No. 20-7816

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Lassissi AFOLABI Poose — PETITIONER
(Your Name)

vs.

WARDEN FORT DIX FCI — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Third Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lassissi AFOLABI
(Your Name)

North Lake Correctional Facility, P.O. Box 1500
(Address)

Baldwin, MI 49304
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

UNDER ESQUIVEL-QUINTANA APPLIES TO 18 U.S.C. § 2423(b) STATUTE AS WHETHER THE GENERIC FEDERAL DEFINITION OF SEXUAL ABUSE OF A MINOR DEFINED IN SECTION 2246

WHETHER THE SAVINGS CLAUSE § 2255(e) PERMITS A PRISONER TO RAISE A CONVICTION AND ADVISORY SENTENCE ENHANCEMENT WHEN ONE HAS BEEN CHARGED WITH MULTIPLE OFFENSES

WHETHER THE COURT OF APPEALS PROPERLY ENTERED SUMMARILY JUDGEMENT AGAINST THE PETITIONER AS TO FIRST, FOURTH, EQUAL PROTECTION CLAUSE OF FOURTHEEN AMENDMENT/DUE PROCESS CLAUSE

WHETHER THERE IS PROBABILITY THAT THE INTERVENIG SUPREME COURT CASE LAWS INTERPRETATTIONS RENDER THE PRISONER'S OFFENSE NON-CRIMINAL OR WHETHER THERE IS PROBBILITY THAT THE PRISONER HAS BEEN CONVICTED OF NONEXISTENT OFFENSE

LIST OF PARTIES

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

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

RELATED CASES

United States v. Lassissi Afolabi, No. 07-cr-0785, U.S. District Court for the District of New Jersey. Judgment entered August 26, 2009.

United states v. Afolabi, 455 Fed Appx 184, U.S. Court of Appeals for the Third Circuit. Judgment entered December 16, 2011.

Afolabi v. Ortiz, No. 1: 19-cv-08802-NLH, U.S. District Court for the District of New Jersey. Judgment entered March 23, 2020.

United States of America v. Akouavi Kpade Afolabi, 508 Fed. Appx. 111, U.S. Court of Appeals for the Third Circuit. Judgment entered January 4, 2013.

Akouavi Kpade Afolabi v. United States, 2015 U.S. Dist. Lexis 77406, U.S. District Court for the District of New Jersey. Judgment entered June 15, 2015.

United States v. kouevi, 698 F.3d 126, U.S. Court of Appeals for the Third Circuit. Judgment entered October 24, 2012.

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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

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

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

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

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

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

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

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

JURISDICTION

☒ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was September 16, 2020.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 27, 2020, and a copy of the order denying rehearing appears at Appendix C.

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

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

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

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 1

FOURTH AMENDMENT

AMENDMENT 5: DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES

AMENDMENT 6: RIGHT OF THE ACCUSED

AMENDMENT 14: DUE PROCESS OF LAW/EQUAL PROTECTION

NJ Stat. Ann § 2C: 14-2(c)

NJ Stat. Ann § 2C: 14-2(c)(5)

NJ Stat. Ann § 2C: 14-3(a)

NJ Stat. Ann § 2C: 14-3(b)

NJ Stat. Ann § 2C: 14-3c (1)-(2)

NC Stat. Ann § 14-27.7A

Texas Penal Code § 22.011(a)(2)

STATEMENT OF THE CASE

From October 2000 through September 2007, it is alleged that Lassissi Afolabi conspired with his ex-wife, Akouavi Kpade and others to obtain the forced labor of twenty-four young girls from Togo and Ghana who had been brought to United States with fraudulently obtained visas. The girls, it is alleged range from 10 to 19 years old, were required to work at the hair braiding Salon up to fourteen hours a day, for six or seven days per week, and were forced to turn over all their earning including tips to the defendants.

FACTS AND PROCEDURAL HISTORY

In 2007, the Petitioner was arrested and on October 4, 2007, a federal grand jury siting in Newark New Jersey, returned an Indictment charged the Petitioner with conspiracy to harbor illegal aliens for purpose of commercial advantage and private financial gain. The Petitioner pleaded not guilty.

On January 15, 2009, the same federal grand jury which had returned the first Indictment against the Petitioner and others on October 4, 2007, returned a Superseding Indictment which charged the Petitioner with conspiracy to commit the offenses of forced labor, trafficking for forced labor, and document servitude ("Multi-Object Count"); committing the forced labor of five of the West African females with respect to forced labor, in connection with the same five West African females named in Substantive Counts forced labor; conspiracy to harbor illegal aliens for commercial advantage and private financial gain; and travel for the purpose of engaging in illicit sexual conduct with a minor.

Beginning in August, prior to the return of the Superseding Indictment in January 2009, the Petitioner was represented by John P. McGovern, Esq. Mr. McGovern represented the

Petitioner throughout pretrial proceedings, plea, sentencing and appeal of his conviction and sentence.

On August 26, 2009, the Petitioner pled guilty to three Counts of Superseding Indictment such as:

(1) Count 11 – Conspiracy to commit forced labor/trafficking document servitude in violation of 18 U.S.C. § 371;
(2) Count 13 – Forced Labor in violation of 18 U.S.C. § 1589;
(3) Count 23 – Traveling for Purpose of Engaging in Illicit Sexual Conduct with a minor in violation of 18 U.S.C. § 2423(b).

In 2010, the District Court sentenced the Petitioner to:

60 months imprisonment for Count 11;

292 months imprisonment for Count 13; and

292 months imprisonment for Count 23, including deportation, and ordered him to pay $3,949,149,80 in restitution. The Petitioner is now paying for the money he has never used. The Petitioner filed a timely Notice of Appeal on March 31, 2008. The Third Circuit affirmed the conviction and sentence in non-precedential decision filed December 16, 2011. *United States v. Afolabi*, Fed. Appx 184 (3d Cir. 2011).

