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

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

JOHN MCGILL
Petitioner, Pro Se

STATEMENT

Comes now, John McGill, petitioner pro Se, in the above styled case and titled action and his cause submits this Reply to the Brief for the United States in Opposition to Petition for Writ of Certiorari, and plea for this Court to grant petitioner his requested relief.

This Case Presents a Classic Case of Statutory Interpretation

Words matter in a criminal case. The words of a criminal statute define the elements of the offense. The words in jury instructions are suppose to reflect the intent of Congress, as well as the words of a criminal indictment.

This petition asks the Court to resolve a split among the circuit courts to bring uniformity of statutory interpretation, and the quantum of proof required for conviction under 18 U.S.C.2422(b) - a criminal statute that imposes a ten year mandatory sentence.

Erroneous Jury Instructions Presented by the District Court

The District Court in this case presented more than one erroneous instruction to the jury. Included in the erroneous jury instructions was the following statement: "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." (T.T. p. 268). Petitioner asserts that these words, cited in this charge to the jury, are in direct opposition to the words found within the indictment. The indictment is cited within the government's Brief in Opposition (p.3). The government does not dispute the reading of the indictment.

The words found within the Pattern Jury Instruction 64-11, Elements of the Offense, include that the defendant knowingly persuaded (or induced or enticed or coerced) an individual to engage in sexual activity (or prostitution). (See Appendix A). This instruction also demands that in order to prove the defendant guilty... the government must prove each of the following elements beyond a reasonable doubt. The Second Element, 64-13, found within these instructions plainly states that "the conduct prohibited by the statute is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself." (See Appendix B).

In United States v. Hite, F.3d, No. 13-3066 (D.C. Cir. Oct. 21, 2014), the D.C. Circuit held that the "ordinary meanings of the verbs persuade, induce, entice, and coerce demonstrate that 2422(b) is intended to prohibit acts that seek to transform or overcome the will of a minor." In so holding, the Hite court rejected a jury instruction that permitted conviction based on conduct merely intended "to cause a minor to engage in illegal sexual activity." The decision in Hite stands in direct conflict with the definition of the same statute in the Eleventh Circuit, which does not demand evidence of intent to "transform or overcome" the minor's will to sustain a conviction under 2422(b).

The definition of "induce" adopted by the Eleventh Circuit is unique among the circuit courts and imposes a lower quantum of proof to secure conviction under 2422(b). Where the Eleventh Circuit has held that "induce" means merely to "stimulate or cause the minor to engage in sexual activity," United States v. Murrell, 368 F.3d 1283, 1287 (11th Cir. 2004), other circuits have held that "inducement" requires proof that the defendant moved the minor through some form of persuasion or influence. See United States v. Rashkovski, 301 F.3d 1133, 1136 (9th Cir. 2002) (defining "induce" to mean "to move by persuasion or influence"); see also United States v. Thomas, 410 F.3d 1235, 1245 (10th Cir. 2005)(evaluated sufficience of evidence based on jury instruction that defined "induce" to mean "leading or moving by persuasion or influence"); United States v. Engle, 676 F.3d 405, 411 n.3 (4th Cir. 2012)(observing that the words in 2422(b) convey the idea of "one person leading or moving another by persuasion or influence". The Eleventh Circuit's weaker proof requirement results in disparate treatment of defendants charged in its trial courts.

Petitioner has previously included the following relevant case law that plainly states the elements concerning the criminalization in this statute being the intent or attempt to entice. Cases presented include Brand, 467 F.3d at 202; Joseph, 542 F.3d 13; Murrell, 368 F.3d at 1287; Lee 603 F.3d at 913 quoting Nestor, 574 F.3d 159,162 n. 4; Lee, (11th Cir. 2010) in quoting Nestor specifically noting that the statute "criminalizes an intentional attempt to achieve a mental state - a minor's assent."

As relevant here, Chambers v. McDaniel, 549 F. 3d 1191, 1200

(9th Cir. 2008), "instruction that violated due process by permitting the jury to convict petitioner without finding the essential element of deliberation could not be deemed harmless...because the error here did not effect a minor issue at trial, but rather went to the very heart of the case."

The record vividly demonstrates how the conflicting interpretations of 2422(b) can result in harsh unequal treatment under the law. Petitioner would not have been convicted under 2422(b) had he been tried in the District of Columbia or in a federal circuit that similarly demands proof of an intent to overcome a minor's will.

In light of the conflict between Murrell and Hite and other circuit courts that similarly require some act directed at bending the minor's will for conviction under 2422(b), the Court should grant certiorari to bring uniformity to interpretation to this criminal statute.

Opening of Reply to the Government's Brief in Opposition.

At the beginning of the government's Brief in Opposition, hereafter denoted as B.I.O., they have submitted a set of questions that are different than the original questions presented by the petitioner to this Court. A copy of petitioner's original submission of the questions is attached, identified as Appendix (C); the government's entry is attached, identified as Appendix (D). Question 2, presented by the petitioner, addresses plain language and congressional intent of the statute. The government's submission only addressed sufficiency of the evidence.

In the government's B.I.O. , (page 2), they present opening statements of their version of this case. The government fails to acknowledge that it was, in fact, the law enforcement officer that initiated, planted the idea of a crime, and induced, prompted and lead the conversation in this case. It is readily discernable that the government placed an advertisement on Craigslist, in an adult-only section of the website, listed as Casual Encounters, 35 year-old woman, seeking a man.

Government Task Force Intent Revealed

Confirmation of the government agent's actions are found within trial testimony. The trial transcript plainly reveals the intent

of the government agent. In trial testimony (p.117), the agent stated: "I can send a picture." Petitioner never asked for a picture. This action, on the part of the government agent, clearly was against ICAC protocol - and was not solicited by the petitioner. Following the action of the agent sending a picture, petitioner asked: "Shall I call you in the morning?" Found within the Trial Transcript (p. 95), the agent stated: "He asked me if I had a lot going on tomorrow." The agent then, with the intent to lure the petitioner through persuasion and pressure stated: "I, (agent) said, "Sunday is our family day, I work during the week and it's busy. I was trying to figure for tonight." In trial testimony (p.119), Defense Counsel asked the agent if the defendant had asked: "What would you like to happen?" Defense Counsel then asked the agent: "Is that correct?" The agent confirmed: "Yes." It is recorded in the conversation that the agent then states to the defendant: "Uhm, well, she is a virgin." Defense Counsel followed up with the question:"And at any point prior to that had he inquired about your daughter's -- purported sexual history or background?" The agent responded: "No, that's the first time that comes up there it appears." Trial testimony (p.120), defense counsel asked the agent: "You had indicated that you had already essentially broched this with her and talked with her about it and she was fine with it?" The agent responded: "Yeah." The agent also responded: "She would know what to expect. Actually was planning for the weekend, but so far nothing has been able to be worked out." This testimony of the agent strongly corroborates that there was no effort by the petitioner to transform or overcome the "minor's" will.

In the government's B.I.O. (page 3 and 13), they reference statements about a shower... however, the government fails to acknowledge that it was confirmed by the government agent during trial testimony (p. 98), where the agent stated: "I (agent) said, I can put her in the shower and she can be fresh for you." Here again, it is confirmed that it was the government agent leading and introducing the criminal design. The government fails to acknowledge that the petitioner drove to what he believed to be the home of a 35 year-old woman that had posted an advertisement seeking a man on the Craigslist website. This is directly related to the intent of the petitioner, as he was

seeking an encounter with an adult female. Additional confirmation of the intent of the government agent was revealed during testimony of AUSA Morris during the Initial Appearance, May 9, 2014, (p.6): "Mr. McGill was arrested on March 2nd as a part of a GBI sting operation in which an undercover ad was placed on Craigslist soliciting a sexual encounter..."

In petitioner's case, the District Judge stated: "Even if this Court were to concede Movant's claim that the fictitious mother was the first to mention sex..." Prior to this statement, however, found within the Final Report and Recommendation of the Magistrate Judge, the government erroneously claims that the earliest mention of sex between the Movant and the government agent were made by the Movant. (p. 5 of 51). Just prior to the statements the government just referenced, the agent had "asked the petitioner when he would be available for something?" Here again, it is the agent leading, applying pressure on the defendant during their conversation.

Relevant State of Georgia Case Dismissed.

As relevant here, within a similar time period within the State of Georgia, a state case, "Cosmo v. The State, Ga." (Case No. S13G1070) the Georgia Court of Appeals reversed a conviction against defendant Dennis Cosmo, who was charged based upon evidence obtained by the North Georgia ICAC Task Force. It should be noted that petitioner, John McGill, was originally charged based upon evidence obtained by the North Georgia ICAC Task Force in their undercover sting operation. According to court documents found in the "Cosmo" case, it was stated that "only slight evidence is required to authorize a charge on a subject" referencing entrapment. Ellzey v. State, 272 Ga. App. 253. 257 (1), (2005). In the Cosmo case, the court determined, "the evidence presented by the State showed that the idea for the commission of the crime originated with a state agent." The court further determined "that the trial court's failure to charge was reversible error and that Cosmo was entitled to a new trial." The prosecution appealed the court's decision to the Georgia Supreme Court where they reversed the earlier decision on one of the charged accounts, however ruled that the defendant was entitled to retrial as a result of trial court's failure to charge on entrapment. The Georgia Court of Appeals ruled on June 11, 2014, that the defendant was entitled to a retrial. The prosecution dropped the case and it was dismissed.

