

20-7471

No.

[docket Number]

IN THE SUPREME COURT OF THE UNITED STATES

Christian Joseph Perez,
Petitioner

vs.

United States of America,
Respondent

Supreme Court, U.S.
FILED

MAR 09 2021

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

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

- Can the Court of Appeals deny Petitioner's application for a Certificate of Appealability ("COA") without any analysis of whether the District Court's decision was debatable or wrong?
- Should the Court of Appeals have granted Petitioner a COA considering the persuasive arguments that the District Court's decision is wrong in many ways and the rest is debatable?
- Is the District Court's interpretation of 18 U.S.C. §2422(b) ("2422(b)") correct even though it conflicts with the previous interpretations of the Circuit and all of the other Circuits?

LIST OF PARTIES

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

RELATED CASES

United States v. Christian Joseph Perez, No. 5:16-CR-1284,
United States District Court for the Southern District of Texas.
Sentenced June 14, 2017.

United States v. Christian Joseph Perez, No. 5:18-cv-82, United
States District Court for the Southern District of Texas.
Memorandum and Order entered July 12, 2019.

United States v. Christian Joseph Perez, No. 19-40714, United States
Court of Appeals for the Fifth Circuit, Order entered July 16, 2020

TABLE OF CONTENTS

	Page
Index to Appendices	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Petition	5
- Conflict with this Court's decisions	5
- Conflicts with other Courts	6
- Other Conflicts between the Circuits	17
Conclusion	21

INDEX TO APPENDICES

	page
App A - District Court decision denying Petitioner's Section 2255 motion	22
App B - Court of Appeals decision denying Petitioner's motion for Certificate of Appealability	31
App C - Court of Appeals decision denying Petitioner's motion for panel rehearing	33
App D - Court of Appeals letter informing Petitioner of denial of his motion to extend time to file	34
App E - Petitioner's brief in support of Application for Certificate of Appealability	35

TABLE OF AUTHORITIES

Cases	page
Buck v. Davis, 137 S. Ct. 759 (2017)	6
Miller-El v. Cockrell, 537 U.S. 322 (2003)	6
Slack v. McDaniel, 529 U.S. 473 (2000)	5
U.S. v. Andrus, 745 Fed. Appx. 235 (5th Cir 2018)	13
U.S. v. Bailey, 228 F.3d 637 (6th Cir 2000)	10, 16
U.S. v. Barlow, 568 F.3d 215 (5th Cir 2009)	10, 14, 17
U.S. v. Berk, 652 F.3d 132 (1st Cir 2011)	10
U.S. v. Broussard, 669 F.3d 537 (5th Cir 2012)	10, 14, 16, 17
U.S. v. Caudill, 709 F.3d 444 (5th Cir 2013)	8, 9, 10, 12, 13, 14, 15
U.S. v. Cramer, 789 Fed. Appx. 153 (11th Cir 2019)	19
U.S. v. Douglas, 626 F.3d 161 (2d Cir 2010)	10
U.S. v. Dwinells, 508 F.3d 63 (1st Cir 2007)	10
U.S. v. Farner, 251 F.3d 510 (5th Cir 2001)	15, 20
U.S. v. Harmon, 593 Fed. Appx. 455 (6th Cir 2014)	8
U.S. v. Gillis, 938 F.3d 1181 (11th Cir 2019)	20
U.S. v. Gladish, 536 F.3d 646 (7th Cir 2008)	18, 20
U.S. v. Hite, 769 F.3d 1154 (D.C. Cir 2014)	8, 12, 13, 19
U.S. v. Howard, 766 F.3d 414 (5th Cir 2014)	9, 10, 11, 14, 16, 18, 19, 20
U.S. v. Hughes, 632 F.3d 956 (6th Cir 2011)	12
U.S. v. Jarrett, 2013 U.S. Dist LEXIS 41859 (E.D. Tenn. 2013)	8
U.S. v. Laureys, 653 F.3d 27 (D.C. Cir 2011)	8, 10, 12, 13, 19, 21
U.S. v. Laureys, 103 F. Supp. 3d 69 (D.C. Cir 2015)	19
U.S. v. Lee, 603 F.3d 904 (11th Cir 2010)	9, 20
U.S. v. Lundy, 676 F.3d 444 (5th Cir 2012)	15
U.S. v. Manley, 532 F.2d 978 (2d Cir 1980)	16
U.S. v. Mcmillan, 744 F.3d 1033 (7th Cir 2014)	9, 10, 14, 15, 16, 18, 19
U.S. v. Montgomery, 746 Fed. Appx. 381 (5th Cir 2018)	11, 12, 13
U.S. v. Murrell, 368 F.3d 1283 (11th Cir 2004)	8, 13, 18, 19
U.S. v. Nitschke, 843 F. Supp. 2d 4 (D.D.C. 2011)	7, 8, 9, 10, 13, 15, 16
U.S. v. Olvera, 687 F.3d 645 (5th Cir 2012)	8, 9, 16, 18, 19
U.S. v. Parker, 2013 U.S. Dist LEXIS 52409 (E.D. Tenn 2013)	8
	page iii

Case	page
US. v. Patten, 397 F.3d 1100 (8th Cir 2005)	16
US. v. Ramirez, 348 F.3d 1175 (10th Cir 2003)	16
US. v. Roman, 795 F.3d 511 (6th Cir 2015)	12
US. v. Rothenberg, 610 F.3d 621 (11th Cir 2010)	9, 17, 18
US. v. Rounds, 749 F.3d 326 (5th Cir 2014)	15, 16
US. v. Sparlock, 495 F.3d 1011 (8th Cir 2007)	10, 14
US. v. Wicks, 586 Fed. Appx. 176 (5th Cir 2014)	13
US. v. Hofus, 598 F.3d 1171 (9th Cir 2010)	17

Rules, Statutes, Publications

18 USC. 2422(b)	i, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21
28 USC. 1254(1)	1
28 USC. 2255	1, 4
5th Cir. Rule 47.5	13
Federal Habeas Corpus Practice and Procedure (7th Edition)	6