On March 14, 2013, through a help from prison inmate, the Petitioner filed a § 2255 motion alleging ineffective assistance of counsel by Mr. McGovern. In support of the § 2255 motion, Petitioner also filed a Memorandum of Law with Exhibits that supplemented the 2255 motion ("2255 Brief").

On April 14, 2016, the Petitioner applied for Certificate of Appealability pursuant to § 2253; the Court denied his Certificate of Appealability (COA) in April 2016. On April 18, 2016, the

Petitioner filed his Notice for Appeal. On August 29, 2016, United States Court of Appeals, 3d Circuit denied (COA).

On February 29, 2016, the United States District Court of New Jersey denied the Petitioner's motion to vacate, set aside, correct sentence of the Petitioner for relief under 28 U.S.C. § 2255.

The United States Supreme Court denied certiorari in 2017.

On March 21, 2019, the Petitioner filed petition for Writ of habeas corpus pursuant to 28 U.S.C. § 2241, asking the District Court to review his entire case, including all the documents related to his case.

In June 24, 2019, the judge ordered the Respondent to answer the Petition. See **Appendix G.**

On August 02, 2019, the Respondent asked for extension and a motion to dismiss the Petitioner's Petition for lack of jurisdiction in lieu of answer.

The District Court granted the Respondent an extension and a motion to dismiss the Petition in August 07, 2019. See **Appendix F.**

The Respondent filed a motion to dismiss the Petitioner's Petition for lack of jurisdiction on August 21, 2019.

On September 23, 2019, the Petitioner replied to the motion to dismiss his Petition.

Right after the Petitioner's Reply, even before the District Court decision on the case, the Petitioner was transferred on February 21, 2020 from the East Compound of Fort Dix, New Jersey to West Compound – from West Compound Fort Dix, New Jersey to MDC Brooklyn, New York, from MDC Brooklyn, New York to Oklahoma, and finally, from Oklahoma to North Lake Correctional Facility, a "Private Facility" in Baldwin, Michigan. A facility which holds only the deportable

immigrants other than Federal Bureau of Prison (FBOP) inmates. The Petitioner arrived at North Lake Correctional Facility on March 24, 2020. The District Court was not aware that the Petitioner was transferred.

On March 23, 2020, the District Court granted a motion to dismiss the Petition for lack of jurisdiction in Respondent's favor.... **CIVIL CASE TERMINATED** – immediately closed the case and ordered to seal the indictment. See **Appendix B**.

The Petitioner filed timely Notice of Appeal on April 22, 2020.

On May 21, 2020, the Respondent filed opposition letter.

On May 26, 2020, the Petitioner filed Permission to Appeal in Forma Pauperis and A Motion for Appointment of Counsel.

On June 08, 2020, the Petitioner's Permission to Appeal in Forma Pauperis was granted. See **Appendix D.**

On June 04, 2020, the Petitioner filed Reply Brief to Respondent's opposition to appeal.

On September 03, 2020, the United States Court District for the District of New Jersey filed appeal, submitted for Possible Dismissal Pursuant 28 U.S.C. § 1915(e)(2)(B) or Summary Action Pursuant to the Third Circuit LAR 27.4 and I.O.P. 10.6. See **Appendix B.**

On September 16, 2020, the United States Court of Appeals for The Third Circuit, on NOT PRECEDENTIAL ground, stating that "Because the appeal fails to present a substantial question, we will summarily affirm the District Court's judgment." The court also denied the Petitioner's application for Appointment of counsel. See **Appendix A**

On October 27, 2020, the Petitioner filed Petition for Rehearing and also Application for Admission to Bail. On November 16, 2020, the Application for Admission to Bail denied. See **Appendix H.**

On November 27, 2020, the United States Court of Appeals for The Third Circuit denied his Petition for Rehearing. See **Appendix C**.

On December 7, 2020, certified judgment issued. See **Appendix E.**

Summary of argument

1. At the heart of the § 2241 habeas corpus petition, "Does a guilty plea bar a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the constitution?" The Supreme Court's response is "In our view, guilty plea by itself does not bar that appeal," Breyer, J., deliver the opinion of the Court. See *Class v. United States*, (No. 16-424) (S. Ct. Feb. 21, 2018).

2. As a reminder, in this case/petition, the Court must always refer to the context in which it was presented to the public and above all, the District Court in 2007 (The Initial Indictment of the Petitioner and co-defendants). The core of this case is "Bringing aliens into the United States in violation of the Immigration Reform and Control Act, 8 U.S.C. § 1324(a)(1)(A)(V)(i) and transporting an alien within the United States in violation of § 1324(a)(2)(B)(ii), 18 U.S.C. § 1546 and 2. This case involves bringing West African females, also referred to herein as "the girls" by obtaining Diversity Visas (DVS') fraudulently. However, the grand jury issued a second and new version of charges against Afolabi et al. – the Superseding Indictment of January 15, 2009 in which the Petitioner was charged with read as follows: Count 11, with conspiracy to commit forced labor,

and document servitude, contrary to 18 U.S.C. §§ 1589, 1590, and 1592, in violation of 18 U.S.C. § 371; in Count 13, with providing and obtaining the forced labor of P.H, in violation of 18 U.S.C. §1589 and 2; and Count 23, with traveling for purpose of engaging in illicit sexual conduct with S.X, in violation of 18 U.S.C. § 2423(b) and 2.

3. Without Section 1324 (Immigration Reform and Control Act) context, the Petitioner's claim or actual facts of what occurred from the time he met the girls until the day he was arrested ("Smuggling illegal aliens in U.S. as it was portrayed in the local news") including his role in the lives of the girls, got buried under the rug – got ignored, omitted, suppressed, and the outcome is dire and consequential as it has already happened in this very case – Mr. Afolabi received about 25 years of prison time because of that reason – "Traffickinization" of the entire case.