Issue of Predisposition of a Defendant.

In Jacobson, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed. 2d 174 (1992) where the U.S. Supreme Court overturned the conviction, when the majority concluded that there was inadequate evidence to demonstrate that the defendant was predispositioned to violate the law. The Court concluded that the prosecution failed to meet it's burden of proving beyond a reasonable doubt that the defendant's predisposition to commit the crime was 'independant of the government's acts.' The Court also concluded, "Congress had not intended that the detection and enforcement processes of the statute should include instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." Importantly, "Jacobson" does establish that "the issue of a defendants predisposition is to be considered at the moment of the government's first contact, rather than the moment the government induces the defendant to commit the crime."

In petitioner's case, the statements of both the agent and AUSA offer more than ample support that the petitioner did not originate the idea of a crime, that it was in fact the government official that originated and instigated an act on the part of a person otherwise innocent in order to lure them to its commission and to punish them.

Judgement of Acquittal.

The government's B.I.O. (page 7), references judgement of acquittal. Petitioner addressed this issue within his 'Written Objection to Final Report and Recommendation' (page 48). The government had falsely claimed, in their response (page 24), that defense counsel "declined to make a motion because, as he stated, he believed the motion lacked merit." That was a false statement on the part of the government. The truth may be found in the Trial Transcript (page 187). Defense counsel failed to move for a judgement of acquittal at trial.

Petitioner Requests Further Review.

Petitioner specifically requests that his conviction and sentence should be vacated. Further review in this Court is warranted. Petitioner respectfully prays that the Court grant his petition for writ of certiorari.

ARGUMENT

QUESTION # 1

Erroneous Jury Instructions

Petitioner has presented, within his 2255 Motion and Reply, extensive evidence of erroneous jury instructions. The first presented example of erroneous jury instruction, quoted in the trial transcript, (p. 275) and referenced in the government's B.I.O. (p. 3), stated: "The government's proof of burden is heavy, but it doesn't have to prove a defendants guilt beyond all reasonable doubt." The court repeated the instruction and substituted the word reasonable with possible.

In the government's B.I.O., they acknowledge that "the district court at one point made a misstatement to that effect, it immediately corrected the misstatement by informing the jury that, in fact, the government only did not have to prove guilt beyond all possible doubt." The petitioner contends that in view of the 5th Amendment Due Process Clause requirement of proof beyond a reasonable doubt as well as a jury verdict required by the 6th Amendment is a jury verdict beyond a reasonable doubt.

The Court called the jury back into the courtroom, after having been dismissed to the jury room for deliberations, and provided the following statement: "The government's burden of proof is a heavy one, but it doesn't have to prove a defendants guilt beyond all possible doubt. The government's proof only has to exclude any reasonable doubt concerning the defendant's guilt." (T.T. 276). This statement is just repeated from the prior instruction provided to the jury by substituting the word reasonable with possible. The government's B.I.O. contends that "Petitioner does not identify any error in the District Court's full instructions." Petitioner asserts that this is an erroneous conclusion. The Court substituted the word reasonable with possible. Significantly, it is the terms "did not have to prove" and "doesn't have to prove" - also denoted as erroneous. Petitioner contends that they have, in fact, identified serious errors in the District Court's full instructions.

Found on page 10 of the government's B.I.O., they state that

"petitioner criticized the reasonable-doubt instruction in his Section 2255 Motion (p.101-102), he did not explicitly make a claim for relief on it." This statement is not true. Petitioner presented factual evidence, supported by relevant case law that addressed the reversal of convictions based upon the issue of erroneous jury instructions. These citations were a part of the petitioner's entire body of work, presented within his 2255 Motion, found in his Prayer for Relief as he explicitly petitioned the court a claim for relief by vacating, setting aside or correcting a sentence by a person held in federal custody.

Most relevant to the present issue here is the conceding by the government in their B.I.O. (p.10), through their admission that "Indeed, the magistrate judge did not address the reasonable-doubt instruction." The government also presented to this Court that "petitioner did not object to the omission in his objections to the magistrate judge's report and recommendation." This is false. In the petitioner's written objection to the magistrate judge's report, (p.49), it was presented that the jury instructions were erroneous. Further asserted in the petitioner's written objection to the magistrate judge's report was the identification of AUSA Traynor quoting one of the same erroneous instructions in his Brief to the Appellate Court. (Identified as p.27, listed as p. 42 of 64). However, the fact remains that the magistrate judge "did not address the reasonable-doubt instruction." It should be noted that the petitioner also addressed within the submission of his response to the government reply, the following relevant information (p.37), identifying the Clisby Rule, requiring district courts to address and resolve all claims raised in habeas proceedings, regardless of whether relief is granted or denied. Clisby, 960 F.2d at 935-936. See Rhode v. United States, 583 F.3d 1289, 1291. (11th Cir. 2009).

The Second Issue of Erroneous Jury Instructions

The second issue of seriously erroneous jury instructions has been presented in the opening section of this current document, (pages 1-3). As identified within the "Hite" case, the D.C. Circuit explicitly rejected a conviction based on a mere intent to 'cause' a minor to engage in an unlawful sex act, whereas the Eleventh Circuit has embraced a lower quantum of proof and, as a result, has broadened criminal conduct under 2422(b) to include acts that do not "necessarily

require any effort [by the defendant] to transform or overcome the will of the minor." The Hite court reversed defendant's conviction because of the instructional error and ordered a new trial.

Petitioner has presented compelling evidence that the District Court issued erroneous jury instructions that included to consider conviction without having to prove the defendant's guilt beyond all reasonable doubt (or possible doubt). The Court also issued instructions that contravene the established Pattern Jury Instructions and sought to consider conviction on an element not criminalized in 18 U.S.C. 2422(b). There was no indication that the petitioner ever attempted to 'bend the will of a minor' or otherwise persuaded, induced or enticed, or attempted to do so in this case. Petitioner requests that the Court should grant certiorari to bring uniformity of interpretation to this criminal statute. Petitioner further contends that his 5th and 6th Amendment rights were violated. Petitioner specifically requests that his conviction and sentence should be vacated. Further review in this Court is warranted.

QUESTION # 2

Petitioner presented four questions to this Court for consideration in his Petition for a Writ of Certiorari. The second question presented by the petitioner was stated as follows:

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?" (Please see Appendix C).

However, in the government's B.I.O., they present the following:

2. "Whether petitioner was entitled to a COA on his claim that the evidence was insufficiant to support his conviction. (Appendix D).

In the government's B.I.O., they appear to contend that the petitioner had only presented "that the evidence was insufficient to support his conviction" because the government did not establish that he communicated directly with a child victim." This contention by the government, however, substantially disregards the focus of the petitioners presented claims. Reading the questions presented in this Petition for a Writ of Certiorari as a whole, as they must be read, petitioner contends that the District Court sought to seek a conviction that does not comport to the plain language, nor Congressional intent

of this statute.

The government's B.I.O. (p.11) cites Hamling v. United States: "it is clear that the district court correctly required proof of petitioner's intent." In petitioner John McGill's case, indeed the government focused on intent - however, the district court focused on the wrong intent and permitted a jury to convict on a perceived intent that is not criminalized in 2422(b). The court permitted the jury in this case to convict the defendant on the perceived basis that he intended to engage in some form of unlawful sexual activity. (T.T. p. 268), and not an intent to persuade, induce, entice or coerce a minor.

In the Eleventh Circuit Criminal Jury Instruction 92.2 and Pattern Jury Instruction 64.13, Second Element - the exact word used is persuasion. "Persuasion to engage in Sexual Activity." The words are not intent to engage. The second element 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." Numerous, Relevant Cases are Cited in Previous Submissions to the Court:

The cases previously presented by the petitioner included, but were not limited to: United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir. 2004). The Murrell Court 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." In Laureys, 653 F.3d at 39-40: "Section 2422(b) is unambiguously directed at persuasion of a minor. It is well-settled that Section 2422(b) requires an attempt to bend the child-victims will." In Joseph, (2nd Cir. 542 F. 3d, 2008): "Jurors permitted to convict on invalid legal basis - conviction may not stand, remanded for a new trial. A conviction under 2422(b) requires a finding only of an attempt to entice, and not an intent to perform the sexual act following the persuasion." In U.S. v. Lee, 603 F. 3d 904 (11th Cir. 2010): "In determining whether sufficient evidence of a substantial step has been presented to affirm the 2422(b) attempt conviction, the panel cited both Murrell and Yost for the proposition that "the government must prove that the

defendant took a substantial step toward causing assent, not toward causing actual sexual contact."