OPINIONS BELOW

- The decision of the U.S. District Court for the Southern District of Texas on Petitioner's section 2255 motion is not reported, but is set forth at pp. 22 - 30 of the Appendix.
- The decision of the U.S. Court of Appeals for the Fifth Circuit on Petitioner's Application for a Certificate of Appealability is not reported, but is set forth at pp. 31 - 32 of the Appendix.
- The decision of the U.S. Court of Appeals for the Fifth Circuit on Petitioner's Motion for Rehearing is not reported, but is set forth at pp. 33 - 33 of the Appendix.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on July 16, 2020. Rehearing was sought and the order denying rehearing was entered on December 8, 2020. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute under which Petitioner was prosecuted was 18 U.S.C. §2422(b), which provided:

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

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS IN THE SECTION 2255 CASE NOW BEFORE THIS COURT

- On February 7, 2017, in a cause pending before the U.S. District Court for the Southern District of Texas, entitled U.S. v. Christian Joseph Perez, Criminal No. 5:16-CR-01284, Petitioner pled guilty to

one count charging violation of 18 USC §2422(b) ("2422(b)").

- On June 14, 2017, the District Court for the Southern District of Texas entered judgment and Petitioner was sentenced to 120 months imprisonment and 15 years supervised release. There was no direct appeal.
- On June 11, 2018, Petitioner filed a motion under 28 U.S.C. §2255 ("2255") to vacate and set aside the conviction. No answer or briefs were required by the District Court or filed by the Government. No hearing was held.
- On July 12, 2019, the District Court entered its Memorandum and Order denying the motion under 2255. (App. p. 22)
- On August 7, 2019, Petitioner filed a motion for reconsideration.
- On September 9, 2019, the District Court entered its order denying the motion for reconsideration.
- On October 1, 2019, Petitioner filed an Application for Certificate of Appealability with the U.S. Court of Appeals for the Fifth Circuit, along with a supporting brief. (App. p. 35)
- On July 16, 2020, the Court of Appeals entered its order denying the motion for a Certificate of Appealability. (App. p. 31)
- On August 4, 2020, Petitioner filed a Motion to extend the time to file for a panel rehearing with the Court of Appeals.
- On August 12, 2020, the Clerk for the Court of Appeals sent Petitioner a letter stating that the court denied the motion to extend time to file for rehearing. (App. p. 34). No order of the Court was ever received.
- On August 7, 2020, Petitioner filed a Motion for panel rehearing on the Court of Appeals' denial of a COA. [redacted]
- On December 8, 2020, the Court of Appeals entered its order denying a panel rehearing. (App. p. 33)

II. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION FOR ENTICEMENT

In October of 2016, an undercover agent ("UC") for Homeland Security responded to Petitioner's personal ad on Craigslist and represented himself as a man involved in a sexual relationship with his girlfriend and her 14-year-old daughter. The UC subsequently asked Petitioner if he wanted to join

all of them for sex at his house in Laredo. Petitioner agreed and the UC asked what he wanted to do sexually with the minor. Petitioner stated what kind of sexual activities he enjoys generally without saying specifically what he wanted to do with the minor. When asked if the minor's age was a problem, Petitioner replied that it wasn't. Arrangements were made for Petitioner to meet the UC at a business in Laredo and follow him back to his house. The last communication stated that Petitioner would text the UC when he was close so that the UC could head over to the location at that time. Petitioner was arrested after entering the business that was the designated meeting place to use the bathroom, exiting, and walking back toward his vehicle. Petitioner never texted the UC to say he was close.

While in pre-trial detention, Petitioner asked his attorney Oscar Pena what the Government had to prove to convict for enticement and was told that all they had to prove was that Petitioner intended to have sex with a minor. They both agreed that the Government likely could prove this and Petitioner was advised to plead guilty. Based on this advice, Petitioner pled guilty and was eventually sentenced. After arriving at FCI Bastrop, Petitioner did research and found out his attorney was wrong about the elements of the crime, that he was not guilty under any reasonable interpretation of 2422(b), and decided to file a 2255 motion arguing this.

Starting March 12, 2020, FCI Bastrop where Petitioner is incarcerated has been on anywhere from partial to complete lockdown. The most time that the inmates have had out of their locked cells has been four hours. For the first four months there was zero access to law library materials. Since then, inmates have been allowed about an hour per week in the library with access to the law library. The only exceptions have been that for a little over a month from October to November 2020, the institution was on complete lockdown with no access due to an outbreak of COVID-19 in which Petitioner and almost every inmate in his housing unit contracted COVID. Also, starting February 1, 2021, the law library was made available on one of the computers in the housing unit that inmates have access to during the four hours (sometimes three or less) they have out of the cell each day. Inmates can get access to the law library for up to two hours if they can wait in line and manage to get on that particular computer.

As a result of this situation it has been very difficult to complete motions for the courts. The first time Petitioner could access the law library after

receiving notice that his request for a COA was denied he misunderstood the rules for rehearings as a result of being rushed for time. Petitioner thought motions for rehearing were due 14 days from the Court's order and that motions for panel rehearing and en banc rehearing could be filed sequentially, filing for an en banc rehearing after the motion for panel rehearing was decided.

As a result, Petitioner hurriedly filed a motion to extend the time to file for a panel rehearing on August 4, 2020 and a motion for panel rehearing on August 7, 2020. Both were denied. Petitioner eventually realized that since the U.S. was a party he actually had 45 days instead of 14; but did not realize he could no longer file a motion for rehearing en banc until he filed a motion to extend the time to file for en banc rehearing, to appoint counsel, and subsequently a motion for en banc rehearing. The Clerk for the Court of Appeals sent petitioner a letter on January 6, 2021 stating that the appeal was closed and no further motions would be considered. Petitioner then realized his motion for rehearing en banc had been due at the same time as the one for panel rehearing and that his 90-day time to file with this Court had been going since December 8, 2020. Petitioner rushed out a motion to this court to extend the time to file for Certiorari, but hasn't heard back and has been rushing to complete this Petition.

III. EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the U.S. District Court for the Southern District of Texas of one count of enticement under 2422(b). A 2255 motion appropriately made in that court and duly appealed to the Fifth Circuit.

