No. _____

In the

Supreme Court of the United States

_____

Daryl Glenn Pawlak,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Christopher Curtis
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Chris_Curtis@fd.org

QUESTIONS PRESENTED

I. This Court should grant review to determine whether the Fifth Circuit's standard for determining outrageous government conduct violates the Fifth Amendment Due Process clause; to resolve a division between the circuits on this issue; and to determine whether the government's conduct in this case rises to the level of outrageous government conduct in violation of the Due Process clause.

II. This Court should grant review to determine whether the Fourth Amendment requires a determination whether the officers who obtained a warrant in violation of Rule 41 acted in actual good faith.

PARTIES TO THE PROCEEDING

Petitioner is Daryl Glenn Pawlak, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daryl Glenn Pawlak seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Daryl Glenn Pawlak*, 935 F. 3d 337 (5th Cir. August 15, 2019). It is reprinted in Appendix A to this Petition. Mr. Pawlak was granted one extension of time to file a petition for rehearing, and he timely filed a petition for rehearing *en banc* on September 12, 2019. The petition was denied October 1, 2019. The order denying rehearing is attached as Appendix B. The district court's judgment and sentence was entered on November 15, 2017, and is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on August 15, 2019. Mr. Pawlak was granted one extension of time to file a petition for rehearing, and he timely filed a petition for rehearing *en banc* on September 12, 2019, and the petition was denied October 1, 2019.This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This Petition involves the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

> in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This Petition involves the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

LIST OF PROCEEDINGS BELOW

1. *United States v. Daryl Glenn Pawlak*, 3:16-CR-00306-D-1, United States District Court for the Northern District of Texas. Judgment and sentence entered on October 23, 2018. (Appendix C).

2. *United States v. Daryl Glenn Pawlak*, 935 F.3d 337 (5th Cir. August 15, 2019), CA No. 17-11339, Court of Appeals for the Fifth Circuit. Judgment affirmed on August 15, 2019. (Appendix A)

STATEMENT OF THE CASE

This is a direct appeal from a conviction after a jury trial and the total aggregate sentence imposed of 210 months for the offenses of receipt of child pornography (Count One) and access with intent to view child pornography (Count Two). (ROA.1138-1145).[1] The factual background of this case is also set out in the Fifth Circuit's published opinion at *United States v. Pawlak*, 935 F.3d 337, 341-343 (5th Cir. 2019) (Appendix A).

The factual background that lead to the investigation and prosecution of Mr. Pawlak begins with the investigation of a child pornography website called "Playpen," (referred to in several government documents as the "Target Website"). *See* (ROA.97,1541-42). Federal Agents began logging into and monitoring Playpen beginning on about September 16, 2014 and continuing through February 3, 2015. *See* (ROA.99,1521). According to Federal Bureau of Investigation (FBI) Agents who investigated the Playpen Website, the site was a child pornography website that was operated in the "Onion Router" or "Tor" network, an anonymity network, or hidden services site, that protects user's identities by masking the user's true internet provider (IP) address. *See* (ROA.97-98,1521-23).

Experts for the government and defense explained in pretrial hearings and trial how the "Onion Router" or "Tor" network functioned. Basically, when a user logs on to a website on the Tor network, the user's communication is routed through

[1] For the convenience of the Court and the parties, Petitioner is citing to the page numbers of the record on appeal below.

multiple randomly selected IP addresses before it connects with the website on the Tor network. Therefore, the user maintains anonymity with regard to websites he is accessing. *See* (ROA.1505-07,1180-1182). Also, the Tor allows the website, such as Playpen, to hide their location. This is called a "hidden service." (ROA.1510-1511).

In December of 2014, a law enforcement agency identified the IP address for the Playpen website. *See* (ROA.110). In December 2014, the FBI was able to identify that the Playpen Website was located on a host server in North Carolina. *See* (ROA.110-111,1542-1544). Sometime in January 2015, the FBI executed a search warrant for this host server in North Carolina and was able to identify the individual who was running the Playpen website. *See* (ROA.110-111,1542-1544). At some point, the FBI made a copy of the host server and maintained it at a government facility in the Eastern District of Virginia. *See* (ROA.111). After the execution of the search warrant in January 2015, it appears the FBI allowed the website to continue operating from the North Carolina host server. *See* (ROA.111,1545).

Executing the January 2015 search warrant on the North Carolina server enabled the FBI to identify the person who was operating the Playpen website. *See* (ROA.1544). However, taking possession of the North Carolina server did not give the FBI the ability to identify the users of the Playpen website because the website was a Tor-based website. *See* (ROA.111,1545).