Erroneous Jury Instructions Relieved the Government it's Burden of Proof.

The government's B.I.O. (p.13), states that "the court described the ample evidence supporting petitioner's conviction" and proceded to present statements of the petitioner, in an attempt to justify this conviction. Petitioner contends that outside of the jury instructions, the district court's misrepresentation of 2422(b) may be best reflected in the 'alleged substantial steps' it identified toward what it viewed as a 2422(b) offense. The statements of the petitioner, cited in the government's B.I.O., are not steps in an online or telephonic persuasion or enticement of a minor. In other words, the jury may well have convicted petitioner without making any findings that he intended to engage in persuasion, inducement, enticement or coercion of a minor. The jury instruction used in petitioner's case relieved the government it's burden of proving that petitioner had actually attempted to persuade, induce, entice or coerce a minor to engage in sexual activity.

The Jury Instruction Did Not Reflect the Substance of the Indictment.

The indictment is cited within the government's B.I.O., (p. 3). The government does not dispute the reading of the indictment. As cited in Sanabria v. United States, 437 U.S. 54, 65-66 (1978): "The precise manner in which an indictment is drawn cannot be ignored. The court must read the indictment as written, not how the government wishes it to be read." Petitioner contends that as found in United States v. Keller, 916 F.2d 628, 634 (11th Cir. 1990): "The trial court's instruction altered the 'essential elements of the offense' contained in the indictment...to broaden the possible bases for conviction beyond what is contained in the indictment."

Congressional Intent Found Within the Words of Congress.

The words, the intent of Congress matters. Congressional intent is found within the very words of criminal statute U.S.C. 2422(b). The words that define the purpose of this statute are recorded, during the enactment of this legislation in "The Congressional Record". (Appendix E).

Included in the Congressional Record are such statements as: "H.R. 3494 targets pedophiles who stalk children on the Internet. H.R. 3494 cracks down on pedophiles who use and distribute child pornography to lure children into sexual encounters. Under current law, the federal government must prove that a pedophile 'persuaded, induced, enticed or coerced a child to engage into a sexual act." Also found in the "Congressional Record" are the words of members of the U.S. Senate. Included examples are: "The provisions found in the original House Bill would have criminalized conduct that was otherwise lawful: It is not a crime for adults to communicate with each other about sex, even if one of the adults pretends to be a child. Given these significant concerns, the 'sting' provisions have been stricken from the House Leahy-Dewine substitute." (Appendix E).

It should be noted that AUSA Morris attempted to significantly discount the importance of calling an expert witness to testify concerning pedophelia, as this issue was raised by the petitioner in his 2255 Motion. In the government's response to the 2255 Motion (p.15 of 37), AUSA Morris made the statement: "McGill was not convicted of being a pedophile." However, it was specifically identified in Congress' own words, a primary focus, their expressed intent "to target pedophiles with the passage of this legislation."(Appendix E).

In summation, the District Court's Jury Instructions permitted the jury to rest petitioner's conviction on conduct 2422(b) does not prescribe; constructively amended the Indictment; was not consistent with the plain language of the statute, Congressional Intent in enacting the legislation, it's severe penalty, and federal attempt jurisprudence. Had the jury been correctly instructed, and required to find proof that petitioner's conduct was directed at 'bending the will' of a minor, he could not reasonably have been found guilty under 2422(b). Petitioner specifically requests that his conviction and sentence should be vacated. Further review in this Court is warranted.

QUESTION # 3

Issue of the Absence of Expert Testimony

Question three addresses the absence of expert testimony in a jury trial and its subsequent deprivation of a defendants right to present a viable defense as insured by their Sixth Amendment right.

As found in United States v. Joseph, 542 F.3d 13 (2nd Cir. 2008), the Second Circuit addressed the issue of expert testimony from Dr. James Herriot (Psychologist, Institute of Advanced Human Sexuality, San Francisco, Ca.). In Joseph, a jury convicted the defendant of violating 18 U.S.C. 2422(b). The Court of Appeals vacated the conviction based upon an erroneous jury instruction, In Dicta, however, the court suggested that the district court might have erred in excluding Dr. Herriot's proposed expert testimony." The Second Circuit "urged the District Court to give a more thorough consideration to the defendant's claim to present Dr. Herriot's testimony, in the event it is offered at retrial." The Court stated that "Dr. Herriot's field of study and experience qualified him to offer relevant testimony, and that his opinions appear to be highly likely to assist the jury to understand the evidence." The Court further noted that "although some jurors may have familiarity" with this Internet activity, "it is unlikely that the average juror is familiar with the activity that Dr. Herriot was prepared to explain in the specific context of sexually oriented conversations in cyberspace."

Other cases referencing expert testimony include United States v. Wragg. Statements from this case reveals that "Expert testimony with respect to the psychiatric condistion (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)." "Educating the jury about the established patterns of behavior that individuals who are sexually attracted to children typically engage is key to any defense, as it will allow the attorney to juxtapose the defendant's history and behavior with those of a textbook pedophile." U.S. v. Curtin, (9th Cir. 2009).

In petitioner's case, AUSA Morris, in the government's response to petitioner's 2255 Motion, offered the following response: (p.15 of 37), "It is unclear if this type of expert testimony would have been admissible at trial. Further, McGill was not convicted of being a pedophile." Petitioner presented detailed, relevant citations of case law, pertaining to expert testimony, including that of the 11th Circuit within the submission of his 2255 Motion (p.2-7). Expert testimony is admissible under F.R.E. 702, if it will assist the jury "to understand

the evidence or determine a fact at issue."

As cited 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." Additionally, "Such behaviors have been studied at length, as the government itself regularly relies on them in order to establish probable cause for its search warrants in similar cases."

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 with which most jurors would have little experience."

In the government's B.I.O. (p. 14-16), they attempt to completely disregard the significance of expert testimony as it relates to this case. Petitioner has presented overwhelming evidence from case law, research findings, as well as admissibility through Federal Rules of Evidence, of the need - and the right - of expert testimony in these cases. The lack of expert testimony could not be deemed harmless because it undermined petitioner's ability to challenge the factual basis for the charge, or to lay a foundation for his affirmative defense to the charge. (Please see Appendix F).

As cited in "Long", the court noted: "at least five circuits have found relevance of evidence of a defendant's sexual attraction to children in Section 2422(b) prosecutions to be so obvious as to not warrant discussion. This included United States v. Godwin, 399 F. App 484, 489-90 (11th Cir. 2010). Petitioner contends that testimony of an expert witness could have shown that he possed no evidence of sexual attraction to children, no prior sexual history with children, no collection or possession of child pornography, nor harbor an intent to entice a minor. Each of those areas of testimony would have been immensely helpful to the defense, and each of the individual errors was highly prejudicial.

The government's B.I.O. cites Strickland v. Washington in an attempt to discredit the significance of the detrimental effect of not securing expert testimony by defense counsel. However, the government fails to acknowledge that petitioner "need not show that

counsel's deficient performance more than not altered the outcome of the case - rather, he must show only the probability sufficient to undermine confidence in the outcome." Jacobs, 395 F. 3d at 105, citing Strickland. "Strickland requires reasonable probability, not certainty." The absence of expert testimony in petitioner's jury trial deprived him of his right to present a viable defense, thus violating his Sixth Amendment right. Petitioner specifically contends that his conviction and sentence be vacated. Further review in this Court is warranted.

QUESTION # 4

Petitioner presented Question Four to this Court to address the issue of a process in the 11th Circuit and its absence of the normal procedures followed by other courts that produce opinions depriving inmates of a process that could reveal them to be wrongfully incarcerated. (See Appendix G).

In petitioner's case, his request to proceed at the appellate level, In Forma Pauperis, was granted by the District Judge on Oct. 24, 2018. A COA was denied 6 days later. (Included two weekend days).

District Judge William Duffy was assigned to petitioner's case May 9, 2014, up until July 2, 2018. Judge Totenberg was assigned to the case and ruled on Aug. 21, 2018. Research of Lexis-Nexis reveals that from 2012-present, Judge Duffy was assigned to 6 cases, whereas Judge Totenberg, within this same time frame, was assigned to 833 cases.

Petitioner contends that these hastily written opinions certainly give credence to the notion that the Courts in the 11th Cir. are potentially depriving inmates of a process that could reveal them to be wrongfully incarcerated. (See Appendix G). Petitioner specifically contends that his conviction and sentence should be vacated. Further review in this Court is warranted.

CONCLUSION

I, petitioner John McGill, have proclaimed my innocence since day one in this case. I specifically request that this conviction and sentence be vacated. Further review in this Court is warranted. The Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

John McGill

John McGill, Petitioner Pro Se

April, 2020

John McGill

Instruction 64-11 Elements of the Offense

In order to prove the defendant guilty of using a facility of interstate commerce (*or* the mails) to persuade (*or* induce *or* entice *or* coerce) an individual to engage in illegal sexual activity (*or* prostitution), the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant used a facility of interstate commerce (*or* the mails) as alleged in the indictment;

Second, that the defendant knowingly persuaded (or induced or enticed or coerced) [name of individual] to engage in sexual activity (or prostitution);

Third, that this sexual activity would violate [name of state] law; and

Fourth, that [said individual] was less than eighteen years old at the time of the acts alleged in the indictment.