IV. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

In Petitioner's brief in support of his Application for a COA (App. p. 35) he set forth multiple reasons why the District Court's decision denying his 2255 motion was wrong and the rest, including the conclusion, was debatable if not wrong. Despite these arguments, any one of which should be sufficient to meet Petitioner's modest burden to obtain a COA, the order of the court of Appeals denies Petitioner's motion with zero analysis, not addressing

any of his arguments.

Additionally, not only has Petitioner been denied a full round of Habeas Corpus review on an issue that is far from settled, but he has not had any opportunity to have an attorney argue the issues in this case, namely, the proper interpretation of 2422(b) and whether his conduct is proscribed by it. Had Petitioner's attorney provided effective assistance, he would have filed a motion to dismiss the charge and made these arguments to support it. He did not do so only because he was mistaken about the elements of the crime and relevant case law. Most of the arguments below were nominally set forth in Petitioner's brief in support of his motions for a COA and panel rehearing (App. pp. 35 - 59) [redacted] [redacted], but Petitioner has attempted to clarify and better organize them here.

V. THE QUESTIONS RAISED IN THIS CASE ARE IMPORTANT AND UNRESOLVED

The correct interpretation of 2422(b) is vitally important so that defendants who have not violated the statute are not subject to being incarcerated for 10 years to life, then 5 years to life supervised release, and being forced to register as a tier two sex offender for decades with the information publicly available to all. Also it is necessary to prevent guilty defendants from escaping punishment. This court has not addressed the issue, but the Circuits have multiple conflicting interpretations and are very much in need of guidance from this Court. The arguments that follow will show this to be true.

REASONS FOR GRANTING THE PETITION

I. CONFLICT WITH THIS COURT'S DECISIONS

A. STANDARD FOR GRANT OF CERTIFICATE OF APPEALABILITY

The Court of Appeals sets out the standard that petitioner must meet to be granted a COA in its order denying one: "he must show that 'reasonable jurists would find the District court's assessment of the constitutional claims debatable or wrong.'" (App. p. 31-2 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000))). Put another way, this means that a "petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could

conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

However, the Court of Appeals makes no analysis of the district court's opinion and does not address any of petitioner's arguments that the opinion is debatable or wrong, instead simply stating that "Perez fails to make the requisite showing." (App. p. 32). The Fifth Circuit has a history of having its denials of a COA overturned by this Court for not following the standard correctly. Specifically they have phrased their decisions in terms of the correct standard, as they did in this case, but essentially decided the case on the merits instead. See Buck v. Davis, 137 S. Ct. 759, 773 (2017); Miller-El v. Cockrell, 537 U.S. at 336-37. In this case, with no explanation, it's impossible to tell if they have done the same or done no analysis at all, but it seems like it must have been one or the other.

B. FULL ROUND OF HABEAS CORPUS REVIEW

This Court has shown concern for preserving access to one meaningful opportunity for a full round of Federal Habeas Corpus review, meaning District Court, Court of Appeals and Supreme Court. Federal Habeas Corpus Practice and Procedure, Part VIII, Vol 2: §35.4(b)(ii) (7th ed.). Petitioner has been denied this opportunity and has had no review with the aid of counsel. The following sections will lay out the arguments that the District Court's decision is debatable and wrong showing that it conflicts with any reasonable interpretation of 2422(b) and the rulings of other courts.

II. CONFLICTS WITH OTHER COURTS

A. THIS CASE IS INDISTINGUISHABLE FROM NITSCHKE

The only evidence put forward as the factual basis in this case is that Petitioner (1) accepted an offer to join in ongoing sex with the VC, his girlfriend, and her 14-year-old daughter; (2) stated 14 is not too young and that he loves young girls; and (3) related the sexual acts he was interested in performing in response to an inquiry by the VC. The Government alleges this third item, but Petitioner maintains that he only related the kinds of things he is into doing generally and not that he specifically wanted to do with the minor. It shouldn't make a difference to the analysis because either way it's not a violation of the statute.

There is only one Court that has considered a case with similar conduct as that in Petitioner's case, despite the District Court's contention to the contrary. That case is U.S. v. Nitschke where the court had to consider the "novel question of whether an individual can be charged with using the internet to attempt to persuade or induce a minor to have sex where he merely tells an adult in an online chat that he would like to join him in sex the adult has already pre-arranged with the minor." 843 F. Supp. 2d 4, 5 (D.D.C. 2011). The Court found the answer to be "unequivocally no" and granted the motion to dismiss. Id. at 5, 16. As in this case, [the UC] asked defendant if he wanted to join the [sex]. Nitschke never himself asked to join, he simply accepted an offer. None of the chats demonstrate anything more than an acceptance to participate in [UC's] pre-existing plans to have sex with the fictitious minor. Id. at 13. The court noted that the most the evidence showed was an "interest in prepubescent sex - or even an intent to engage in such acts" and a "willingness and desire to meet" for such, but that "does not demonstrate an intent to persuade a minor via the internet." Id. at 14. The same is true for this case.

Given the undisputed facts here, no reasonable juror could find that [Petitioner] intended to cause the minor to assent.

For example, [Petitioner] never sought [the UC's] help in procuring the fictitious minor. He did not ask [the UC] to pass along any communications whatsoever to the minor. He did not make any promises to the minor through [the UC]. He did not offer any money or anything else of value, and he did not invite [the UC] or the minor anywhere. These facts are what makes this case different. Id. at 13.

The fact that at least one other court has found that the exact same conduct as Petitioner's is not a violation of 2422(b) directly contradicts the District Court's decision in this case and by itself should be enough to grant a COA. If a court would find the decision to be wrong, then certainly a reasonable jurist could as well. This would be true even if the District Court's assertion that, under Fifth Circuit precedent, Petitioner's conduct violates the statute was correct (it's not as discussed below). A jurist is not bound by the court's precedent. Disagreement between the courts should be adequate to deserve encouragement to proceed, if for no other reason than to allow this Court

the opportunity to resolve the disagreement.