On February 19, 2015, FBI personnel executed a court-authorized search at the residence of the person who was the suspected administrator of the Playpen Website. *See* (ROA.115,1544). At that time, the FBI transferred a copy of the Playpen website from the server in North Carolina to a server in Virginia at a government controlled facility where the FBI continued to operate the website for another 13 days. *See* (ROA.75-115,130-135,1545).During this time, the FBI deployed what has been referred to a Network Investigative Technique (NIT). *See* (ROA.115-116,1544-46). The NIT was a device by which the FBI, as it operated the child pornography website, sent communications to the computers of the users of the Playpen website and caused the users' computers to send back information that would reveal to the FBI the user computers' IP addresses, MAC addresses and other identifying information. *See* (ROA.115,1546).

Also on February 20, 2015, The FBI obtained a separate search warrant from a United States Magistrate Judge in Virginia authorizing the FBI to use the NIT and send communications that would cause the users' computers to send identifying information to the FBI operated server. *See* (ROA.137-140,1546). The FBI operated the Playpen website, distributing child pornography over the internet, for approximately 13 days. *See* (ROA.1546).

During the course of the FBI operating the Palypen Website, someone using the "notsoslow" user account clicked on one of the posts in the Playpen website that triggered the deployment of the NIT to invade the computer used by "notsoslow". (ROA.1559). The information received as a result of the deployment of the NIT from

the computer using the "notsoslow" account was received on March 4, 2015; 9:52 a.m. Central Standard Time. (ROA.1562). The information received from the NIT allowed the FBI to determine that the computer using the "notsoslow" account had a usernmane of d.pawlak (ROA.1563). The name of the computer was identified as "Sigma94" (ROA.1563). The NIT provided the IP address for where this individual's computer was connected to the Internet (ROA.1564), and The MAC address for the computer. (ROA.1565).

Through an administrative subpoena, the FBI determined that the IP address was provided by AT&T and was located at Mr. Pawlak's residence Texas. (ROA.1567).

On September 28, 2015, the FBI obtained a warrant for the search of Mr. Pawlak's residence, which was executed in October 1, 2015. *See* (ROA.67); and *United States v. Pawlak,* 935 F.3d at 342. The probable cause in the affidavit in support of a search warrant for Mr. Pawlak's residence was based upon the information received as a result of the NIT warrant, including an IP address linked to Mr. Pawlak's residence by subscriber information. Moreover, the search of Mr. Pawlak's home culminated in a phone conversation with Mr. Pawlak that resulted in statements made by Mr. Pawlak that the government used to support his conviction. *See* (ROA.3467-3677,ROA.3649-51); *See also United States v. Pawlak*, 935 F.3d at 342-43.

Also, based upon the information received during the telephone interview with Pawlak, the FBI later acquired a computer identified as the Sigma 94 computer from Pawlak's previous employer, Sigma Cubed. The record of the jury trial established

that the images alleged in count one of the indictment were found in the internet cache of the Sigma 94 computer. (ROA.1681-82,1734-35,1838-39). There were only a total of 10 images of alleged child pornography found in the Sigma 94 computer, and they were all found in the internet cache. (ROA.1828-29). None of the images in count two of the indictment were found on any of Pawlak's computers. *See* (ROA.1887-1889). Regarding the images alleged in count two, the government simply used the information gained by the use of the NIT that someone using the Sigma 94 and using Pawlak's user ID had accessed images of alleged child pornography on the Playpen website on March 4, 2015, during the time that the FBI was illegally operating the Playpen website and distributing child pornography.

Pawlak moved to suppress the evidence obtained using the NIT, as well as all other evidence discovered as a result of its deployment. He argued on appeal that the warrant was void ab initio because it violated the scope of the issuing magistrate judge's authority under Federal Rule of Criminal Procedure 41(b). He also moved to dismiss the indictment against him asserting that the government's operation of the Playpen website constituted outrageous conduct. The district court denied both motions.

Following a three-day trial, a jury convicted Pawlak on both counts. At sentencing, the presentence report recommended a two-level obstruction-of-justice enhancement relating to Pawlak's attempt to delete the contents of the hard drive on his Independence Oil computer (another work computer that was voluntarily surrendered by Pawlak). The district court overruled Pawlak's objection to the

enhancement. The court sentenced Pawlak to 210 months' imprisonment on each count, to be served concurrently, followed by a supervised release term of fifteen years.

Pawlak raised five issues on appeal, including that the district court erred in denying his motion to dismiss the indictment based on outrageous government conduct and also that the court erred in denying his motion to suppress. Pawlak is requesting this Court to grant certiorari review on these two issues.