Authority

First Circuit: United States v. Davila-Nieves, 670 F.3d 1 (1st Cir. 2012).

Second Circuit: United States v. Brand, 467 F.3d 179 (2d Cir. 2006).

Fourth Circuit: United States v. Fugit, 703 F.3d 248 (4th Cir. 2012).

Fifth Circuit: Fifth Circuit Pattern Criminal Jury Instruction 2.85.

Seventh Circuit: United States v. Cochran, 534 F.3d 631, 633 (7th Cir. 2008).

Ninth Circuit: United States v. Tello, 600 F.3d 1161 (9th Cir. 2010); United States v. Goetzke, 494 F.3d 1231 (9th Cir. 2007).

Tenth Circuit: United States v. Thomas, 410 F.3d 1235 (10th Cir. 2005).

Eleventh Circuit: United States v. Daniels, 685 F.3d 1237 (11th Cir. 2012); Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 92.2.

Comment

Instruction 64-13 Second Element—Persuasion to Engage in Sexual Activity

The second element that the government must prove beyond a reasonable doubt is that the defendant knowingly persuaded (*or* induced *or* enticed *or* coerced) [name of individual] to engage in sexual activity (*or* prostitution).

The words persuade (*or* induce *or* entice *or* coerce) should be given their ordinary meanings.

If appropriate, add: **The government does not have to prove that the defendant communicated directly with [said individual]. Communication with a third party whose role was to persuade (*or* induce *or* entice *or* coerce) [said individual] is sufficient to establish this element.**

Authority

First Circuit: United States v. Berk, 652 F.3d 132 (1st Cir. 2011).

Second Circuit: United States v. Douglas, 626 F.3d 161 (2d Cir. 2010).

Eighth Circuit: United States v. Spurlock, 495 F.3d 1011 (8th Cir. 2007); United States v. Patten, 397 F.3d 1100 (8th Cir. 2005).

Eleventh Circuit: United States v. Daniels, 685 F.3d 1237 (11th Cir. 2012).

District of Columbia Circuit: United States v. Hite, 769 F.3d 1154, 1160, 1166–1167 (D.C. Cir. 2014).

Comment

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. 1

The terms "persuade," "induce," "entice," and "coerce" are sufficiently familiar that no further definition is required. 2 Several courts have resorted to the dictionary, suggesting alternate language such as "convinced" or "influenced" 3 and "to stimulate the occurrence of." 4 While there is nothing objectionable about including these definitions in a charge, they add little to the jury's understanding of the statutory language. The Ninth Circuit has suggested in a discussion of the term that "enticement" includes "[making] the possibility more appealing," 5 but the Second Circuit has reversed a conviction when the jury charge included that phrase, 6 so it should be avoided.

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?

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.

105TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 105–557

CHILD PROTECTION AND SEXUAL PREDATOR PUNISHMENT ACT OF 1998

JUNE 3, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MCCOLLUM, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 3494]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3494) to amend title 18, United States Code, with respect to violent sex crimes against children, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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Sec. 103. Increased prison sentence for enticement of minors. This section doubles the maximum prison sentence from 5 to 10 years for enticing a minor to travel across state lines to engage in illegal sexual activity and increases the maximum prison sentence from 10 to 15 years for enticing or coercing a minor to engage in prostitution or a sexual act.

Sec. 104. Additional jurisdictional base for prosecution of production of child pornography. This section allows for the prosecution of child pornography production cases where materials used to make the child pornography were transported in interstate or foreign commerce. While current law regarding the possession of child pornography proscribes the possession of child pornography that was produced with materials that had been mailed, shipped or transported in interstate or foreign commerce, the child pornography production statute only allows for prosecution if the defendant knows or has reason to know that the visual depictions themselves will be transported in interstate or foreign commerce. Federal law enforcement officials confront numerous cases where the defendant produced the child pornography but did not intend to transport the images in interstate commerce. This section will allow for such prosecutions.

Sec. 105. Increased penalties for certain activities relating to material involving the sexual exploitation of minors or child pornography and technical correction. Subsection 105(a)(1) increases penalties for distributing child pornography after a previous conviction for an offense involving the transportation of another person for sexual activity and other related offenses under Chapter 117 of title 18, United States Code. Current law provides for a sentence of not less that 5 years for distributing child pornography after a previous rape or sexual abuse conviction. This section would add Chapter 117 offenses to the list of prior offenses which would trigger a stiffer penalty if an individual is convicted of distributing child pornography.

Subsection 105(a)(2) increases penalties for possessing 50 or more images of or items containing child pornography. There is currently no greater punishment for the possession of large quantities of child pornography. While possession of child pornography carries a punishment of up to 5 years in prison, this provision would establish a penalty of not less than 2 years if the quantity possessed exceeds 50 items or images. Law enforcement experts have testified before the Subcommittee on Crime that those who possess large quantities of child pornography are frequently child sex offenders and use such materials to lure children into sexual encounters.

Subsection 105(b) increases penalties for sexual exploitation of children after previous convictions involving the transportation of another person for sexual activity and other related offenses under Chapter 117 of the federal criminal code. Current law provides for a sentence for sexual exploitation of children of not less than 15 years if the offender has one prior rape or sexual abuse conviction and not less than 30 years if the offender has two or more previous rape or sexual abuse convictions. This section would add Chapter 117 offenses to the list of prior offenses which would trigger stiffer

Obey	Rush	Taylor (MS)
Olver	Sabo	Thompson
Ortiz	Sanchez	Tierney
Owens	Sanders	Torres
Pallone	Sandlin	Towns
Pascrell	Sawyer	Velazquez
Pastor	Schumer	Vento
Payne	Scott	Visclosky
Pelosi	Serrano	Waters
Pomeroy	Skaggs	Watt (NC)
Poshard	Skelton	Waxman
Rahall	Slaughter	Wexler
Rangel	Smith, Adam	Weygand
Reyes	Snyder	Wise
Rodriguez	Stark	Woolsey
Ros-Lehtinen	Stokes	Wynn
Rothman	Strickland	Yates
Roybal-Allard	Stupak	

NOT VOTING—7

Berman	Farr	Lewis (GA)
Boyd	Gonzalez	
Etheridge	Lewis (CA)	

□ 1202

Mr. HINOJOSA and Mr. SPRATT changed their vote from "no" to "aye."

So the bill was passed.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

AUTHORIZING THE CLERK TO MAKE CORRECTIONS IN ENGROSSMENT OF H.R. 2888, SALES INCENTIVE COMPENSATION ACT

Mr. FAWELL. Mr. Speaker, I ask unanimous consent that in the engrossment of the bill, H.R. 2888, the Clerk be authorized to make technical corrections and conforming changes to the bill.

The SPEAKER pro tempore (Mr. EWING). Is there objection to the request of the gentleman from Illinois?

There was no objection.

GENERAL LEAVE

Mr. FAWELL. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks and include extraneous material on the bill, H.R. 2888.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Illinois?

There was no objection.

CHILD PROTECTION AND SEXUAL PREDATOR PUNISHMENT ACT OF 1998

The SPEAKER pro tempore. Pursuant to House Resolution 465 and rule XXIII, the Chair declares the House in the Committee of the Whole House on the State of the Union for the consideration of the bill, H.R. 3494.

□ 1205

IN THE COMMITTEE OF THE WHOLE

Accordingly, the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 3494) to amend title 18, United States Code, with respect to violent sex crimes against children, and for other purposes, with Mr. McHugh in the chair.

The Clerk read the title of the bill.

The CHAIRMAN. Pursuant to the rule, the bill is considered as having been read the first time.

Under the rule, the gentleman from Florida (Mr. MCCOLLUM) and the gentleman from Michigan (Mr. CONYERS) each will control 30 minutes.

The Chair recognizes the gentleman from Florida (Mr. MCCOLLUM).

Mr. MCCOLLUM. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, H.R. 3494, the Child Protection and Sexual Predator Punishment Act of 1998, is a very important piece of legislation that responds to the horrifying threat of sex crimes against children, particularly crimes against children facilitated by the Internet.

Industry experts estimate that more than 10 million children currently spend time on the Information Superhighway, and by the year 2002, 45 million children will use the Internet to talk with friends, do homework assignments, and explore the vast world around them.

Computer technologies and Internet innovations have unveiled a world of information that is literally just a mouse click away. Unfortunately, individuals who seek children to sexually exploit and victimize them also use the mouse click.

"Cyber-predators" often "cruise" the Internet in search of lonely, curious, or trusting young people. Sex offenders who prey on children no longer need to hang in the parks or malls or school yards. Instead, they can roam from Web site to chat room seeking victims with no risk of detection.