Both the District Court and the court of Appeals refused to address the Nitschke decision even though other courts have had no problem "applying the Nitschke analysis" to analyze a defendant's conduct. *U.S. v. Harman*, 593 Fed. Appx. 455, 464 (6th Cir 2014). The decision in Nitschke has never been criticized and has in fact been followed and distinguished by various District Courts and Courts of Appeals. See eg. *U.S. v. Jarrett*, 2013 U.S. Dist. LEXIS 41859 at 25-28; *U.S. v. Parker*, 2013 U.S. Dist. LEXIS 52409 at 30-33 (E.D. Tenn. 2013); *U.S. v. Hite*, 769 F.3d 1154, 1164 (D.C. Cir 2014). The following sections will argue how the District Court's analysis of whether the Petitioner's conduct demonstrates intent and a substantial step to violate 2422(b) conflicts with other courts and is thus debatable or outright wrong. The conflicts between all the circuits will be emphasized to show the need for guidance from this Court.

B. THE DISTRICT COURT'S ANALYSIS OF INTENT

In the opinion, the District Court notes correctly that to prove an attempted violation of 2422(b), there must be proof that appellant had intent to violate the statute and that he took a substantial step toward doing so. (App. p. 25). Intent is addressed first.

The opinion misstates Petitioner's argument as being that his conduct did not violate the statute because he did not direct any of his communications to the minor. (App. p. 26). In fact, the argument is that he did not violate the statute because he did not "attempt[E] to cause assent on the part of a minor" through his communications, as the statute requires. *U.S. v. Olvera*, 687 F.3d 645, 648 (5th Cir 2012) (citing *U.S. v. Laureys*, 653 F.3d 27, 42 (D.C. Cir 2011) (Brown, J. dissenting)).

The opinion goes on to state that the court in *Olvera* expressly reserved judgment on whether a defendant who didn't try to have any communications passed on to the minor could violate the statute. (App. p. 26 (citing *U.S. v. Caudill*, 703 F.3d 444, 446 (5th Cir 2013))). Although the *Caudill* opinion does say this, it is wrong. The ruling in *Olvera* is clear that "the situation present in *Murrell*" that the court need not address is whether attempting "to convince an adult to cause a child to engage in sexual conduct" is a violation of the statute. 687 F.3d at 648 (referring to *U.S. v. Murrell*, 368 F.3d 1283 (11th Cir 2004)).

The court instead found that *Olvera* "took actions directed toward obtaining the

child's assent through an intermediary, not simply the consent of the [adult]."

Id. The Court never made any distinction around having communications passed to the minor. Regardless, the question is irrelevant because even if the statute could be violated simply by persuading an adult, there is no evidence that Petitioner attempted to persuade the adult, much less the minor.

The District Court's opinion correctly identifies that the court found triggered liability in Caudill as seeking confirmation that the minors would engage in specific types of sex and agreeing to pay their caretaker to arrange the encounters. (App. p. 26 (citing Caudill, 709 F.3d at 447)). However, the opinion agrees that Petitioner did not exhibit this conduct. Id. It goes on to state that Petitioner's conduct violated the statute by "correspond[ing] with the VC with the express goal of arranging a sexual encounter with a minor." Id. at 26-27. This conflicts with decisions of Courts of Appeals, including the Fifth.

First, it is unclear which specific conduct the opinion is referring to. Is it accepting the invitation to join the sex and come to the VC's house; relating the kinds of sexual activity Petitioner enjoys, or maybe the discussions of the details of the meeting? It seems a bit disingenuous to describe this conduct as corresponding with the express goal of arranging a sexual encounter with a minor. Nonetheless, every single court, including the Fifth Circuit, has cited specific conduct (parts of the communications) that violated 2422(b) when deciding these types of cases. See e.g., Olvera, 687 F.3d at 648 (sending explicit photo/videos); U.S. v. Howard, 766 F.3d 414, 426-27 (5th Cir 2014) (explicit conversations, sending sexual photos, travel discussions along with instructing adult to perform sex acts on and procure birth control for the minors); Nitschke, 843 F. Supp. 2d at 12-13 (collecting cases of indirect persuasion); U.S. v. Lee, 603 F.3d 904, 916-18 (11th Cir 2010) (noting 23 pieces of evidence which, "taken as a whole," violated 2422(b)); U.S. v. McMillan, 744 F.3d 1033, 1037 (7th Cir 2014) (offering explicit photos, asking to talk directly to minor, asking if adult had talked to the minor about the sex yet). If corresponding with the goal of arranging sex with a minor is all that's required, then every case of this kind would only need to make a similar general statement and could dispense with their detailed analyses of the specific conduct. This would include Caudill which the District Court is relying on. On the contrary, an individual evaluation of a "defendant's intent as disclosed by his words or speech is necessary in every prosecution under § 2422(b)." U.S. v. Rothenberg, 610 F.3d 621, 627 (11th Cir 2010).

Further, when the opinion states that Petitioner's "admitted conduct]"

"makes abundantly clear that he anticipated the EUCJ would lead [Petitioner's intended victim] to submit to sexual activity," it is misinterpreting Caudill. (App. p. 27 (quoting Caudill, 709 F.3d at 447) (alterations in original)). The District Court's interpretation would make the intent required by 2422(b) indistinguishable from an intent to have sex with a minor which all courts agree is not what this statute is about. For example:

In Barlow and Broussard, we clarified that §2422(b) "does not require that the sexual contact occur, but that the defendant sought to persuade the minor to engage in that contact." U.S. v. Broussard, 669 F.3d 537, 548 (5th Cir 2012) (quoting Barlow, 568 F.3d at 219 n.10) (internal quotation marks omitted). Put another way, as the First Circuit observed, "[§2422(b)] criminalizes an intentional attempt to achieve a mental state—a minor's assent—regardless of the accused intentions vis-a-vis the actual consummation of sexual activities with the minor." U.S. v. Dwinells, 508 F.3d 63, 71 (1st Cir 2007); see also U.S. v. Bailey, 228 F.3d 637, 639 (6th Cir 2000) ("Congress has made a clear choice [in 18 USC §2422(b)] to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves").

Howard, 766 F.3d at 420; see also Nitschke, 843 F. Supp. 2d at 11 (collecting cases).