4. The Government and defense lawyer's scheme and actions of ignoring relevant information have a direct bearing on this case; omission and suppression of necessary facts required in any legal matter and, of course, regarding this case at bar, presents difficulty in evaluating and properly assessing the actual statutes and elements of the crimes the Petitioner is charged under. Also, the invocation of the crime of violence catch-all phrase prevalent in most alien/immigration-related criminal cases does not help at all; results in gruesome, ambiguous, and unconstitutional convictions of accused; and Mr. Afolabi is the perfect example or victim of these draconian enhancement and unconstitutional and unambiguous judicial convictions purported by the government. See *United States v. Moscony*, 927 F.2d 742, 749 (3rd Cir. 1991) (trial court has institutional interest in protection truth-seeking function regardless of any proffered waiver by defendant). The abandoning of 18 U.S.C. § 1324 by prosecution or the Government was intended to obfuscate the true nature of this case – which is in essence the heart and core of this case. The

trafficking part was intended to dehumanize Afolabi et al., actually to make them look as monsters to the American Public or Society in order to obtain convictions.

5. Moving forward, as to this case, because of its origin and very nature "Human Trafficking" in order to address lingering concerns and questions regarding the validity of the trafficking elements pertaining to the Petitioner's role and already presented allegations regarding the entire case. (i) Because affirmative evidence exists to establish that the parents and relatives of the girls have been aware that these girls have been brought to America with their own will. (ii) Because affirmative evidence exists to establish that these girls haven't been trafficked or coerced to come to America since they left their respective countries, in this case Ghana and Togo with the knowledge of their parents. (iii) Because affirmative evidence exists to establish that the ages of the girls are inaccurate since the Government in its case-in-chief claims that the Diversity Visas (DVS'), passports have been obtained through fraudulent means. And above all, some of the girls were not who they claimed to be (age and name wise) in these documents. (iv) If there has been human trafficking, affirmative evidence does not exist to establish that the Petitioner has had a hand in trafficking of the girls from Ghana and Togo since the girls themselves were complicity in the trafficking scheme with those who have won those lotteries to come to America with hope of learning and earning money (American dollars) as hair braiding and send some back home to help their respective families afford basic necessities of life. More importantly, there was not affirmative evidence to establish that all these girls were coming to the United States of America to attend school when all of them were not in school back home. The Petitioner is respectfully asking the Court to see his "DECLARATION/AFFIDAVIT" which has been attached to his initial § 2241 Petition for more clarity of this case.

Rule 7(c) insures satisfaction of 3 Constitutional rights: It satisfies Sixth Amendment guaranty that in criminal prosecution accused must be informed of nature and cause of accusation; it protects rights of accused to be free from double jeopardy, as guaranteed by Fifth Amendment; and guarantees that accused has been indicted by grand jury as required by Fifth Amendment, for offenses on which accused is to be tried. See *United States v. Sugar et al.,* 606 F. Supp. 1134; 1985 U.S. Dist. LEXIS 21083; 18 Fed. R. Evid. Serv. (Callaghen) 1443 SS No. 84 Cr 629 (Swk).

REASONS FOR GRANTING THE PETITION

6. To begin, the United States Supreme Court's judge Amy Comey Barrett said that a judge should not make a law. That the law should be applied the way is written. In this instant case, the law is not properly applied the way is written, the ambiguous interpretation of the statute is involved, misrepresentation of the facts, misstatement of evidence, and there is conflict between the Courts of Appeals. This probably results in a complete miscarriage of justice.

7. The core of this case was about lottery visa fraud that happened in Africa, specially, Ghana and Togo. The girls in this case used those visas to enter into the United States. The girls' passports were true and real and were delivered to them by the official authorities of Togo and Ghana. The visas in their passports were given to them by American Embassy. Neither their passports nor their visas were faked. At that time, the Petitioner has been already living here in United States. He has never played that lottery and has never known if the form of that lottery visa was red, blue or white. When these girls arrived at JFK Airport, the U.S. Customs had let them through, entered the United States territory. The Petitioner did not transport these girls across the borderlines into the United States. The Petitioner did not conspire with any mean with anyone to bring these girls into the United States. The Petitioner only picked up these girls at JFK Airport

after they entered in this country. The Petitioner then transported them to his place where he lived and gave them place to stay so they could pursuit and achieve their dreams. See *United States v. Duran, et al.*, (No. 13-3430) (7th Cir. November 12, 2014) (Count one alleged that defendants conspired, in violation of 8 U.S.C. § 1324(a)(1)(A)(V)(1), to violate 8 U.S.C. § 1324 (A)(1)(A)(iii) and (iv) by shielding unauthorized aliens from detention and encouraging them to reside in the United States. The Court reversed count one and acquitted the defendants).

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8. Further, after the Petitioner exhausted his remedy, applied to the Supreme Court and waited until the final decision from the Supreme Court denying his case, the Petitioner then filed a petition pursuant to 28 U.S.C. § 2241 under "Savings Clause" § 2255(e) attacking his conviction and sentence. In that Petition, the Petitioner has asserted that he is actually innocent for Traveling for a Purpose of Engaging in Illicit Sexual Conduct with a minor pursuant to 18 U.S.C. § 2423(b) under the Supreme Court intervening in *Esquivel-Quintana*. In *Esquivel-Quintana v. Sessions* 581 US - - 137, S. Ct. 1562; 198 L. Ed. 2d 22(2017), the Supreme Court held that the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16. The Petitioner has asserted that the girl who he traveled with to North Carolina was older than 16 years of age at the time of traveling, he did not have sex with her, the purpose of the traveling across a state line was for inspecting a hair braiding Salon a friend was selling and that the girl did not fit the generic federal definition of sexual abuse of a minor. Due, the Petitioner respectfully demands the Court that Count 23 should not stand. See *United States v. Gamache*, 156 F.3d 1 (1st Cir. 1998); *United States v. Murphy*, 942 F.3d 73 (2d Cir. 2019) (quoting **Treatise**); *United States v. Bredimus*, 352