The anonymous nature of the on-line relationship allows users to misrepresent their age, gender, or interests. Perfect strangers can reach into the home and befriend a child.

Parents are confronted with new challenges regarding the World Wide Web. While they may warn their children about the dangers outside the home, they may not be aware of the dangers posed to a child on the Information Superhighway. Children are rarely supervised while they are on the Internet. Unfortunately, this is exactly what cyber-predators look for. We are seeing numerous accounts in which pedophiles have used the Internet to seduce or persuade children to meet them to engage in sexual activities. Children who have been persuaded to meet their new on-line friend face to face have been kidnapped, raped, photographed for child pornography, and worse. Some children have never been heard from again.

Law enforcement have also found a close relationship between child pornography and victimization by pedophiles. Even more than a snapshot of one child's horrible victimization, child pornography is a horrible tool for child molesters to recruit new victims. Often used to break down inhibitions and introduce and validate specific sex acts as normal to a child, pedophiles frequently send pictures to young people to gauge a child's interest in a relationship. Child pornography is often used to blackmail a child into silence, once molestation ends.

Three factors, the skyrocketing on-line presence of children, the proliferation of child pornography on the Internet, and the presence of sexual predators trolling for unsupervised contact with children, has resulted in a chilling mix which has resulted in far too many terrible tragedies that steal the innocence from our children and create scars for life.

H.R. 3494, the Child Protection and Sexual Predator Punishment Act, provides law enforcement with the tools it needs to investigate and bring to justice those individuals who prey on our Nation's children, and sends a message to those individuals who commit these heinous crimes that they will be punished swiftly and severely.

H.R. 3494 targets pedophiles who stalk children on the Internet. It prohibits contacting a minor over the Internet for the purposes of engaging in illegal sexual activity and prohibits knowingly transferring obscene materials to a minor, or an assumed minor, over the Internet.

H.R. 3494 also prohibits transmitting or advertising identifying information about a child to encourage or facilitate criminal sexual activity. This bill doubles the maximum prison sentence from 5 to 10 years for enticing a minor to travel across State lines to engage in illegal sexual activity, and increases the maximum prison sentence from 10 to 15 years for persuading a minor to engage in prostitution or a sexual act. Moreover, the bill establishes a minimum sentence of 3 years for using a computer to coerce or entice a minor to engage in illegal sexual activity.

In addition to Internet-related crimes, the bill also includes other very important provisions such as cracking down on serial rapists (those who commit Federal sexual assaults and have been convicted twice previously of serious State or Federal sex crimes), and authorizing pretrial detention for Federal sex offenders.

Mr. Chairman, nearly two-thirds of prisoners serving time for rape and sexual assault victimize children. Almost one-third of these victims were less than 11 years old.

The bill also increases the maximum prison sentence from 10 to 15 years for transporting a minor in interstate commerce for prostitution or sexual activity and requires the U.S. Sentencing Commission to review and amend the Federal sex offenses against children.

H.R. 3494 also doubles prison sentences for abusive sexual contact if the victim is under the age of 12, and doubles the maximum prison sentence available for second-time sex offenders.

H.R. 3494 also gives law enforcement the tools it needs to track down pedophiles, kidnappers, and serial killers. The bill allows for administrative

this legislation, and I would simply like to close by indicating that there are three provisions in here that I think are crucial. As I heard the gentleman from New Jersey (Mr. FRANKS) speak of great tragedy, so many of us can cite incidences in our neighborhoods or in our cities or in our States that we much rather not discuss, and I am reminded of the time I was on the city council in Houston when a 3-year-old was sexually molested and then killed by a recently released sexual predator who continued to deny to the very end. And not only did that occur, but they had to have two trials. One of the trials wound up with a hung jury, and so it put the family through that crisis again. In fact, I hope that this legislation, when passed, will be a tribute to that little life that was unnecessarily lost.

And so the provision in this bill that clarifies that Federal kidnapping investigations do not require a 24-hour waiting period and can be initiated immediately is crucial. How many times we have frustrated the law enforcement officers who have wanted to go out immediately once they have determined that there has been an abduction. This bill clarifies that. It also permits the government to seek pretrial detention of someone accused of a Federal rape and child sex abuse or child pornography. That means that individual is not out and able to attack others. And then, of course, it directs the Justice Department to establish a special center to investigate child abductions, child homicides and serial homicides.

These particular provisions in this legislation are extremely crucial for untying the hands of our law enforcement officers and, of course, paying really a tragic tribute to those lives that we have lost and hoping that we will have this kind of legislation to prevent future loss.

Mr. Chairman, I have no additional speakers at this time, and I yield back the balance of my time.

Mr. MCCOLLUM. Mr. Chairman, I yield 2 minutes to the gentlewoman from New Jersey (Mrs. ROUKEMA).

Mrs. ROUKEMA. Mr. Chairman, I rise here in strong support of this legislation and really to focus on an important part of this bill that is known as Joan's Law. First, however, I want to stress the importance of the total bill and that we must strongly punish this obscene behavior of predators, and 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.

But right now I want to rise in memory of Joan D'Alessandro. As the gentleman from New Jersey (Mr. FRANKS) has mentioned, we already have a law in New Jersey in memory of Joan, who was sexually assaulted and murdered in 1973. Her family has suffered through all these years, but we have gotten that law in New Jersey, and now with this legislation we will extend that right to protect the children in all 50 States.

But I want to particularly commend Rosemary D'Alessandro, the mother of Joan, who had to endure this inhumane threat to her peace of mind, but also to thank her so that other families will no longer have to endure the emotional travesty that the D'Alessandro family has endured. This legislation protects those families, but of greatest importance is that we are now going to say to the children of our country that they will no longer have to be fearful in their neighborhoods or in their shopping centers of released sexual predators preying on them. But I do this in memory of not only Joan, but in the name of Mrs. D'Alessandro without whom this reform either in New Jersey or across the Nation would not have been realized. She has protected children for all times from these predators.

Mr. Chairman, I rise today in strong support of HR 3494—the Child Protection and Sexual Predator Punishment Act of 1998. I would like to thank the Committee and Mr. FRANKS, who have joined me in this endeavor.

There is no greater resource in the nation than our children. And whenever a child is harmed or injured by violent crime it is a tragedy. But that tragedy is made even worse when it could have been prevented.

This bill's purpose is to strongly punish the obscene behavior of sexual predators who prey on children. Knowledgeable professionals in the field—psychiatrists, psychologists—all know the implicit persistent compulsive behavior that leads to this type of violence against children.

But I rise here today to focus on an important part of this bill and its incorporation of New Jersey's Joan's Law and in honor of the memory of Joan D'Alessandro. Joan's Law mandates a prison term of life without parole for a person who causes the death of a child during the commission of a violent crime. It was named after Joan D'Alessandro—an innocent seven year old girl from Hillsdale, New Jersey who was sexually assaulted and murdered in 1973.

We have a responsibility to protect the most volnerable people in our society—our children. The state of New Jersey has led the way. Now Congress must protect children in ALL fifty states.

The purpose of life without parole is twofold. First, someone who kills a child does not deserve Ever to step outside prison again. And second, it will provide families who lost innocent children with the knowledge and emotional relief that they will not have to relive the horror of losing their child every few years at endless parole hearings.

Rosemarie D'Alessandro, Joan's mother, has had to endure this inhumane threat to her peace of mind. But thanks to her, other families will no longer endure such emotional travesty. This legislation protects those families and of greatest importance are the children who will no longer have to be fearful in their very own neighborhoods and shopping centers.

Thanks to the bill, families who have suffered the worst tragedy known to parents—the loss of a child—will at least have the comfort of knowing the murderer will never be released from prison.

I strongly urge passage of this important family protection bill in the name of Mrs. D'Alessandro without whom this reform—protecting children could never have been achieved.

Mr. MCCOLLUM. Mr. Chairman, I yield 2 minutes to the gentlewoman from California (Mrs. BONO) for the purposes of debate.

Mrs. BONO. Mr. Chairman, I rise today to support the Child Protection Sexual Predator Punishment Act of 1998 and to urge its adoption by the House. As a longtime computer user, I am very aware of the many benefits the Internet presents. It allows people to communicate, learn, appreciate art and music, and collaborate across great distances. However as a parent of two young children, I am disturbed by what we have learned.

Personally I can say that my children already use computers and take advantage of the World Wide Web. As we move into the 21st century and the high technology future, America's children will not have a choice. They will be expected to use computers at a young age to get ahead.

Unfortunately the growing problem of child stalkers and predators is all too real and alarming. The situation will only increase as computers find their way into more homes. We know that children will always find a way onto the computer; for example, their schools or the home of a friend, so we must make sure cyberspace is a safe place.

The evidence of the type of dangerous, sick behavior of predators presented to the Committee on the Judiciary is an issue that we must confront and develop intelligent approaches to protect our Nation's youth. Congress has a role of protecting our most precious resource, our children. The Subcommittee on Crime did it the right way, holding much more hearings and listening to an array of experts.