Correctly read, the Caudill quote requires a defendant to be asking or trying to persuade the adult to help him persuade the minor to have sex. This can be seen by the conduct held to violate the statute in the cases cited above and the cases cited by the Court in Caudill. See eg. U.S. v. Berk, 652 F.3d 132, 140 (1st Cir 2011) (conversation regarding "renting [the minor] out" and asking what she thought); U.S. v. Douglas, 626 F.3d 161, 162-63 (2d Cir 2010) (offered "sex training without harm and cash payments"); U.S. v. Spurlock, 495 F.3d 1011, 1014 (8th Cir 2007) (admitted attempting to persuade the minors through the mother). In all these cases, the defendant's communications are clearly attempting to enlist the adult's help to gain the minor's assent. Other courts have made this explicit. See eg. Laureys, 653 F.3d at 33 and 40 n.3 (A minor's "assent might be obtained, for example, by persuading a minor's adult guardian to lead a child to participate in sexual activity") (majority and dissent both quoting Douglas, 626 F.3d at 164) (emphasis added); McMillan, 744 F.3d at 1036 (quoting Douglas); Nitschke, 843 F. Supp. 2d at 12-13 ("cases from other circuits... have all found that... the defendant must in essence be asking the adult to persuade the minor, thereby constituting indirect persuasion") (collecting cases). Petitioner did nothing that can remotely be

construed as asking the UC to persuade the minor for him.

Next, the opinion asserts that the Fifth Circuit has "repeatedly affirmed convictions based on conduct nearly identical to [Petitioner's]," first pointing to *US v. Montgomery*. (App. p.27 (citing *Montgomery*, 746 Fed. Appx. 381, 383 (5th Cir 2018))). The *Montgomery* decision directly contradicts this assertion. The conduct cited by the District Court, (App. p.27), is not even mentioned in the analysis of intent in *Montgomery*. 746 Fed. Appx. at 386. Communications that the court found "evinced an intent to persuade" included that the defendant "sought confirmation that the [minor] would be interested in having sex with him; asked the [adult] to explain why she thought [the minor] would be interested in him [; and]... stat[ed] that, for the first encounter, they would need to [drag the child]." *Id.* Further, the defendant "relied] on the [adult's] influence over [the] child" when he "asked what the [adult] wanted to have happen to her 'little babe'; described his 'ideal night' with the [child] at the [adult's] request and stated that he would not 'force the situation'; offered to give the child a trophy he won; asked the [adult] what she had told the [child] about him; and stated he would hate to disappoint the child." *Id.* None of this is remotely similar to Petitioner's case and the Fifth Circuit, or any other court, has never affirmed a conviction of a defendant who simply accepted an offer to join in a pre-existing plan for sex with a minor.

The opinion goes on to say that *Montgomery* "flatly rejected" that "a violation of §2422(b)... requires [that the] defendant's interaction with the intermediary be aimed at transforming or overcoming the child's will." (App. p. 27). Again, this assertion is contradicted by *Montgomery* which never states this. The opinion notes that the Court in *Montgomery* "emphasized that 'our Circuit requires only that defendant take actions directed toward obtaining the child's assent through an intermediary.'" (App. p.27 (quoting 746 Fed. Appx. at 385)). *Montgomery* never states that these are two different standards or how they might be different. The District Court's contention that they are different standards and rejection of the first seems to contradict at least one decision of the Fifth Circuit besides *Montgomery*. In *Howard* the Court notes, "put another way, as the First Circuit observed, [§]2422(b) criminalizes an intentional attempt to achieve a mental state - a minor's assent..." 766 F.3d at 420 (emphasis added). This makes it clear that attempting to gain the minor's assent involves seeking to transform the mental state of a minor from the absence of assent to assent. This fits perfectly with the phrase "transform or overcome the will." After all, what

is the child's will if not their mental state?

Although the Fifth Circuit has not addressed the latter standard directly, other courts have and they starkly contradict the District Court's assertions. In *U.S. v. Hite*, the court definitively rejected the Government's argument that "2422(b) does not require the defendant to transform or overcome the minor's will," 769 F.3d 1154, 1164 (D.C. Cir 2014). The Court concluded this after examining the context and history, combined with the dictionary definitions, common usages and accepted legal interpretations along with the fact that the minor is the intended object of the actus reus verbs. *Id.* at 1161-64. See also *Lareys*, 653 F.3d at 40 n.3-4 ("Courts agree [that] 2422(b) requires an attempt to bend the child-victim's will"; and collecting cases) (Judge Brown Dissenting); *U.S. v. Roman*, 795 F.3d 511, 516-17 (6th Cir 2015) (citing *U.S. v. Hughes*, 632 F.3d 956, 961 (6th Cir 2011) and *Hite*). As noted above, these standards are not different and Courts use them interchangeably. See *Hite*, 769 F.3d at 1163 n.4, 1164.

The opinion goes on to say that 2422(b) may be violated "solely by 'relying on a parent's influence or control over the child[.]'" (App. p. 27) (citing *Montgomery*, 746 Fed. Appx. at 385)). Ignoring the fact that this specifies a parent, this is contradicted by a correct reading of the *Montgomery* decision itself. That court did not state that a violation can occur solely by relying on such influence or control, instead stating that a defendant can "take actions directed toward obtaining the child's assent through an intermediary... by relying on a parent's influence or control over the child." *Montgomery*, 746 Fed. Appx. at 385 (internal quotation marks omitted). The Court clearly didn't intend the meaning the District Court inferred, which is made clear when they go on to specify the particular conduct (parts of the communications) which relied on that influence as noted in the above quote about the conduct in that case.

The Court in *Montgomery* cited *Caudill* for its reference to a parent's influence or control. *Id.* The District Court's assertion certainly contradicts *Montgomery*, but even that decision references *Caudill* in a misleading way. The Court in *Caudill* only ruled that a person "who communicates solely with an adult intermediary can be held to violate §2422(b)." 709 F.3d at 447. Relying on a parent's influence or control was only used to describe an Eighth Circuit case in a way that makes clear that it is the context of specific parts of the communications that rely on that influence and was only part of the logic

page 12

leading to the ruling, not part of the ruling itself. *Id.*

Notably, the District Court's opinion in this case seems to contradict Fifth Circuit rules because *Montgomery* is an unpublished opinion and not precedent. 5th Cir. Rule 47.5.

