under section 2255.'" Id. at D3 (quoting United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000), cert. denied, 531 U.S. 1131 (2001)). The district court also rejected petitioner's objections concerning his pedophilia-expert claim, agreeing with the magistrate judge that "such testimony would not have effectively countered the extensive evidence of [petitioner's] guilt." Id. at D8.

In addition to denying petitioner's Section 2255 motion, the district court denied a COA. Pet. App. D8. The court of appeals likewise denied a COA. Pet. App. B1.

ARGUMENT

Petitioner contends (Pet. 9-20) that his conviction and sentence should be vacated because the district court's jury instructions were infirm, the evidence was insufficient to convict, and his counsel was constitutionally ineffective for failing to retain an expert. The court of appeals correctly declined to issue a COA for any of petitioner's claims, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioner further contends (Pet. 20-21) that the court of appeals has adopted inappropriate procedures for handling Section 2255 cases; that claim is premised on a misunderstanding of the procedures followed in this case. Further review in this Court is unwarranted.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted). The lower courts correctly determined that petitioner's claims did not satisfy that standard.

a. Petitioner first contends (Pet. 9-13) that the district court's jury instructions were infirm in two respects -- namely, that the court erred in defining "reasonable doubt" and in explaining the elements of 18 U.S.C. 2422(b). These contentions lack merit.

Petitioner argues (Pet. 9) that the district court erred by instructing the jury that the government "doesn't have to prove a defendant[']s guilt beyond all reasonable doubt." But although the district court at one point made a misstatement to that effect, it immediately corrected that misstatement by informing the jury that, in fact, the government only did not have to prove guilt beyond all "possible doubt." Trial Tr. 261 (emphasis added). After petitioner's subsequent objection, the court called the jury back into the courtroom and gave the instruction from scratch,

correctly. Id. at 276. Petitioner then indicated that he had no objection. Ibid. Petitioner does not identify any error in the district court's full instructions, including the two clarifications, nor does he argue that reasonable jurists could disagree on that issue. See Victor v. Nebraska, 511 U.S. 1, 17 (1994) (no error when "the judge instructed the jury that a reasonable doubt is 'not a mere possible doubt'"). And petitioner has not suggested that the decision below implicates any division of authority on reasonable-doubt instructions.[1]

Petitioner also contends (Pet. 10-13) that the district court erred in giving the following instructions regarding 18 U.S.C. 2422(b): "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 Tr. 268. Contrary to petitioner's assertion (Pet. 10), those sentences are consistent with the current Eleventh Circuit Pattern Jury Instructions for the crime of Attempted Coercion and Enticement of

[1] Petitioner notes (Pet. 9) that the district court did not specifically address this claim. But although petitioner criticized the reasonable-doubt instruction in his Section 2255 motion, see D. Ct. Doc. 67-1, at 101-102, he did not explicitly make a claim for relief based on it. Indeed, the magistrate judge did not address the reasonable-doubt instruction, and petitioner did not object to that omission in his objections to the magistrate judge's report and recommendation. See D. Ct. Doc. 93 (Apr. 11, 2018).

a Minor to Engage in Sexual Activity, 18 U.S.C. 2422(b). See 11th Cir. Pattern Jury Instructions (Crim. Cases) Instruction No. O92.3 ("[I]t is not necessary for the Government to prove that the individual was actually [persuaded] [or induced] [or enticed] [or coerced] to engage in [prostitution or] sexual activity; but it is necessary for the Government to prove that the Defendant intended to engage in [prostitution or] some form of unlawful sexual activity with the individual."). The same instructions were also explicitly approved by the Eleventh Circuit in United States v. Lee, 603 F.3d 904, 917-918, cert. denied, 562 U.S. 990 (2010).