REASONS FOR GRANTING THIS PETITION

I. This Court should grant review to determine whether the Fifth Circuit's standard for determining outrageous government conduct violates the Fifth Amendment Due Process clause; to resolve a division among the circuits on this issues; and to determine whether the government's conduct in this case rises to the level of outrageous government conduct in violation of the Due Process clause.

This Court has long held that the federal judiciary has the power to evaluate a criminal case's entire proceedings to determine whether they "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting *Malinski v. People of the State of New York*, 324 U.S. 401, 416-17 (1945)). This Court has recognized that government conduct may be so outrageous as to violate due process even when the defendant was predisposed to commit a crime and could not rely on an entrapment defense. *United State v. Russell,* 411 U.S. 423, 431 (1973). When the government violates these standards of "decency and fairness," due process concerns are implicated. *See Rochin*, 342 U.S. at 169. Thus, government conduct that "shocks the conscience" may constitute a due process violation, requiring dismissal. *Id*. at 172.

The Fifth Circuit, at one point, interpreted this precedent to mean that, while the government may infiltrate criminal activity, it may not "instigate the criminal activity, provide the place, equipment, supplies and know-how, and run the entire operation with only meager assistance from the defendants without violating fundamental fairness." *United States v. Tobias*, 662 F.2d 381, 386 (5th Cir. 1981)

(citing *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978)). Courts must consider the "totality of the circumstances" in each case to determine whether the government's conduct went too far. *Tobias,* 662 F.2d at 386. This defense may only be invoked "in the rarest and most outrageous circumstances." *Id.* at 387.

However, the Fifth Circuit has also developed the requirement that defendants must show they were mere "passive participants" in the crime. *See United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2013). This conflates the outrageous conduct defense with entrapment. In *Russell*, this Court held that the entrapment defense was foreclosed to a defendant who was predisposed to commit the crime, regardless of the government's involvement, but acknowledged that there may be some instances where the government's conduct was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." 411 U.S. at 431–32. *Russell* distinguishes traditional entrapment and acknowledges that there may be cases where the government's conduct is too much, regardless of predisposition. The Fifth Circuit is wrong to require the defendant establish that he was a mere passive participant in order to utilize the outrageous conduct defense. The focus of the analysis should be on the government's actions. The Fifth Circuit's standard, which conflates the entrapment defense with outrageous government conduct violates due process.

Moreover, this standard does not appear to be applied in all Federal circuits. *See United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013) (Ninth Circuit focused on the conduct of the government agents and informants); *United States v. Twigg*, 588

F.2d at 378-79 (Third Circuit recognizing, "although proof of disposition to commit the crime will bar application of the entrapment defense, fundamental fairness will not permit *any* defendant to be convicted of a crime in which police conduct was 'outrageous.'") (*emphasis added*). Hence, this Court should grant review to resolve the division between the Federal circuits on this issue.

The present case is a compelling vehicle for review of this constitutional issue for several reasons. The issue has been thoroughly preserved for review. Pawlak filed a pretrial motion to dismiss in which he raised this argument. (ROA.418-427). He also raised the issue on direct appeal. The facts revealed in the record supporting a finding of the outrageous government conduct are overwhelming in this case. The FBI took control of an existing child pornography website, and in violation of the law, distributed thousands of images of child pornography over the internet for approximately 13 days.

However, the Fifth Circuit specifically applied the "more than a mere passive participant" standard in disposing of Petitioner's issue. *See United States v. Pawlak*, 935 F.3d at 344-345. The Fifth Circuit also went on to determine that the government conduct "was not outrageous and did not violate fundamental fairness." *Id.* at 356. This Court should grant review to address the standard adopted by the Fifth Circuit, which improperly focuses on the conduct of the defendant, and to review the specific conduct of the government to determine whether it violated a fundamental fairness required by due process.

As the Petitioner argued to the trial court and the Court of appeals, there is no authorization under the law allowing the FBI to distribute child pornography. In fact, 18 U.S.C. § 3509(m) prohibits the distribution of the child pornography that comes into the possession of law enforcement officials. See (ROA.1176,1202-1207). Other statutes addressing the government's duties with regard to child pornography include 18 U.S.C. § 1466A(e), 18 U.S.C. § 2252(c), 18 U.S.C. § 2252A(c), and 18 U.S.C. § 2258C(d)-(e). None of these provisions allow the government to publicly distribute child pornography. Given that Playpen was open to anyone all over the world, the government likely violated dozens of international child pornography laws as well. See, e.g., R.S.C. 163.1(3) (Canadian law barring distribution of child pornography); Protection of Children Act, 1978, 1(1)(b) (same, United Kingdom).