The Internet and computers pose very difficult and novel questions for lawmakers, as I am sure the gentleman from North Carolina (Mr. COBLE) and the rest of the intellectual property community know. Yet, I urge each Member to support this bill that will help make the Internet a safer environment for family and legitimate users.

In closing I want to commend the gentleman from Florida (Mr. MCCOLLUM) and the gentleman from Illinois (Mr. HYDE) for developing a well crafted, narrowly tailored solution to an extremely serious problem. They can count on my support to help monitor this issue and revisit it, if necessary, in the future.

Mr. MCCOLLUM. Mr. Chairman, I yield 2 minutes to the gentleman from Alabama (Mr. BACHUS).

Mr. BACHUS. Mr. Chairman, I thank the gentleman from Florida (Mr. MCCOLLUM) for yielding this time to me.

When we consider an issue like child pornography, we need to understand that issue. A recent poll showed that most people in the United States know little about child pornography and understand little about it. They are surprised when they learn that child pornography is the tool of choice used by child molesters and pedophiles to entice young children into sexual activity. They also are unaware that most sexual pedophiles, sexual predators, possess child pornography that is usually on their person or found in their homes. They also, in fact, ask very often how does child pornography, how is it even created? How does it begin?

Mr. Chairman, we can answer all three of those questions with one answer, and that is, and the final report of the Commission on Pornography outlined this, why sexual predators use pornography, why they always possess it, how child pornography is created. And Dr. Shirley O'Brien, there was an attachment of her study on this, and it shows that this is how child pornography is created.

Child pornography is shown to a child by an adult; 2, the adult uses the materials to convince the child that the depicted sexual act is acceptable, even desirable; 3, the material desensitizes the child, lowering his or her inhibitions; 4, some of the sessions progress to sexual activities involving the child; 5, photographs or home movies are taken of the activity, and finally the nude pornographic material is used to lure more child victims and also to keep the victim from talking about the experience.

So, as we discuss this issue, bottom line, let us remember that child pornography is used in every community in America to lure children into this child abuse.

Mr. MCCOLLUM. Mr. Chairman, I yield 3 minutes to the gentlewoman from Texas (Ms. GRANGER).

Ms. GRANGER. Mr. Chairman, I am pleased to join many of my colleagues on both sides of the aisle in support of this very important bill, and I want to publicly thank the gentleman from Florida (Mr. MCCOLLUM) and the gentlewoman from Washington (Ms. DUNN) for the work they have done and put into this legislation.

We hear much today about family values, but I ask do we really value families? The bill I am proud to support today is one which values our families by protecting our children.

The Child Protection Sexual Predator Punishment Act does two important things. It protects our children, and it punishes their predators. The goal of the bill is simple, to keep pornography out of the sight of children and to keep our children out of the reach of sexual predators.

To do this the bill does several important things. First, it prohibits knowingly transferring obscene materials to a minor over the Internet. Second, the bill increases penalties for using a computer to entice a minor to engage in illegal sexual activity. This information superhighway must not be allowed to be used by sexual predators as a gateway to their prey. Third, the bill increases penalties for sending child pornography to any child anywhere by any means. Whether it is on the Internet or in person, this bill says child pornography in any form is ill-advised and illegal.

Finally, the bill puts the blame on the criminals and the predators, and it puts the law on the side of families and their children. This legislation doubles the penalties for repeat sex offenders. It also requires the U.S. Sentencing Commission to review and amend the sentencing guidelines to increase penalties for sexual abuse offenses. In short, it protects our children by punishing their stalkers.

Why is this strong legislation needed? Because cyberpedophiles have discovered that the information superhighway can be a path to a new victim. In the last 2 years the FBI and the Customs Service have arrested 600 people on Federal charges of trading child pornography on the Internet. Even scarier still, many of these predators use cyberspace to meet children and ask them out.

Earlier this year a South Houston teenager ran away to see someone she never met before. That night Edward Dub Watson sexually assaulted her. And why did she leave home to see this person? Because she talked to him on the Internet, and she thought he sounded like a nice person.

This is the issue we are trying to deal with. It is sick, and it has simply got to stop. I urge my colleagues to join us in supporting this important bill to help protect our young people from those who misuse the Internet.

It has often been said that the opposite of love is not hate, but indifference. This legislation says that the indifference stops right here and right now. Let us help create the world our children deserve, our future demands and our values dictate. Let us pass the Child Protection and Sexual Predator Punishment Act for our children, for our families and for our future.

Ms. JACKSON-LEE of Texas. Mr. Chairman, I ask unanimous consent to retrieve my time.

The CHAIRMAN. The gentlewoman from Texas is seeking unanimous consent to retrieve 9 minutes previously yielded.

Is there objection to the request of the gentlewoman from Texas?

There was no objection.

Ms. JACKSON-LEE of Texas. Mr. Chairman, I yield myself such time as I may consume just to inquire if the gentleman from Florida has an additional speaker. Someone was trying to come to the floor.

Mr. MCCOLLUM. Mr. Chairman, will the gentlewoman yield?

Ms. JACKSON-LEE of Texas. I yield to the gentleman from Florida.

Mr. MCCOLLUM. Mr. Chairman, I do not, just myself to close. That is all I have over here on this side.

Ms. JACKSON-LEE of Texas. Let me see if they arrive, and I will simply indicate to the Chair that there are loopholes that this legislation is looking to shore up, if my colleagues will, and I believe that it is important that, if we talk about this blight on our country of sexual predators and protecting children, that this legislation answers some of the questions. We are not completed with our work after hearing all the recalling of these different tragedies, we are just beginning really. We have got to get to a point where sexual predators know that they are totally intolerated in this country.

Mr. Chairman, I reserve the balance of my time.

□ 1300

Mr. MCCOLLUM. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, I want to say this debate has been good. The bill we have before us today, the sexual predator bill, is one which has been long overdue, dealing with serial killers, serial rapists, but, most of all, pedophiles who use the Internet.

It is amazing how many of them go into the chat rooms of this Nation and actually engage children. Usually they do this, as I understand it, for a considerable period of time, when they pretend often to be other children. What they are doing is gaining the confidence of this child, without the child realizing it is an adult on the other end, let alone a pedophile. Then they will gradually engage in sexually explicit conversations, and building up, often times, sending pornographic material to that child, and, finally, trying to meet that child out on the street somewhere.

Current laws at the Federal level do not allow for the arrest and the conviction of somebody until they have actually induced in some manner the child to actually go meet with them somewhere to engage in a sexual activity.

The key portion of this bill, and there are a lot of other things in it, is to make sure when there is contact made over the Internet for the first time by a predator like this with a child, with the intent to engage in sexual activity, whatever that contact is, as long as the intent is there to engage in that activity, he can be prosecuted for a crime. I think that is an exceedingly important change in this bill. There are a lot of other things in here with wide-ranging importance, but that is number one, and it is the heart of this bill, to get to the Internet problem.

Mr. WHITE. Mr. Chairman, I would like to thank Representative FRANKS for working with me to improve upon his amendment, which requires Internet Service Providers (ISPs) to report to the Attorney General when they obtain knowledge of facts or circumstances that appear to indicate a violation of child pornography statutes. I believe we are working in

Statement by Senate Oct. 9, 1998 (p. S12263)

and I would like to associate myself with those remarks.

Mr. Chairman, this amendment addresses something that is wrong and does what is right.

What is wrong? Present Federal law, which says it is legal to possess one or two pieces of child pornography, but not three or more. Now, that was said to be the result of a compromise with civil libertarians, but I would say that it was an insane compromise with the devil, a compromise which exposes every American child to pedophiles and child predators who lurk in every American community, armed with items of child pornography. Let us also say that any item of child pornography, one item, is the ultimate example and evidence of the ultimate child abuse.

What is the right thing to do? The right thing to do is full protection for American children against these predators, zero tolerance for this perversion. We have seen pictures from Paducah, Jonesboro, Pearl, Mississippi, Pennsylvania and Oregon, cruel examples of children gunned down, of lives lost. Less graphic, but equally destructive and disturbing and more widespread, is that we have allowed under the Federal law pedophiles and child predators in every community of our country to legally possess child pornography and to use this child pornography to destroy our youth. That is wrong.

Therefore, the gentleman from Alabama (Mr. RILEY) and I have offered this amendment. The amendment is right, and I urge each Member to do what is right and vote yes on the Riley amendment.

Mr. RILEY. Mr. Chairman, I yield 1 minute to the gentlewoman from Washington (Ms. DUNN).

Ms. DUNN. Mr. Chairman, I rise in strong support of the Riley-Bachus amendment, because stopping the sexual exploitation of our children simply cannot be thoroughly achieved without it. As impossible and amazing as it seems, current law actually allows individuals to possess up to two items of child pornography. It means that somebody can own two magazines or two videotapes containing thousands of pictures depicting children engaged in explicit sexual conduct. I have no idea where this came from. I did not know it was part of the law. I think it is appalling.

We have got the opportunity now and we must act now to ensure that possession of any child pornography be made illegal. That is why it is important for this amendment and it is so crucial.