Petitioner appears to contend (Pet. 10-11, 13) that the district court's instruction was faulty because it allowed the jury to find him guilty without proof that petitioner intended to entice a minor victim. That contention, however, disregards the rest of the instructions. In addition to the language above, the district court instructed the jury that the government was required to prove that petitioner "knowingly intended to commit the crime of using a facility of interstate commerce to induce a minor to engage in unlawful sexual activity and [that] the defendant's intent was strongly corroborated by his taking a substantial step toward committing the crime." Trial Tr. 269. Reading the instructions as a whole, as they must be read, see, e.g., Hamling v. United States, 418 U.S. 87, 107-108 (1974), it is clear that the district court correctly required proof of petitioner's intent. Reasonable jurists could not conclude otherwise, and

petitioner has identified no conflict of authority that the denial of relief on this claim would implicate.

b. Petitioner further contends (Pet. 13-17) that the evidence was insufficient to sustain his conviction because the government did not establish that he communicated directly with a child victim. This Court has recently and repeatedly denied petitions for writs of certiorari raising similar questions regarding the scope of Section 2422(b). See Montgomery v. United States, 139 S. Ct. 1262 (2019) (No. 18-651); Brooks v. United States, 139 S. Ct. 323 (2018) (No. 18-5164); Grafton v. United States, 138 S. Ct. 2651 (2018) (No. 17-7773); Matlack v. United States, 137 S. Ct. 2293 (2017) (No. 16-7986); Rutgerson v. United States, 137 S. Ct. 2158 (2017) (No. 16-759); Reddy v. United States, 135 S. Ct. 869 (2014) (No. 14-5191) (plain-error posture). The same result is warranted here.

Section 2422(b) imposes criminal liability on a person who, through the mail or a means of interstate or foreign commerce, "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." 18 U.S.C. 2422(b). As the courts of appeals have unanimously recognized, Section 2422(b) may be violated where a defendant communicates with an adult intermediary instead of with the minor directly, so long as the defendant acts with the requisite intent. See United States v.

Roman, 795 F.3d 511, 516 (6th Cir. 2015) (collecting cases); see also, e.g., United States v. Clarke, 842 F.3d 288, 298 (4th Cir. 2016); United States v. Hite, 769 F.3d 1154, 1160 (D.C. Cir. 2014); United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir.), cert. denied, 543 U.S. 960 (2004). Petitioner suggests that a division of authority exists on this question (Pet. 16), but he points only to a dissenting opinion in United States v. Laureys, 653 F.3d 27, 37-42 (D.C. Cir. 2011) (Brown, J., dissenting in part) (per curiam), cert. denied, 565 U.S. 1132 (2012), in support of his position.

To the extent that petitioner is challenging the sufficiency of the evidence that he in fact attempted to communicate indirectly with a minor, the court of appeals considered and rejected this argument on petitioner's direct appeal. 634 Fed. Appx. at 237 ("[Petitioner]'s argument that communications with an adult intermediary are insufficient to support a § 2422(b) conviction lacks merit."). The court described the "ample evidence" supporting petitioner's conviction, including that petitioner "asked numerous questions about [the 13-year old] Emily's interests and sexual experience, what Emily would enjoy, and what would 'freak her out'"; requested that Emily wear "sexy panties" because "[g]uys really like that" and take a shower "everywhere because we may go there"; and "described what he would say and do to make Emily feel comfortable and the sex acts he planned to perform with Emily." Ibid. (second set of brackets in original).

The court correctly determined that the evidence was sufficient to prove that petitioner "attempted to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sex." Ibid.

As the district court below observed, a claim that has been raised and rejected on direct review generally may not be relitigated in a collateral attack under 28 U.S.C. 2255. See Pet. App. D3; see also, e.g., Foster v. Chatman, 136 S. Ct. 1737, 1758 (2016) (Alito, J., concurring in the judgment) ("at least as a general rule, federal prisoners may not use a motion under 28 U.S.C. § 2255 to relitigate a claim that was previously rejected on direct appeal") (collecting cases); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000) ("[O]nce a matter has been decided adversely to a defendant on direct appeal it cannot be relitigated in a collateral attack under section 2255.") (citation omitted; brackets in original), cert. denied, 531 U.S. 1131 (2001). The courts below thus correctly denied a COA on this claim, and it implicates no division of authority.