F.3d 200 (5th Cir. 2003); *United States v. DeCarlo*, 434 F.3d 447 (6th Cir. 2006); *United States v. Vang*, 128 F.3d 1065 (7th Cir. 1997); *United States v. Hersh*, 297 F.3d 1233 (11th Cir. 2002); *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002). See also, **¶ 64.05 Interstate Travel to Engage in Illicit Sexual Conduct (18 U.S.C. 2423(b)).** See the Statutory Interpretation in **Appendix I.**

9. As you can see here that the Petitioner in this case did not commit this crime. He did not travel across the state line to go meet any underage girl in another state. There was no phone or e-mail communication between the Petitioner and any underage girl across the state line. This act is not also in case where "in a sting operation in which a law enforcement officer poses as a minor or the parent of a minor, and the Petitioner travels with the necessary intent to engage in sexual activity with that minor." The girl in question lived with the Petitioner in the Petitioner's home about three years and the Petitioner has never had sex with her before they both flew together from New Jersey to North Carolina for the purpose of inspecting a new hair braiding Salon. The girl was older than 16 and the Petitioner did not have sex with her. See N.J. Stat. Ann. § 2C: 14-1(d). See also, *May v. Ryan*, 2020 U.S. App. LEXIS 9612 (9th Cir. Arz. March. 27, 2020). The Court of Appeals erred by agreeing with the district court that age is not element in this statute.

10. The Petitioner has asserted that after the Court accepted his plea agreement at the Rule 11 hearing, the Government has started applying a wrong statute using "Transportation of a minor with intent to engage in criminal sexual activity" throughout the rest of the entire proceedings. The Petitioner explained that the Superseding Indictment issued by the grand jury did not charge him with transportation of a minor with intent to engage in criminal sexual activity. Instead, he was charged with "Traveling for the Purpose of Engaging in Illicit Sexual Conduct with a minor in violation of 18 U.S.C. § 2423(b). The Petitioner also pointed out that if he was charged with transportation of a minor with intent to engage in criminal sexual activity, then the Government

must show that exact plea agreement to the Court. If the Government cannot provide that exact document, one can argue that the document is fabricated or forged. See *Hamilton v.* McCotter, 772 F.2d; 1985 U.S. App. LEXIS 23447 (5th Cir. October 3, 1985). That meant the Petitioner was convicted of an ambiguous interpretation of the statute. Rule 7 may be properly relied upon to avoid dismissal where prosecution intentionally cited inappropriate statute, as long as there is another statute which is appropriate and prescribes conduct charged in indictment, *United States v. Massuet*, 851 F.2d 111, 26 Fed. R. Evid. Serv. (CBC) 145 (4th Cir 1988).

11. The District Court itself recognized that the Government used an ambiguous statute but did not address that portion of the Petitioner's claim to end the dispute. Even if the Petitioner was charged with transportation of a minor with intent to engage in criminal sexual activity, the Government must prove that the girls in question came to the United States for prostitution. That is something the Government cannot be able to prove because these girls came here with their own will for the purpose of learning how to braid hair and have career and better lives for themselves. None of them has been putted in prostitution.

Note that learning something for yourself in order to have a career is different from working for somebody. These girls did not work for the Petitioner, instead, they had been learning for themselves.

WHETHER THE SAVINGS CLAUSE § 2255(e) PERMITS A PRISONER TO RAISE A CONVICTION AND ADVISORY SENTENCE ENHANCEMENT WHEN ONE HAS BEEN CHARGED WITH MULTIPLE OFFENSES

12. Furthermore, the Petitioner asserts that he is actually innocent for a wrongful application of adversary sentence enhancement for aggravated sexual abuse related to Count 13 in violation of forced labor pursuant to 18 U.S.C. § 1589, the crime the judge has described as forced rape. Clue

– there is no police report/complaint, or medical record. Again, in *Esquivel*-Quintana, the Supreme Court held that in the context of statutory rape offenses that criminalize sexual intercourse "based solely on the age of participants", the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16.

13. The Court of Appeals states that, "We also agree, for the reasons provided by the District Court, that the Petitioner may not pursue, in a § 2241 petition, his claim that his sentence is unconstitutional because he was not convicted of a crime of violence," citing, *Gardner v. Warden Lewisburg USP*, 845 F.3d 99, 103 (3d Cir. 2017) ("unlike the change in substantive law leading to the exception in *Dorsainvil*, issues that might arise regarding sentencing did not make § 2255 inadequate or ineffective").

14. Here, the Petitioner has asserted that the allegation of P.H happened in New Jersey and the girl in question was woman – an adult older than 18 years of age and did not fit the generic federal definition of sexual abuse of a minor or aggravated sexual abuse under 18 U.S.C. § 1589 statute. The Petitioner asserts that he should not be convicted of either federal or state sex offenses because at that time a sexual abuse of a minor or aggravated sexual abuse offense in New Jersey was under 16. See N.J. Stat. Ann. § 2C: 14-2(c)(5) (West 1995). See **¶ 47A.02 Forced Labor (18 U.S.C. 1589).** See also, *Burrage v. United States*, 571 U.S. 204, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014). If the Court looks closely in this statute, it will see that Congress has carefully chosen words or phrase ("choose appropriate alternative") to definite the statute. As you can see that Congress has not intended to punish anyone having sex with an adult in this statute. Subsequent, Congress moves forward to clarify the term or meaning of the "sexual act" that must be applied for this statute. See the Statutory Interpretation at **Appendix J.**

15. By opposing, the Government stated that Afolabi next challenges the sentencing court's application of a 4-level enhancement for conduct involved sex by forced. Section 2A3.1(b)(1) of the advisory Guidelines increases a defendant's offense level by four when "the offense involved conduct described in 18 U.S.C. § 2241(a) or (b)." In this case, the District Court looked to subsection (a), which criminalizes conduct that knowingly causes another person to engage in a sexual act – (1) by using force against that other person; (2) by threatening or placing that other person in fear will be subjected to death, serious bodily injury, or kidnapping." 2241(a).