It is also time, Mr. Chairman, that we set the record straight with child pornographers and pedophiles. The sexual exploitation of our children will not be tolerated in any way, shape or form.

Ms. JACKSON-LEE of Texas. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, let me congratulate the gentleman for this very important amendment. I agree with the previous speaker; we are absolutely appalled that sick people or criminal-minded people would take innocent children and abuse them by capturing pictures and utilizing these on the Internet or for sale. This is important legislation. I think I heard one quote, "One pornographic picture of a child is one too many." So we congratulate the gentleman on this legislation and amendment. I ask my colleagues to support it.

Mr. Chairman, I yield 1 minute to the gentleman from Alabama (Mr. RILEY), and ask unanimous consent that he may control it.

The CHAIRMAN. Is there objection to the request of the gentlewoman from Texas?

There was no objection.

Mr. RILEY. Mr. Chairman, I yield 1 minute to the gentleman from Florida (Mr. MCCOLLUM), the distinguished chairman of the subcommittee.

Mr. MCCOLLUM. Mr. Chairman, I just want to comment, the gentleman has offered a fine amendment. It is a zero tolerance amendment. It gets the law squared away where it should be, and there should be no confusion after this. So I strongly support the gentleman's amendment, and appreciate the gentleman authoring it. It has been very positive.

Mr. RILEY. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, in conclusion, let me just say that I think this is a bill that is past due. It has been brought before this floor a couple of times before. For whatever reason, at that time it was not passed. But I think in this day, when you have the ability to download off of the Internet, we all know it is hard to take a computer to a playground, but we have to get to the point where we keep a pedophile or a sexual predator from taking an individual picture and going to a school playground. This amendment will do this. We will have zero tolerance for the first time in history in this country, and I urge all Members on both sides to please support the amendment.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. All time has expired.

The question is on the amendment offered by the gentleman from Alabama (Mr. RILEY).

The amendment was agreed to.

The CHAIRMAN. It is now in order to consider amendment No. 2 printed in House Report 105-576.

AMENDMENT NO. 2 OFFERED BY MS. SLAUGHTER

Ms. SLAUGHTER. Mr. Chairman, I offer an amendment.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment No. 2 offered by Ms. SLAUGHTER:

Page 11, after the matter following line 13, insert the following:

SEC. 112. STUDY OF PERSISTENT SEXUAL OFFENDERS.

The National Institute of Justice, either directly or through grant, shall carry out a study of persistent sexual predators. Not later than one year after the date of the enactment of this Act, such Institute shall report to Congress and the President the results of such study. Such report shall include—

(1) a synthesis of current research in psychology, sociology, law, criminal justice, and other fields regarding persistent sexual offenders, including—

(A) common characteristics of such offenders;

(B) recidivism rates for such offenders;

(C) treatment techniques and their effectiveness;

(D) responses of offenders to treatment and deterrence; and

(E) the possibility of early intervention to prevent people from becoming sexual predators; and

(2) an agenda for future research in this area.

□ 1315

The CHAIRMAN pro tempore (Mr. BLUNT). Pursuant to House Resolution 465, the gentlewoman from New York (Ms. SLAUGHTER) and a Member opposed each will control 5 minutes.

The Chair recognizes the gentlewoman from New York (Ms. SLAUGHTER).

Ms. SLAUGHTER. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, it has been a joy working with the gentleman from Florida (Mr. MCCOLLUM) and with his staff on this critical issue. I have spent about 4 years here in Congress working on what to do about child protection against sexual predators, and I am so pleased that the provisions that are already in this bill will answer this.

I think it is a very important step that we have taken here today to address what is really a national epidemic of serial rape. I specifically want to call attention to the section of the bill which calls for imprisonment of rapists with two prior rape convictions in either State or Federal court.

These provisions regarding serial rapists are based on similar provisions in the bill that we had passed in last Congress by a vote in the House of 411 to 4. Unfortunately, it languished in the Senate.

I thank the chairman again for allowing the full House to consider this important issue. When this bill passes and becomes law, I hope that we will see the last time that we are naming laws in this country after dead children.

This amendment today is not controversial and also stems from the previous bill that we had. It authorizes the National Institute of Justice to conduct a study of persistent sexual predators and to report to Congress on the results. The report will include a synthesis of current research regarding persistent sexual offenders, including the common characteristics of such offenders, the recidivism rate for such offenses, the treatment techniques and

That center will gather information, expertise and resources that our nation's law enforcement agencies can draw upon to help combat these heinous crimes.

Sentences for child abuse and exploitation offenses will be made tougher. In addition to increasing the maximum penalties available for many crimes against children and mandating tough sentences for repeat offenders, the bill will also recommend that the Sentencing Commission reevaluate the guidelines applicable to these offenses, and increase them where appropriate to address the egregiousness of these crimes. And H.R. 3494 calls for life imprisonment in appropriate cases where certain crimes result in the death of children.

Protection of our children is not a partisan issue. We have drawn upon the collective wisdom of the House as well as from Senators on both sides of the aisle to draft a bill which includes strong, effective legislation protecting children. Once again, I urge the House to act quickly to pass this bill so that we can get it to the President for his signature this session. Protection for our children delayed is protection denied.

Mr. LEAHY. Mr. President, I am glad that we have been able to achieve passage of a bill that will help protect children from sexual predators.

As the leaders of the Senate Judiciary Committee, it is the responsibility of Chairman HATCH and myself to schedule legislation for consideration by the Committee and to draft changes, if warranted. Many bills never are scheduled for committee votes, and as the legislative session draws to a close, it becomes increasingly important that any bills brought to the Senate Floor adequately address concerns raised, to improve their chances for enactment. At this stage of the legislative process, even one senator can prevent passage of an ill-considered or controversial bill. Passage today of the Hatch-Leahy-DeWine substitute to H.R. 3494 is due to the efforts of those members who have worked to resolve the legitimate concerns raised by the original bill we received from the House.

In the case of H.R. 3494, the Chairman and I, joined by Senator DEWINE, worked hard to bring forward a bill that was both strong and sensible and that would have a chance to win enactment in the short time remaining in the legislative session.

Unlike some who may just want to score political points, we actually want to enact this bill to protect children, something that I worked hard to do as a prosecutor, when I convicted child molesters in the state of Vermont. We wanted to bring forward a bill that could pass.

The problem area is the original House bill as it reached the Committee centered on its unintended consequences for law enforcement, regulation of the Internet, and important privacy rights that have nothing to do with child pornography.

As I have said before, the whole world watches when the United States regulates the Internet, and we have a special obligation to do it right.

The goal of H.R. 3494, and of the Hatch-Leahy-DeWine substitute, is to provide stronger protections for children from those who would prey upon them. Concerns over protecting our children have only intensified in recent years with the growing popularity of the Internet and the World Wide Web. Cyberspace gives users access to a wealth of information; it connects people from around the world. But is also creates new opportunities for sexual predators and child pornographers to ply their trade.

The challenge is to protect children from exploitation in cyberspace while ensuring that the vast democratic forum of the Internet remains an engine for the free exchange of ideas and information.

The Hatch-Leahy-DeWine version of the bill meets this challenge. While neither version is a cure-all for the scourge of child pornography, the substitute is a useful step toward limiting the ability of cyber-pornographers and predators from harming children.

The bill has come a long way since it was passed by the House last June. Significant objections were raised by civil liberties organizations and others to provisions in the original H.R. 3494, and we worked hard on a bipartisan basis to ensure that this bill would pass in the short time remaining in this Congress.

I thank the Chairman and Senator DEWINE, and other members of the Committee, for working together to address the legitimate concerns about certain provisions in the House-passed bill, and to make this substitute more focused and measured. Briefly, I would like to highlight and explain some of the changes we made, and why we made them.

As passed by the House, H.R. 3494 would make it a crime, punishable by up to 5 years' imprisonment, to do nothing more than "contact" a minor, or even just attempt to "contact" a minor, for the purpose of engaging in sexual activity. This provision, which would be extremely difficult to enforce and would invite court challenges, does not appear in the Hatch-Leahy-DeWine substitute. In criminal law terms, the act of making contact is not very far along the spectrum of an overt criminal act. Targeting "attempts" to make contact would be even more like prosecuting a thought crime. It is difficult to see how such a provision would be enforced without inviting significant litigation.

Another new crime created by the House bill prohibited the transmittal of identifying information about any person under 18 for the purpose of encouraging unlawful sexual activity. In its original incarnation, this provision would have had the absurd result of prohibiting a person under the age of consent from e-mailing her own address or telephone number to her boyfriend. The Hatch-Leahy-DeWine substitute fixes this problem by making it clear that a violation must involve the transmission of someone else's identifying information. In addition, to eliminate any notice problem arising from the variations in state statutory rape laws, the Senate bill conforms the bill to the federal age of consent—16—in provisions regarding the age of the identified minor. The Senate bill also clarifies that the defendant must know that the person about whom he was transmitting identifying information was, in fact, under 16. This change was particularly important because, in the anonymous world of cyberspace, a person may have no way of knowing the age of the faceless person with whom he is communicating.