The FBI assumed direct and exclusive control of the Playpen website on February 19, 2015. FBI agents briefly shut down the site while they moved it to a government server in Virginia, then re-launched, maintained, and operated it until at least March 4, 2015. According to the government, approximately 100,000 unique users logged in to the site during that time (about 50,000 per week). *See* (ROA.692-700) and *United States v. Michaud*, 3:15-CR-5351 (W.D. Wash. January 8, 2016) (Govt. Response to Order Compelling Discovery)(ROA.692-700;3549-58). There were approximately 1,000,000 total logins during the same period (with some users logging in multiple times). *Id*. During that period, users clicked on approximately 67,000 unique links on the website, 25,000 of which were links to image files that appeared to be to child

pornography, and the remaining links were to websites with encrypted archives, likely video files. *Id.*

The FBI's operation of the site included facilitating the uploading and redistribution of child pornography onto the Internet. During the time that the FBI operated the Playpen website, Playpen users posted approximately 13,000 links on the website. *See* (ROA.693-694).The government has not provided the exact distribution numbers involved in this enterprise. Instead, the government has acknowledged that it recovered approximately 9,000 images and 200 videos that were made available during the 13 days the government operated Playpen. (ROA.694).

Given the limited information that has been disclosed, a reasonable estimate is that the FBI actually distributed as many as 1,000,000 pictures and videos. As noted, there was a total of approximately 1,000,000 logins to the FBI's site (with some of the 100,000 users logging in multiple times). (ROA.695) Assuming that the site was dedicated to child pornography as the government has claimed, it would be fair to assume that visitors downloaded or posted at least one picture or video during their visits. This results in a conservative estimate that the FBI distributed somewhere in the range of 1,000,000 images of child abuse.

Moreover, the government's criminal conduct of operating a child pornography website for the purposes of distributing child pornography runs afoul of the government's own guidelines. Online investigations are especially sensitive and problematic because the agents have no ability to control the redistribution of pictures, malware, or other contraband once they are on the Internet. As a result, the

DOJ itself cautions its attorneys and agents about the harms that can arise from online investigations and requires special approval for operating any type of "online undercover facility." DOJ, Online Investigative Principles for Federal Law Enforcement Agents (Nov. 1999) https://info.publicintelligence.net/DoJ-OnlineInvestigations.pdf.

Moreover, the Court need only consider the government's own pronouncements about the harm caused by the proliferation of child pornography to fully realize how troubling this investigation is. It is impossible to reconcile the Playpen operation with the government's own view of the harm caused by the distribution of child pornography:

> [V]ictims of child pornography suffer not just from the sexual abuse inflicted upon them to produce child pornography, but also from knowing that their images can be traded and viewed by others worldwide. Once an image is on the Internet, it is irretrievable and can continue to circulate forever. The permanent record of a child's sexual abuse can alter his or her live (sic) forever. Many victims of child pornography suffer from feelings of helplessness, fear, humiliation, and lack of control given that their images are available for others to view in perpetuity.

Child Pornography, UNITED STATES DEPARTMENT OF JUSTICE, http://www.justice.gov/criminal-ceos/child-pornography (last accessed July 18, 2017) (emphasis added).

In fact, this Court has explained that circulating child pornography "renew[s] the victim's trauma" and makes it difficult for victims to recover from abuse. *Paroline v. United States*, 134 S. Ct. 1710, 1717 (2014) (victim's suffering was "compounded by the distribution of images of her abuser's horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were

and would be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed against her").

In the present case, the government specifically violated the criminal law by distributing child pornography for 13 days. By doing so, the government continued to victimize countless children. If an individual had engaged in the conduct of the FBI, that person would be facing potentially a life sentence for his actions.

Most Fifth Circuit opinions regarding the outrageous conduct defense stem from drug distribution cases in which the government participated by supplying drugs or ingredients. See, e.g., United States v. Tobias, 662 F.3d 381, 386 (5th Cir. 1981); and *United States v. Asibor*, 109 F.3d 1023, 1039 (5th Cir. 1997). Of course, these cases are plainly distinguishable from Petitioner's case in that there were no third party victims of the government's criminal activities.

In *United States v. Venson*, 82 Fed. Appx. 330 (5th Cir. 2003), the Fifth Circuit considered the defense in relation to a child pornography sting operation. However, the case is again distinguishable because the material sold to the defendant was recovered by the undercover officers, thus the children in the material were not re-victimized repeatedly by distributing their images over the internet. *See id.* at 331.