16. The Petitioner has asserted that firstly, the advisory guidelines should not be applied in the first place in this statute because the grand jury of New Jersey did not charge him with aggravated sexual abuse of P.H, that uncharged offense violated his constitutional rights. If a defendant is presumed innocent upon acquittal, then it necessarily follows that he is innocent of charges for which he was never convicted regardless of whether the "non-convictions" are a result of a dismissal or a failure to charge outright. See *Nelson v. Colorado.* Also, this is outright violation of his Fifth Amendment right. See *Nelson v. Colorado*, 137 S. Ct. 1249 (2017); the Petitioner is being punished for uncharged conduct. Secondly, the Petitioner had no criminal record before he was arrested. Thirdly, the girl in question in this case was an adult older than 18 years of age and sex between both the Petitioner and that girl was consensual, and this offense is not a crime of violence. More importantly, Congress has no intended to prosecute people for having sex with an adult in this statute. See *Burrage v. United States*, 571 U.S. 204, 134 s. Ct. 881, 187 L. Ed 2d 715 (2014). See *Sessions v. Dimaya*, No. 15-1498 (S. Ct. April 17, 2018); *United States v. Hernandez-Avila*, No. 16-51009) (5th Cir. June 2018); *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). Thus, this uncharged crime should not stand.

17. The Petitioner also argues that in Count 13, the government did not mention that the Petitioner had to plead guilty to "forced labor" and "aggravated sexual abuse" of P.H, or (Abla). Neither the government nor his counsel, or the Court has told him that the baseline of Count 13 is up to 20 years and that would be enhanced to life if aggravated sexual abuse involved. See *Okereke v. United States*, 307 F.3d 117, 120 (3rd Cir. 2002).

18. Here, there is conflict between the Circuit Courts of Appeals that create problems because the Court of Appeals agreed that the Petitioner is barred for raising sentence enhancement issue. See *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013); *Hill v. Masters*, 839 F.3d 591 (6th Cir. 2016); *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018); *Smith v. Martinez*, 2018 U.S. Dist. LEXIS 3766 (January 5, 2018); *Gilbert v. United States*, 640 F.3d 1293, 1323 (11th Cir. 2011); *Trenkler v. United States*, 536 F.3d 85, 99 (1st Cir. 2008); *Bryant v. Warden*, 738 F.3d 1253 (11h Cir. 2013); *Allen v. Ives*, No. 18-35001 (9th Cir. Feb. 24, 2020).

WHETHER THE COURT OF APPEALS PROPERLY ENTERED SUMMARILY JUDGEMENT AGAINST THE PETITIONER AS TO FIRST, FOURTH, EQUAL PROTECTION CLAUSE OF FOURTHEEN AMENDMENT/DUE PROCESS CLAUSE

19. The Court of Appeals, by affirming the District Court dismissal of the Petitioner's § 2241 petition, stating that it agrees with the District Court that the Petition fails to present a substantial question. That as the District Court explained, the Petitioner's admissions at the plea hearing belie his claim of innocence, and, any even his actual innocence claim does not come within the scope of the saving clause, citing *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 180 (3d Cir. 2017). That the thrust of the Petitioner's other innocence argument is that the Government and the District Court are wrongly interpreting the statute under which he was convicted, not that the Supreme Court has construed or interpreted it differently. *Cf. Dorsainvil*, 119 F. 3d at 247, 251 (holding

that Petitioner could resort to § 2241 to pursue his claim where the Supreme Court's decision interpreting 18 U.S.C. § 924(c)(1) rendered his conviction invalid).

20. Before the Petitioner filed his 28 U.S.C. § 2241 petition, he sent a motion to the sentencing court asking for appointment of counsel. That motion had been denied. When the Petitioner finally filed his § 2241 petition, he paid for his filing fees, and he also filed a motion to proceed in Forma Pauperis. But when the District Court scrutinized the Petition and found out that it could not dismiss the Petition without the Respondent's answer to the Petition, the District Court did not appoint any counsel to pursue the Petitioner's claims. 28 U.S.C. §1915(d) gives district court broad discretion to request an attorney to represent an indigent civil litigant. Such litigants have no statutory right to appointed counsel. See *Tabron v. Grace*, 6 F. 3d 147; 1993 U.S. App. LEXIS 25274. The Petitioner then filed application for appointment of counsel to the Court of Appeals. The Court of Appeals denied the motion. The Petitioner has asserted that the Court of Appeals erred by denying him appointed counsel.

21. The Court of Appeals for the Second and Seventh Circuits, rejecting the strict, "exceptional circumstances" requirement applied in other circuits, have provided district court with set general standards for appointing counsel in the context of § 1915(d). See *Hodge v. Police Officer*, 802, F.2d 58(2d Cir1986*); Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981) (per curiam). We take this opportunity to follow their example in so doing, we elaborate upon Smith -Bey by delineating further criteria for ascertaining the "special circumstances" under which counsel may be appointed for an indigent litigant in a civil case.

22. First, as the Seventh Circuit explained in *Maclin*, the district court must consider as a threshold matter the merit of the plaintiff's claim. "Before the court is justified in exercising its discretion in favor of appointment, it must first appear that the claim has some merit in fact and

law." *Maclin*, 650 F.2d at 887 (quoting *Spears v. United States*, 266 F. Supp. 22, 25-26 (S.D.W. Va. 1967)); see also *Rayes v. Johnson*, 969 F.2d 700, 703 (8th Cir.) ("The appointment of counsel should be given serious consideration if the [indigent] plaintiff has not alleged a frivolous or malicious claim and the pleadings state a prima facie case.") (internal quotations and citations omitted). Cert. denied, 121 L. Ed. 2d 584, 113 S. Ct. 658 (1992). See *Castillo v. Cook County Mail Room Dept.*, 990 F.2d 304 (7th Cir. 1993) (instructing district court to appoint counsel on remand to represent indigent plaintiff who had difficulty with the English language); see *Rayes,* 969 F.2d at 703-04 (reversing denial of request for counsel where indigent prisoner was severely hampered in pressing his claims by conditions of confinement making him unable to use typewriter, photocopying machine, telephone, or computer). Where applicable, these factors should be considered, if it appears that an indigent plaintiff with a claim of arguable merit is incapable of presenting his or her case, serious consideration should be given to appoint counsel, see e.g., *Gordon v. Leeker,* 574 F.2d 1147, 1153 & n.3 (4th Cir.), cert. denied, 439 U.S.C. 970, 99 S. Ct. 464, 58 L. Ed. 2d 431 (1978), and if such a plaintiff's claim is truly substantial, the decision whether to appoint counsel will also be informed by a number of other factors.