The District Court cites two other cases (both also unpublished) to back up its reading of *Caudill*. (App. p.28 (citing *U.S. v. Andrus*, 745 Fed. Appx. 235, 236 (5th Cir 2018), *U.S. v. Wicks*, 586 Fed. Appx. 176, 177-78 (5th Cir 2014))). As previously noted, Petitioner is not arguing against *Caudill*'s ruling, only that his conduct doesn't violate the statute even in light of *Caudill*. These two additional cases do not support the District Court's ruling that Petitioner's conduct violated 2422(b). The Court in *Andrus* didn't need to address specific conduct because the defendant was only arguing that *Caudill*'s ruling was wrong. 745 Fed. Appx. at 236. The Court in *Wicks* noted that the defendant "attempt[ed] to persuade the adult to provide Wicks with a minor for sex [;]" agreed to pay \$100 to the adult for this purpose, and sought confirmation that the minor would engage in various sex acts, the exact same conduct in *Caudill*. *Wicks*, 586 Fed. Appx. at 176-77.

The District Court concludes its discussion of intent by observing that "because Petitioner's communications were aimed at obtaining the child's assent by way of the VC, they plainly satisfy the statute's intent requirement." (App. p.28). It is not plain because it still fails to mention any specific parts of the communications or how they were aimed at obtaining the child's assent. If the implication is that any arrangement of a sexual encounter would violate 2422(b), this is contradicted by other Courts. See *Hite*, 769 F.3d at 1167 (jury instructions that the "government must only prove that the defendant believed that he was communicating with someone who could arrange for the child to engage in unlawful sexual activity" was erroneous); *Laureys*, 653 F.3d at 39 (2422(b) does not penalize any attempt to solicit sex with minors).

The only other possible implication is that the statute criminalizes Petitioner's intent to persuade the minor later at a face-to-face meeting. The Fifth Circuit has never ruled that this can suffice for intent to violate 2422(b). However, the intent "must be an intent to persuade using a means of interstate commerce." [2422(b)] thus does not criminalize an intent to persuade at some later point in person." *Nitschke*, 843 F. Supp. 2d at 11 (citing *Marell*, 368 F.3d at 1296); See also *Laureys*, 653 F.3d at 39 ("Even if *Laureys* intended at some point in the future to entice the fictitious child herself, there is no evidence *Laureys*

intended to use a facility of interstate commerce to do so"; "And there is no evidence Laureys attempted to entice the fictitious girls through his online communication with [the adult]" (citing *U.S. v. Spurlock*, 495 F.3d 1011, 1012, 1014 (8th Cir 2007)); *McMillan*, 744 F.3d at 1036 ("what is important under [2422(b)] is the defendant's attempt (using the mail or other instrumentalities of commerce) to persuade the minor") (emphasis added). Even if the intent to persuade later in person could satisfy the intent requirement, there is no evidence in this case that Petitioner intended to do so.

C. THE DISTRICT COURT'S ANALYSIS OF A SUBSTANTIAL STEP

The opinion goes on to address a substantial step, relying on *Howard* for its contention that "controlling case law clearly holds that 'travel to a meeting place is... sufficient to establish' a substantial step." (App. p. 29 (citing 766 F.3d at 421)). Once again, the District Court is wrong. *Howard* never ruled that, nor could it have because there was no travel in that case. The Court in *Howard* found a substantial step in the communications alone. 766 F.3d at 426. In dicta, the Court does propose that the Fifth Circuit has affirmed convictions by finding that defendants took a substantial step by travelling to a meeting place. *Id.* at 421. This is simply not true. The Court cites three cases to back up this mistaken assertion. *Id.* at 420-21, n.6. These cases and others contradict the assertion.

In *U.S. v. Barlow* (cited by *Howard*), the court only ruled that the defendant took "substantial steps" after noting specific conduct in the communications along with travel. 568 F.3d 215, 219 (5th Cir 2009). The District Court in this case states that the substantial steps *Barlow* had already taken (before leaving) were "arranging and traveling to the meeting." (App. p. 29 (citing 568 F.3d at 219-20)). However, the substantial steps were never detailed specifically, with the court holding only that "there was ample evidence for a jury to conclude that *Barlow* took a substantial step..." 568 F.3d at 219-220. The Fifth Circuit has previously interpreted the substantial steps being referred to as being in the conversations alone, disregarding the travel. *Broussard*, 669 F.3d at 548 ("Barlow also illustrates that a substantial step toward persuading the minor to assent to sexual contact can occur solely through communications") (emphasis added). This directly contradicts *Howard*'s interpretation and the District Court's use of it in this case. *Howard* also cites *Caudill*, but that case

only addresses intent and never mentions a substantial step or travel in its analysis, finding parts of the communications (detailed previously) as indicative of intent. Caudill, 709 F.3d at 447. The last cite is US. v. Farner, which only addressed a claim of legal impossibility and noted substantial steps toward "engag[ing] in sexual acts with a [minor]" without referring to specific conduct. 251 F.3d 510, 513 (5th Cir. 2001). It is certainly reasonable to presume that travel to a meeting place would be a substantial step toward actually engaging in sexual acts, however, as discussed previously, that is not what is criminalized by 2422(b).

The District Court's cite of US. v. Lundy with the quote "[the defendant] also showed up at the location of the meeting... which indicates a substantial step towards completion of the crime[,]" is similarly contradicted. (App. p. [quoting Lundy, 676 F.3d 444, 449 (5th Cir. 2012)]). The crime being referred to in Lundy cannot be 2422(b), but seems to be the underlying offense of statutory rape under Mississippi law which shows that the proposed sex in the case would have been unlawful. If the Court is referring to 2422(b) (it's unclear), its intent and substantial step analysis is wrong because it relies on Farner's mistaken conclusion that "[defendant] intended to engage in sexual acts with a 14-year-old girl and that he took substantial steps toward committing the crime." Lundy, 676 F.3d at 449 (quoting Farner, 251 F.3d at 513) (emphasis added). Travel would likely be a substantial step toward "engag[ing] in the illegal sexual activity of statutory rape." Id. at 448. Again though, that has nothing to do with violating 2422(b). There is nothing in Lundy that can support travel being a substantial step toward 2422(b).