In Petitioner's case, the Fifth Circuit did not even address the fact that the FBI's conduct was illegal, and that it resulted in the re-victimization of countless child victims by distributing the images over the internet. *See Untied States v. Pawlak*, 935 F.3d at 345-46.

Accordingly, this Court should grant review to determine whether the Fifth Circuit has applied the wrong standard by requiring the defendant to show he was a mere passive participant before being allowed to raise the outrageous government conduct issue, and to resolve the circuit split regarding this issue. This Court should also grant review to determine whether the government's conduct arose to a level of unfairness that prosecution violates due process.

II. This Court should grant review to decide whether the Fourth Amendment requires a determination that the officer who obtained a warrant in violation of Rule 41 acted in actual good faith.

The search warrant that was obtained to allow the FBI to use the NIT malware that was introduced into users' computers (including those in Texas) after logging onto the FBI operated Playpen website was obtained from a magistrate judge in the district of Virginia. Pawlak filed a pre-trial motion to suppress the evidence and fruits resulting from the execution of the search warrant on the grounds that Fed. R. Crim P. 41(b) did not allow for the issuance of an out-of-district search warrant by a magistrate judge. The district court found that the warrant did violate Rule 41(b) in that the magistrate judge in Virginia exceeded his authority by authorizing the search of a computer in Texas. *See United States v. Pawlak*, 237 F. Supp. 3d 460, 468 (N.D. Texas, Feb. 17, 2017). However, the district judge denied the motion to suppress applying the good faith exception in *United States v. Leon*, 468 U.S. 897, 921-925 (1984). *See id.*at 470.

On Appeal, Petitioner raised the issue that the district court erred by applying the good faith exception without allowing Petitioner to call as a witness the affiant on the search warrant application to determine whether he was, in fact, acting in good faith. In support of this argument, the Petitioner pointed out that the government had previously tried to obtain a similar search warrant in the Southern District of Texas, but the application was denied. *See United States v.* Pawlak, 935

F.3d at 347, *citing In re Warrant*, 958 Fed. Supp. 753 at 762 (S.D. Texas, April 22, 2013). Petitioner also pointed out that at the time the warrant was illegally obtained in Virginia, the government was in the process of actively trying to amend the applicable provisions of Rule 41.

The Fifth Circuit disposed of Petitioner's claim arguing that the subjective intent of the affiant was irrelevant to determining whether the officer's reliance on the warrant was objectively reasonable.

Petitioner contends that while the test of reasonable reliance is an objective standard, the determination cannot be made, particularly in a case as this one, without evidence of whether the affiant was actually acting in good faith. In other words, if the Petitioner had been allowed to call the affiant as a witness, and the affiant testified that the application for a warrant was presented to a magistrate judge in Virginia for the purpose avoiding the unfavorable court decision in Texas, then, even using an objective standard, the affiant was not acting in good faith. Simply disposing of this issue by saying the subjective good faith of the affiant is irrelevant tells law enforcement that it does not matter whether they knowingly and intentionally obtained an invalid warrant. This tantamount to instructing law enforcement that bad motive3s and intent are irrelevant once they have a warrant in hand. This cannot possibly be the result intended by this Court in *Leon*.

As professor LaFave has pointed out, to determine what was objectively reasonable, the subjective intent of the officer becomes important. LaFave, *Search & Seizure*: *A Treatise on the Fourth Amendment*, § 1.3 (c) (5th ed.). In fact, the rule set

forth in *Leon* is that "evidence seized under a constitutionally defective warrant should not be suppressed when the officers acted in good faith, objectively reasonable reliance on the validity of the warrant." *United States v. Comstock*, 805 F.2d 1194, 1206 (5th Cir. (1986).

As this Court stated in *Leon*, "it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *United States v. Leon*, 468 U.S. at 922-23.

In this case, if the affiant intentionally took the application for a search warrant to a magistrate judge in Virginia to avoid presenting the application in a jurisdiction where similar warrants had been denied, the affiant was not acting in objective good faith. If the affiant intentionally went to the magistrate judge in Virginia in open disregard of the limitations of Rule 41, then he was not acting in objective good faith. In this case, both the district court and the court of appeals violated Petitioner's rights under the Fourth Amendment by not allowing him the opportunity to test whether the affiant was, in truth and fact, acting in good faith when he took the search warrant application to a magistrate judge in Virginia. This Court should grant review to decide whether such a determination as required.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 30th day of December, 2019.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Christopher A. Curtis
Christopher Curtis
Assistant Federal Public Defender
Federal Public Defender's Office
819 Taylor Street, Room 9A10
Fort Worth, Texas 76102
Telephone: (978) 767-2746
E-mail: Chris_Curtis@fd.org

Attorney for Petitioner