Another provision of the House bill, which makes it a crime to transfer obscene material to a minor, raised similar concerns. Again, the Hatch-Leahy-DeWine bill lowers the age of minority from 18 to 16—the federal age of majority—and provides that the defendant must know he is dealing with someone so young. This provision of the Senate bill, like the House bill, applies only to "obscene" material—that is, material that enjoys no First Amendment protection whatever—material that is patently offensive to the average adult. The bill does not purport to proscribe the transferral of constitutionally protected material.

The original House bill would also have criminalized certain conduct directed at a person who had been "represented " to be a minor, even if that person was, in fact, an adult. The evident purpose was to make clear that the targets of sting operations are not relieved of criminal liability merely because their intended victim turned out to be an undercover agent and not a child. The new "sting" provisions addressed a problem that simply does not currently exist: No court has ever endorsed an impossibility defense along the lines anticipated by the House bill. The creation of special "sting" provisions in this one area could unintentionally harm law enforcement interests by lending credence to impossibility defenses raised in other sting and undercover situations. At the same time, these provisions would have criminalized conduct that was otherwise lawful: It is not a crime for adults to communicate with each other about sex, even if one of the adults pretends to be a child. Given these significant concerns, the "sting" provisions have been stricken from the House Leahy-DeWine substitute.

Another concern with the House bill was its modification of the child pornography possession laws. Current law requires possession of three or more pornographic images in order for there to be criminal liability. Congress wrote this requirement into the law as a way of protecting against government overreaching. By eliminating this numeric

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CHILD PROTECTION AND SEXUAL PREDATOR PUNISHMENT ACT OF 1998

(House of Representatives - October 12, 1998)

MONDAY

[Pages H10566-H10575]
From the Congressional Record Online through the Government Publishing Office [www.gpo.gov]

CHILD PROTECTION AND SEXUAL PREDATOR PUNISHMENT ACT OF 1998

Mr. HUTCHINSON. Mr. Speaker, I move to suspend the rules and concur in the Senate amendments to the bill (H.R. 3494) to amend title 18, United States Code, with respect to violent sex crimes against children, and for other purposes.

The Clerk read as follows:

Senate amendments

Strike out all after the enacting clause and insert:

of new crimes and increased penalties we have ever developed in response to this horrible problem.

It is a bipartisan effort. It is supported by the administration. Moreover, this bill received a great amount of input from several Members of Congress, Federal, State and local law enforcement, child advocacy groups and victims' parents. Were it not for their invaluable assistance, I would not be proposing this essential package of legislation today.

Mr. Speaker, the chairman, the gentleman from Florida (Mr. McCollum), could not be here today, but I know he is very pleased that this legislation has received such overwhelming support by the House and Senate and that if it passes today it will go to the President for signature.

This is an important bill, and I urge my colleagues to support it.

Mr. Speaker, I reserve the balance of my time.

Mr. HASTINGS of Florida. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, on behalf of the gentleman from Michigan (Mr. Conyers), who cannot be with us at this time, I rise in support of this timely, much-needed piece of legislation.

H.R. 3494 is a comprehensive response to the horrifying menace of sex crimes against children, particularly assaults facilitated by computers. While there are currently no estimates as to the number of children victimized in cyberspace, the rate at which Federal, State and local law enforcement are confronted with these types of cases is growing at a rapid rate.

The Child Protection and Sexual Predator Punishment Act seeks to address the challenges posed by the new computer age to these challenges by providing law enforcement with the tools it needs to investigate and bring to justice those individuals who prey on our Nation's children.

{time} 1430

The legislation makes a number of important changes, principally by targeting pedophiles who stalk children on the Internet and by cracking down on pedophiles who use and distribute

[[Page H10572]]

child pornography to lure children into sexual encounters.

This legislation passed the House unanimously last June. However, the Senate made several significant changes to that bill. Many of these changes are worthwhile. For example, this version of the bill contains no mandatory minimum sentences. Although none of us support the type of conduct covered by the bill, it is not productive to tie judges' hands with one-size-fits-all mandatory minimum sentences.

The original House bill was also too broad in that it made it a crime to contact or attempt to contact a minor. This was so broad that it would have covered a simple ``hello'' in an Internet chat room. Targeting attempts to make contact is like prosecuting a thought crime.

Another overbroad provision in the original House bill would have prohibited transmittal of identifying information about any person under 18 for the purpose of encouraging unlawful sexual activity. This would have had the absurd result of prohibiting a person under the age of 18 from e-mailing her own address or telephone number to her boyfriend. The Senate fixed this problem by making it clear that a

error requiring reversal. In *Coleman*, it said reversal isn't automatic when counsel is denied at a preliminary hearing.

The harmless-error ruling in *Coleman* was the central holding in that case and is directly applicable to this one, while the contrary language from *Cronic* was "dictum," Justice Joan L. Larsen said for the unanimous court July 31.

Dictum is language that isn't a necessary part of a court's decision. When dictum and a holding conflict, the holding wins out, Larsen said.

The state high court sent the case back to the lower court to conduct harmless-error review. The lower court will ask whether Lewis was "otherwise prejudiced by the absence of counsel at the preliminary hearing."

Justice Bridget M. McCormack, joined by Justice Richard H. Bernstein, concurred in a separate opinion.

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Full text at http://www.bloomberglaw.com/public/document/People_v_Lewis_No_154396_2017_BL_266231_Mich_July_31_2017_Court_O?doc_id=XP3VN7J0000N.

Appeals

Lack of Expert Testimony Wrecks Sex Convictions

A lawyer's failure to call a mental health expert to the stand means the lawyer was ineffective and the defendant gets a new trial, the U.S. Court of Appeals for the District of Columbia Circuit held Aug. 8 (*United States v. Laureys*, 2017 BL 275690, D.C. Cir., No. 15-3032, 8/8/17).

There's a "reasonable probability" that the outcome of Brandon Laureys' trial would've been different with psychiatric testimony, the court said, applying the standard from the U.S. Supreme Court's 1984 decision in *Strickland v. Washington*.

The court stressed the need to elicit such testimony when mounting a mental health defense in a criminal trial.

There's "no question that Laureys' defense, and his own testimony, would have been significantly bolstered by expert testimony regarding" online fantasy chats that led a jury to convict him, the court said.

In 2008, Laureys chatted online with a guy who said he could lead him to sex with an underage girl, according to a court summary. But the guy was a detective who led Laureys to prison instead.

Laureys testified at trial that his online chats were just fantasy, but the jury convicted him of attempted coercion and enticement of a minor and travel with intent to engage in illicit sexual conduct.

The circuit court reversed the convictions and sent the case back for a new trial.

Judge Judith W. Rogers wrote the opinion for the court, joined by Judges David S. Tatel and Cornelia T.L. Pillard.

Cozen O'Connor, Washington, represented Laureys. The department of justice represented the government.

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Full text at http://www.bloomberglaw.com/public/document/United_States_v_Laureys_No_153032_2017_BL_275690_DC_Cir_Aug_08_20.

APPENDIX F

CRL ISSN 0011-1341

The warden also cites the "reasonable possibility" that the high court will grant review and the "fair prospect" that it will reverse the Fourth Circuit.

Malvo was granted resentencing in light of the new constitutional rule that a juvenile offender convicted of homicide cannot receive a mandatory sentence of life without parole.

Virginia's highest court and the Fourth Circuit disagree whether the Supreme Court has expanded the prohibition to discretionary sentences.

This is the sort of disagreement that can warrant Supreme Court review, the warden points out.

The Chief Justice has called for Malvo's lawyers to respond by Aug. 17 at noon.

The case is *Mathena v. Malvo*, U.S., No. 18-119, *application filed* 8/2/18.

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Habeas Corpus

Eleventh Cir. Panel Criticizes Own Outlier Habeas Procedures

Three Eleventh Circuit judges expressed dismay that the court has recently begun making precedent in the absence of the normal procedures followed by other courts.

In an unsigned Aug. 1 opinion, the panel rejected Octavious Williams's application to file a second petition for habeas corpus relief.

Then the panel took the opportunity to address 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.

That decision means "we have the worst of three worlds in this Circuit," the court said here in a concurring opinion by Judge Charles Reginald Wilson.

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. In non-capital cases it makes the decision without any input from the government, Wilson said.

"We should not elevate these hurriedly-written and uncontested orders in this manner," he said.

The court also pointed to its unique application form, which leaves very little physical space for prisoners to write or type.

Judges Beverly B. Martin and Jill A. Pryor joined the opinion.

In a second concurrence written by Martin and joined by the other two, the court said that 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."

This abbreviated process has recently established that particular crimes constitute "crimes of violence" or "violent felonies" for sentencing purposes. These decisions will affect "scores of people serving long sentences in Alabama, Florida, and Georgia," Martin noted.

The case is *In re Williams*, 2018 BL 273345, 11th Cir., 18-12538, 8/1/18.

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Appendix G

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