In fact, the Fifth Circuit has never ruled that travel is a substantial step toward violating 2422(b). Cases where the defendant traveled to a meeting sometimes don't even mention it. See e.g. Wicks, 586 Fed. Appx. at 177; Roman, 795 F.3d at 517-18; McMillan, 744 F.3d at 1037; US. v. Rounds, 749 F.3d 326, 333-34 (5th Cir. 2014). In every case of this type, the Fifth Circuit has always cited persuasive communications (as noted previously) along with travel, if travel is even mentioned at all, when finding a substantial step. See Lundy, 676 F.3d at 450 (collecting cases that found a substantial step in persuasive communications along with travel).

The other Circuits have always done the same. Nitschke, 843 F. Supp. 2d at 15-16 (collecting cases finding a substantial in persuasive communications plus travel). Additionally, at least one court has found that "travel... is not

sufficient to establish a substantial step." *Id.* at 15.

The Fifth Circuit's decisions support the logic behind this conclusion. First, "the substantial step must be necessary to the commission of the crime." *Id.* This comes from *Bailey*, 228 F.3d at 640 ("[substantial step] must be necessary to the consummation of the crime") (quoting *U.S. v. Manley*, 632 F.2d 978, 987-88 (2d Cir 1980)). The Fifth Circuit has endorsed the view in *Manley*. See *Howard*, 766 F.3d at 419 (quoting *Manley* on a substantial step). Other courts agree that a "substantial step is an appreciable fragment of a crime..." *Nitschke*, 843 F.Supp. 2d at 15 (quoting *U.S. v. Ramirez*, 348 F.3d 1175, 1180 (10th Cir 2003)). If it is a fragment, then it is a part of the whole and thus, necessary to the crime.

The Fifth Circuit is very clear that "travel or definite plan to travel is not necessary to constitute a 'substantial step' under 2422(b)." *Howard*, 766 F.3d at 426-27 (emphasis added). See also *Rounds*, 749 F.3d at 334 (substantial step found without mentioning travel); *Broussard*, 669 F.3d at 548-50 (substantial step does not require travel) (collecting cases); *Olvera*, 697 F.3d at 648 (sending photo/videos constituted attempt). Additionally, the analysis in *Howard* is likely fatally flawed because it directly contradicts binding precedent (detailed below).

The other Courts agree that "[t]here is no doubt that travel is not necessary to violate §2422(b)[.]". *Nitschke*, 843 F. Supp. 2d at 15 (and collecting cases). See also *Lee*, 603 F.3d at 915 (collecting cases and finding travel not required); *McMillen*, 744 F.3d at 1037 (finding attempt in communications alone). Similarly, "[I]f face-to-face persuasion, as explained above, is not criminalized under §2422(b); accordingly, arranging to meet... cannot be a substantial step either." *Nitschke*, 843 F. Supp. 2d at 15. Since neither travel or arranging to meet are necessary to the crime, they cannot be substantial steps.

"[M]ore fundamentally, travel ultimately has nothing to do with this crime. A violation occurs, if at all, before any travel is undertaken; indeed, travel is not even necessary. The crime is complete with the persuasion or attempted persuasion, both of which are necessarily confined to the interstate communications between a defendant and the minor or an adult intermediary. Travel for a face-to-face meeting cannot be a substantial step because such face-to-face persuasion is not criminalized." *Id.* at 16. See also *U.S. v. Patten*, 397 F.3d 1100, 1103 (8th Cir 2005) ("2422(b) is an interstate communication

crime"); *Broussard*, 669 F.3d at 550 ("the prohibited act of persuasion can occur over a distance, as the statute expressly contemplates"; "the very nature of the underlying offense - persuading, inducing or enticing engagement in unlawful sexual activity - necessarily contemplates oral or written communications as the principal if not the exclusive means of committing the offense") (quoting *Bothenberg*, 610 F.3d at 627) (emphasis added). Travel as a substantial step only makes sense for a crime that criminalizes something physical such as engaging in sexual activity.

Even if travel could be a substantial step, Petitioner still would not have not taken a substantial step because, had the UC not been a police officer, there is no way the meeting would have occurred "unless interrupted by independent circumstances." *Lawreys*, 653 F.3d at 43 (quoting *U.S. v. Hofus*, 598 F.3d 1171, 1174 (9th Cir 2010)). "A substantial step is one that manifests 'a true commitment toward completing the crime.'" *Id.* The last exchange in the communications in this case had Petitioner telling the UC that he would text when he was getting close to the location so the UC could then head to the meeting location from home. While the opinion states that Petitioner was "arrested before he could send a text message notifying the UC of his arrival," (App. p.28), in fact, the text was agreed to be sent before his arrival. If Petitioner was going to send the text, he had plenty of opportunity to do so before he exit the store after using the bathroom and was arrested, but he had already changed his mind about meeting and so never sent it. Had the UC not been a cop he would have been waiting at home for that text that was never coming. The opinion compares Petitioner's actions to those in *Barlow* where the defendant left before meeting anyone. (App. p.29). But this misses the point. In *Barlow*, the meeting was set, having both a place and time specified, and the defendant "drove to the [meeting place] and waited for [the minors'] arrival," only leaving when "he noticed another adult in the parking lot[.]" 569 F.3d at 220. The same cannot be said about Petitioner. There can't be a meeting if only one person knows when to attend.