23. In conjunction with the consideration of the plaintiff's capacity to present his or her case, the court must also consider the difficulty of the particular legal issues. The court "should be more inclined to appoint counsel if the legal issues are complex." *Hodge*, 802 F.2d at 61. As the Seventh Circuit stated in *Maclin*, "Where the law is not clear, it will often best serve the ends of justice to have both sides of a difficult legal issue presented by those trained in legal analysis." 650 F.2d at 889.

24. Here, the Petitioner in this case is Ewe and French speaking person who has had hard time understanding English before his arrestation. The English language has become the Petitioner's

third language, which he has been learning in prison through ESL class and has worked harder to earn his GED in English. That does not mean he has known every expression in English. Also, the Petitioner had not access of the law library because of CORONAVIRUS, the appeal he had sent to the Court of Appeals has been his handwriting, except, the Petition for Rehearing. The facility has only three typewriters for the whole compound. Two of them broke and the only one which has been working to serve the whole compound is no longer working. However, the facility has computers without all options, but there are two upgraded computers which can be used by inmates with permission for legal work purposes. The Petitioner also has filed a motion for appointment of counsel to the Court of Appeals, stating that his case is complex and has difficulty understood legal issue. The Petitioner asserts that if the Court of Appeals has appointed him a counsel, the counsel might have helped to present "a substantial question" the Petitioner has not able to present. Incompetency of one counsel can't render the rest of the counsel incompetent. In fact, there are still competent counsels up there who wanted to save lives.

WHETHER THERE IS PROBABILITY THAT THE INTERVENIG SUPREME COURT CASE LAWS INTERPRETATTIONS RENDER THE PRISONER'S OFFENSE NON-CRIMINAL OR WHETHER THERE IS PROBBILITY THAT THE PRISONER HAS BEEN CONVICTED OF NONEXISTENT OFFENSE

A Section 2241 petition for habeas corpus on behalf of a sentenced prisoner attacks the manner in which, his sentence is carried out or the prison authority's determination of its duration. To prevails, a § 2241 petitioner must show that he is a in custody in violation of the constitution of laws or treaties of the United States. See 28 U.S.C. § 2241(c) (2012). By contrast, a motion to vacate or correct sentence pursuant to 28 U.S.C. § 2255, provides the primary means of collateral attack on a federal sentence.

Section 2255 does contain "Saving clause" in subsection (e) which acts as a limited exception to those general rules. It provides that "Court may entertain a petition for a writ of habeas corpus challenging Federal Criminal Conviction if it concludes that filing a motion to vacate, set aside or correct sentence pursuant to § 2255 is inadequate to challenge a prisoner's detention. See 28 U.S.C. § 2255(e).

Although unavailability of Section 2255 relief "does not automatically mean that one gets to seek relief under §2241[,] ...a fundamental defect...in the criminal conviction...which cannot be corrected under § 2255" permits resort to Section 2241: "A valid claim of actual innocence would be enforceable under § 2241 without regard to time limits under § 2255 if relief under that section was not for some reason, available." Parenthesis omitted. See *Cooper v. United States*, 199 F. 3d 898, 901 (7th Cir. 1999), cert denied. 530 U.S. 1283 (2000). See also *Triestma v. United States*, 124 F.3d 361, 363, 377 (2nd Cir. 1997).

However, a petitioner must satisfy a two prongs test before he may invoke the "Saving Clause" to address errors occurring at trial or sentencing in a petition filed pursuant to 2241. In consideration of the afore-mentioned and the claims raised by the petitioner in the case at bar, § 2255 as inadequate and ineffective to test the legality of a conviction due to : (1) at the time of the conviction, settled law of the circuit or the Supreme Court established the legality of the conviction; (2) Subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rules is not of constitutional law." See In re Jones, 226 F.3d 328, 333 (4th Cir. 2000).

25. The Third Circuit states that "This Court's precedent does not contain a similar limitation. Our Circuit permits access to § 2241 when two conditions are satisfied: First, a prisoner must assert a "claim of 'actual innocence' on the theory that 'he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision' and our own precedent construing an intervening Supreme Court decision"-in other words, when there is a change in statutory caselaw that applies retroactively in cases on collateral review. *Tyler*, 732 F.3d at 246 (quoting *Dorsainvil*, 119 F.3d at 252). And second, the prisoner must be "otherwise barred from challenging the legality of the conviction under § 2255." Id. Stated differently, the prisoner has "had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate." *Dorsainvil*, 119 F.3d at 251. It matters not whether the prisoner's claim was viable under circuit precedent as it existed at the time of his direct appeal and initial § 2255 motion. What matters is that the prisoner has had no earlier opportunity to test the legality of his detention since the intervening Supreme Court decision issued."