2. Petitioner separately contends (Pet. 17-20) that his counsel provided constitutionally ineffective assistance by not retaining an expert witness. Although he does not describe his desired expert's testimony in the petition, petitioner did assert in his Section 2255 motion that the expert would have testified "to the modus operandi of a true pedophile"; his theory was that such evidence would have established that petitioner "does not

'fit the mold' of a sex offender." D. Ct. Doc. 67-1, at 5, 79; see id. at 9-10.

Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant asserting a Sixth Amendment claim of ineffective assistance of counsel must show both (1) that counsel's performance was deficient, meaning that "counsel's representation fell below an objective standard of reasonableness," id. at 688, and (2) that the deficient performance prejudiced the defendant, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694.

As the magistrate judge correctly observed, counsel's decision whether to call a particular witness is "the epitome of a strategic decision" that will rarely rise to the level of objectively unreasonable performance. D. Ct. Doc. 91, at 43 (quoting Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir.) (en banc), cert. denied, 516 U.S. 856 (1995)); see also, e.g., Harrington v. Richter, 562 U.S. 86, 106-109 (2011) (discussing strategic considerations bearing on trial counsel's decision to retain an expert); Boyle v. McKune, 544 F.3d 1132, 1139 (10th Cir. 2008) ("[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney."), cert. denied, 556 U.S. 1136 (2009). And even if petitioner's counsel had called an expert to testify about pedophilia, the district court reasonably found that "such testimony would not

have effectively countered the extensive evidence of [his] guilt." Pet. App. D8. Petitioner was "not charged with being a pedophile," nor did the government present any evidence at trial "that [he] had any such history." D. Ct. Doc. 91, at 43. Instead, petitioner "was charged with a specific unlawful act that occurred on a specific occasion." Id. at 43-44. As described above and by the Eleventh Circuit, the evidence was more than sufficient to support petitioner's guilt of that crime. Petitioner therefore cannot make either showing required by Strickland, the courts below properly denied a COA, and his factbound ineffective-assistance claim implicates no division of authority in the lower courts.

3. Finally, petitioner contends (Pet. 20-21) that certiorari is warranted because the court of appeals procedurally erred in denying him a COA. In support, petitioner notes that some Eleventh Circuit judges have recently criticized that court's practice of issuing precedential opinions denying second-or-successive Section 2255 applications. But no such procedure was at issue here.

In United States v. St. Hubert, 883 F.3d 1319 (11th Cir.), cert. denied, 139 S. Ct. 246 (2018); vacated and superseded, 905 F.3d 335 (2018), cert. denied, 139 S. Ct. 1394 (2019), petition for cert. pending, No. 19-5267 (filed July 18, 2019), the court of appeals held "that law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions are binding precedent on all subsequent panels of this Court,

including those reviewing direct appeals and collateral attacks." Id. at 1329. Some circuit judges have criticized that rule. See United States v. St. Hubert, 918 F.3d 1174, 1198 (11th Cir. 2019) (Wilson, J., dissenting from the denial of rehearing en banc); see also id. at 1199-1210 (Martin, J., dissenting from the denial of rehearing en banc); In re Williams, 898 F.3d 1098, 1100-1105 (11th Cir. 2018) (Wilson, J., specially concurring); id. at 1105 (Martin, J., specially concurring).

Petitioner's Section 2255 motion, however, was not itself a "second or successive" one, and the court of appeals did not cite a "published three-judge order[] issued pursuant to 28 U.S.C. 2244(b)" in support of its denial of a COA. St. Hubert, 883 F.3d at 1328-1329. Rather, the court of appeals issued a one-judge order finding that petitioner had failed to make the requisite "substantial showing of the denial of a constitutional right" to warrant a COA. Pet. App. B1. The court of appeals thereafter issued a two-judge order denying petitioner's motion for reconsideration, which again stated only that "he has offered no meritorious arguments to warrant relief." Id. at A1. The procedures about which petitioner expresses concern therefore did not apply to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROSS B. GOLDMAN
Attorney

DECEMBER 2019