III. OTHER CONFLICTS BETWEEN THE CIRCUITS

One Court, surveying prior cases of 2422(b) throughout the

Circuits found three interpretations of the statute in the context of indirect persuasion alone. See *McMillan*, 744 F.3d at 1036. There are still others as well. For instance, the most outlying interpretation is from the Seventh Circuit. The Court overturned a conviction of a defendant which almost certainly would be upheld by any other Circuit. See *U.S. v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008). In that case, the defendant sent the minor a video of himself masturbating among other communications about having sex. *Id.* Other Courts have specifically found this to be a violation of 2422(b). See e.g., *Olivera*, 687 F.3d at 648. The Court in *Gladish* rejected the idea that speech alone could be a substantial step, instead requiring something more such as travel or making hotel reservations. 536 F.3d at 649-50. This despite the fact that the statute is specifically about communications as discussed previously and despite citing cases where a substantial step was found in speech alone. *Id.* at 649-50. Every other Court to consider it has concluded that speech alone is a substantial step because there is no "First Amendment right to attempt to persuade minors to engage in illegal sex acts." *Bothenberg*, 616 F.3d at 627 n.7 (quoting *Bailey*, 228 F.3d at 639). Refusing to acknowledge that *Gladish* is wrong and criticize it can lead other Courts' opinions to be inconsistent in and of themselves. See e.g., *Howard*, 766 F.3d at 423, 427 (quoting *Gladish* on speech and then finding a substantial step in speech alone).

Additionally, the *Marrell* decision could be read as interpreting 2422(b) to criminalize any arrangement for sex with a minor because it found that induce could be defined as "to stimulate the occurrence of; cause." 368 F.3d at 1287. However, the Court only used this definition to rule that "direct communication with a minor or supposed minor is unnecessary under the text of §2422(b)," finding that by "negotiating with the purported father of a minor, *Marrell* attempted to stimulate or cause the minor to engage in sexual activity with him." *Id.* at 1287-88. Other Courts have read this to mean that the statute covers "persuad[ing] an adult to cause a child to engage in sexual conduct."

Laureys, 653 F.3d at 39. See also Mcmillan, 744 F.3d at 1036 (describing Murrell as permitting conviction based on "persuad[ing] another adult to allow the defendant to engage in sexual conduct with a minor"); Olvera, 687 F.3d at 648 (describing Murrell as a "case that upheld the conviction of a defendant who attempted to convince an adult...") (emphasis added). Laureys gives four reasons why "Murrell's plainly erroneous interpretation" that "mistakenly assumed §2422(b) penalizes any attempt to solicit sex with a minor" was wrong, including three that explain why that definition of induce is wrong. 653 F.3d at 39-42. Judge Brown further argued that a "subsequent panel of the same court hinted Murrell's analysis was based on a misreading of the statute." *Id.* at 39. The Eleventh Circuit disagrees as it is still applying the reasoning in Murrell to more recent cases. See e.g. *U.S. v. Cramer*, 789 Fed. Appx. 153, 156 (11th Cir. 2019) (rejecting the D.C. Circuit's interpretation of 2422(b) in favor of Murrell's).

While Judge Brown's opinion in Laureys is admittedly a dissent, "[i]n 2014—four years after this Court, Judge Robertson presiding, issued the jury instructions in question here—the Circuit largely adopted the rationale underlying Judge Brown's dissent." *U.S. v. Laureys*, 103 F. Supp. 3d 69, 74 (citing *Hite*, 769 F.3d at 1163 n.4).

Some Courts have conflicting rulings within the same Circuit. For example, Olvera was decided in 2012 and ruled that "Olvera's communications sending a photo and videos that he intended the intermediary to show to the child constituted an attempt to entice a child within the meaning of [2422(b)]." 687 F.3d at 648. Despite this binding precedent, in 2014, the same court "disagree[d] with the District Court's conclusion that Howard took a substantial step toward enticing a minor to engage in illegal sex simply by sending a sexually explicit photograph of himself and asking that it be shown to the [minors]." 766 F.3d at 425.

Some Courts also come up with some bizarre interpretations of other Court's decisions such as when a court implied that a defendant

took a substantial step by literally stepping "to his front porch to accept delivery of what he believed to be pornographic pictures of the minor[s]." Howard, 766 F.3d at 424 (referring to Lee, 603 F.3d at 917). Not surprisingly, since it's hard to understand how this could possibly be construed as a substantial step toward persuading a minor to have sex, Lee never stated or implied that it was, instead finding that twenty-three pieces of evidence taken as a whole amounted to a violation of 2422(b). 603 F.3d at 916-18.

Finally, many courts give lip service to the fact that the intent and substantial step required by 2422(b) are to entice a minor, not engage in the unlawful sex. After noting this, they will still go on to find a substantial step that was toward engaging in the sex. See eg. U.S. v. Gillis, 938 F.3d 1181, 1190 (11th Cir 2019) ("Gillis" remained interested in engaging in sexual activity with the [minor] and anticipated doing so after first meeting the father. And Gillis took a substantial step toward consummating that plan when he drove [to the] meeting"); Farner, 251 F.3d at 513 ("the District Court correctly concluded from the stipulated evidence, beyond a reasonable doubt, that Farner intended to engage in sexual acts with a 14-year-old girl and that he took substantial steps toward committing the crime") (emphasis added); Gladish, 536 F.3d at 649-49, 650, 651 ("it is always possible that had the intended victim been a real girl the defendant would have gotten cold feet at the last minute and not completed the crime even though he was in position to do so"; "the fact that the defendant in the present case said to a stranger whom he thought a young girl things like 'ill suck you titties' and 'ill kiss you inner thighs' and 'ill let ya suck me and learn about how to do that,' while not 'harmless banter,' did not indicate that he would travel to northern Indiana to do these things to her in person"; "the psychologist could not have been permitted to testify that the defendant did not intend to have sex with [the minor], but he could have testified that it was unlikely, given the defendant's

Page 20

psychology, that he would act on his intent"; "[counsel] said that the expert witness would testify that the defendant did not have 'a real intent' to have sex with [the minor]. But it is reasonably clear that what the lawyer meant was that the expert would testify that the defendant was unlikely to have acted on his expressed intent").

One last thing to note is that even a trial court expressed "concern about '[t]he way [§2422(b)'s] language has to be parsed and chopped and sliced and diced in order to make everything fit.'" Laureys, 653 F.3d at 41 (quoting the court transcripts in the case).

CONCLUSION

If the Court of Appeals had done any analysis, it could not have concluded that a COA should not be granted in this case. Petitioner has shown that much of the District Court's decision denying his 2255 motion is debatable or outright wrong and has therefore met this Court's standard to obtain a COA. Thus, the Court of Appeals is in conflict with this Court's decisions.

This Petition for a writ of certiorari should, therefore, be granted.

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