26. For the first prong, the Petitioner asserts that he has met actual innocence prong of the saving clause text under 28 U.S.C. § 2241. Based on the interpretation of "generic federal definition of sexual abuse of minor," his conviction for Traveling for the Purpose of Engaging in Illicit Sexual Conduct with a minor in violation of 18 U.S.C. § 2423(b) is deemed not to be criminal under federal law. See *Esquivel-Quintana v. Sessions*, 581 US _ _ 137, S. Ct. 1562, 1567, 198 L. Ed. 2d 22 (2017) (generic federal definition of sexual abuse of a minor" for purpose of 8 U.S.C. § 1101(a)(43)(A). See *United States v. Murphy*, 942 F. 3d 73 (2nd Cir. 2019). In Murphy, United States Court of Appeals for the Second Circuit vacated and remanded. Holding that defendant's conviction for violating 18 U.S.C. § 2423(b) was vacated because the statute criminalizes interstate travel "for the purpose" – that is, with the intent of – engaging in a sexual act with someone aged

at least 12, not yet 16, and at least four years the defendant's junior. Defendant, however, apparently believed he was going to have sexual intercourse with a 16-year-old which meant, while he might have been guilty of a different crime, he was not guilty of violating § 2423(b); [2]- The district court plainly erred in violation of Fed. R. Crim. P. 11(b)(1)(G) by accepting defendant's plea because given evidence that defendant apparently believed the person to be age 16, there was not an adequate factual basis for the plea and the error prejudicially affected defendant's substantial rights.

27. For the second prong, the Third Circuit stated that, the prisoner must be "otherwise barred from challenging the legality of the conviction under § 2255." Id. Stated differently, the prisoner has "had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate,"

28. The Petitioner asserts that he has had no earlier opportunity to challenge his conviction for crime that an intervening change in substantive law may negate because the Supreme Court held *Esquivel-Quintana v. Sessions* in 2017 after the Petitioner's direct appeal and his initial § 2255 motion. *Dorsainvil*, 119 F.3d at 251.

29. According to the Third Circuit test "it matters not whether the prisoner's claim was viable under circuit precedent as it existed at the time of his direct appeal and initial § 2255 motion. What matters is that the prisoner has had no earlier opportunity to test the legality of his detention since the intervening Supreme Court decision issued."

30. Here, the Government claimed that the Petitioner has had earlier opportunity to raise this claim, where in fact, this interpretation of the law has been foreclosed by the Third Circuit precedent at the time of the Petitioner's sentencing, direct appeal, and initial § 2255. At that time

the Third Circuit has insisted that the victim has to be 18, until the Supreme Court clarified the "generic federal definition of sexual abuse" in 2017. See *Esquivel-Quintana v. Sessions*, US., No 16-54, 5/30/2017). This decision took place after the Petitioner first § 2255 in 2016, and there was not any way the Petitioner could have raised *Esquivel-Quintana v. Sessions* argument earlier.

31. Based on the Third Circuit own test, the Petitioner has demonstrated his claim pursuant to § 2241 petition under "Savings Clause" § 2255(e), but the Government and the District Court claimed that the Petitioner did not state any caselaw that satisfied the "Saving Clause", that all the case-laws the Petitioner has cited in his case were for immigration purpose. The Petitioner disagreed, citing for example, *Monerieffe v. Holder*, 133 S. Ct. at 1688; *Nijhawan v. Holder*, 557 US 29 (2009); *Padilla v. Kentucky*, 559 U.S. 356 (2016); *Carachuri-Resndo v. Holder*, 130 S. Ct. 2577 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006) which were immigration cases established by the Supreme Court and have been used in drug cases. The Court of Appeals also agreed that the Petitioner guilty plea would prevent him from claiming actual innocence. The Petitioner rejects and objects to that decision stating that if his guilty is going to prevent him from collateral attacking his conviction, then the facts related to how the plea has been accepted by the Court should not be excluded from 28 U.S.C. § 2241 petition because the "Savings Clause" § 2255(e) is la suite of the 28 U.S.C. §2255 motion itself.

32. Moving forward, the Court of Appeals for the Third Circuit summarily affirmed for possible dismissal of the Petitioner's Petition pursuant to 28 U.S.C.§ 1915(e)(2)(B) or summary action pursuant to the Third Circuit LAR 27.4 and I.O.P 10.6. The Petitioner strongly rejects and opposes to the Court of Appeals judgment. The Court of Appeals judgment is not warranted.

33. In 2013, the Supreme Court granted certiorari in a 6th Circuit case to address the proper application of section 1915(e)(2)(B)'s summary dismissal mechanism, but the Court thereafter

summarily vacated the 6th Circuits judgment and remanded for further consideration in light of a subsequent decision of that circuit. In the case in which the Court initially granted *certiorari* *Burnside v. Walters*, 569 U.S. 971 (2013) (*mem.*) the 6th Circuit had issued an unpublished decision affirming the district courts summary denial under section 1915(e)(2)(B) of an IFP complaint for fail[ure] to state a claim on which relief may be granted.... Thereafter, the 6th Circuit issued a decision in *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013), hold[ing], like every other circuit to have reached the issue, that under Rule 15(a) a district court can allow a plaintiff to amend his complaint even when the complaint is subject to dismissal under the PLRA or section 1915(e)(2)(B), and overruling the 1997 circuit decision that had held otherwise (*McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997)). See *Neitzke v.Williams*, 490 U.S. 319, 324 (1989) (Section 1915 is "designed to ensure that indigent litigants have meaningful access to the federal court"); Id. At 329 ("Congress' over-arching goal in enacting the in forma pauperis statute [was]; 'to assure equality of consideration for all litigants'" (quoting *Coppedge v. United State*s, 369 U.S. 438, 447 (1962))). See *Neitzke v. Williams*, 490 U.S. at 32225 (dismissal for frivolousness is permissible only if the petitioner cannot make any rational argument in law or in fact, which would entitle him or her to relief standard is more lenient than that of [Fed. R. Civ. P.] Rule 12(b)(6); *Weeks v. Jones*, 100 F.3d 124, 12728 (11th Cir. 1996) (*per curiam*) (claims in federal habeas corpus petition, which were arguable, although ultimately unsuccessful, could not be deemed frivolous); *Koetting v. Thompson*, 995 F.2d 37, 40 (5th Cir. 1993) (*per curiam*) (notwithstanding vagueness of petitioners claims and doubts whether he could prevail on merits, district court erred in dismissing petition as frivolous because petition has an arguable basis in law); see also, *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

34. Here, conflict between the Circuit Courts of Appeals creates problems. As you can see that none of the Petitioner's claims is frivolous or malicious or fails to state a claim. Instead, there is a probability that the intervening Supreme Court's decision under *Esquivel-Quintana*, provides a new federal definition of sexual abuse of a minor that renders his offense non-criminal or there is a probability that he has been convicted of nonexistent offense. In *Cabeda*, it is stated by the Third Circuit that "the BIA agreed that the IJ had erred by failing to use *Esquivel-Quintana's* "new" federal definition of sexual abuse of a minor" and one of the judges dissented, stating that *Esquivel-Quintana* did not provide a 'new' federal definition of a crime of sexual abuse of a minor.... Supreme Court tells us we are not to 'look... to the fact of the particular ... case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony." *Moncrieffe v. Holder*, 569 U.S. 184, 190, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013) (internal quotation marks and citation omitted). See *Cabeda v. Attorney General of the United States of America*, 2020 U.S. App. LEXIS 26126 (3d Cir. 08/2020). The Petitioner asserts that if *Esquivel-Quintana* does not provide a new rule of federal definition of sexual abuse of a minor, then the Petitioner has been convicted of nonexistent offense. See *Reyes-Requena v. United States*, 243 F.3d 893; U.S. App. LEXIS 2891 (February 28, 2001). In *Reyes-Requena*, the Fifth Circuit held that since the defendant's claim was that he had been imprisoned for non-criminal conduct, he met the actual innocence prong of the savings clause test under 28 U.S.C. § 2241, and it was for the district court to rule on the merits of the defendant's petition. Courts have framed the actual innocence factor differently, but the core idea is that the petitioner may have been imprisoned for conduct that was not prohibited by law. Such a situation would likely surface in a case that relies on a Supreme Court decision interpreting the reach of a federal statute due to the following rationale: Section 2255 is the primary method by which a

federal prisoner may collaterally attack a conviction or sentence. See *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). Thus, a petitioner's first recourse on collateral review is the initial § 2255 motion (which can be filed, inter alia, on grounds that the sentence violated the Constitution or federal laws). Similarly, if a petitioner has already filed a § 2255 motion, his or her second recourse would be a successive § 2255 motion. Section 2255 permits second or successive motions only if the motion contains:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. § 2255 (2000).
>
> And, as subsection (2) speaks only to intervening Supreme Court decisions based on constitutional grounds, the provision does not provide any avenue through which a petitioner could rely on an intervening Court decision based on the substantive reach of a federal statute. See *Lorentsen v. Hood*, 223 F.3d 950, 953 (9th Cir. 2000) ("Congress has determined that second or successive § 2255 motions may not contain statutory claims."); *Sustache-Rivera*, 221 F.3d at 16 ("The savings clause has most often been used as a vehicle to present an argument that, under a Supreme Court decision overruling the circuit courts as to the meaning of a statute, a prisoner is not guilty . . . . The savings clause has to be resorted to for statutory claims because Congress restricted second or successive petitions to constitutional claims." (internal citations omitted)).

35. "Decisions of the Supreme Court holding that a substantive federal criminal statute does not reach certain conduct . . . necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley v. United States*, 523 U.S. 614, 620, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998) (quoting *Davis v. United States*, 417 U.S. 333, 346, 41 L. Ed. 2d 109, 94 S. Ct. 2298 (1974)); see also *United States v. McKie*, 315 U.S. App. D.C. 367, 73 F.3d 1149, 1151 (D.C. Cir. 1996) (" A court's interpretation of a substantive criminal statute generally declares what the statute meant from the date of its enactment.").

36. To capture the idea that the incarceration of one whose conduct is not criminal "'inherently results in a complete miscarriage of justice,'" *Davis v. United States*, 417 U.S. 333, 346, 41 L. Ed. 2d 109, 94 S. Ct. 2298 (1974), most circuits have included an actual innocence component in their savings clause tests. See, *e.g., Jones*, 226 F.3d at 334 ("the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal"); *Wofford*, 177 F.3d at 1244 ("the holding of the Supreme Court establishes the petitioner was convicted for a nonexistent offense"); *Davenport*, 147 F.3d at 611 ("so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense"); *Dorsainvil*, 119 F.3d at 251 ("prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate"). The actual innocence element has also been foreshadowed in our own savings clause jurisprudence. See, *e.g., Kinder*, 222 F.3d at 213 (noting with approval that "where the petitioner's case has been viewed in other circuits as falling within the savings clause, it was in part because the petitioner arguably was convicted for a nonexistent offense").

Second, the decision upon which the petitioner is relying must be retroactively applicable on collateral review. See *Wofford*, 177 F.3d at 1244 ("claim is based on a retroactively applicable

Supreme Court decision"); *Dorsainvil*, 119 F.3d at 251 ("government concedes that such a change should be applied retroactively").

37. We therefore hold that the savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion. Under these circumstances, it can fairly be said, in the language of the savings clause, that "the remedy by a successive § 2255 motion is inadequate or ineffective to test the legality of the petitioner's detention." Of course, this test will operate in the context of our existing jurisprudence regarding what is not sufficient to obtain access to the savings clause. See, e.g., *Pack*, 218 F.3d at 452-53 (providing examples of such circumstances from caselaw).

38. The Petitioner also asserts that there is a probability that the Supreme Court's decision in *Rehaif v. United States*, _ U.S _ 139 S. Ct. 2191 (2019) renders his Count 13 non-criminal if it is properly applied to his 18 U.S.C. § 1589 statute. The Petitioner had never been convicted and had no criminal record before he was arrested. The Petitioner asserts that the Court of Appeals should have proceeded under *Rehaif*. In *Rehaif v. United States*, the Supreme Court held that in order to secure a firearm conviction under 18 U.S.C § 922(g), the government must prove "both that the defendant knew he possessed a firearm and he knew he belonged to the relevant category of persons barred from possessing a firearm," 139 S. Ct. at 2200. In this instant case, the Government must prove both that the Petitioner knowingly engages in forced labor and aggravated sexual abuse by using force against anyone as is described in 18 U.S.C. § 1589 statute. And the Government also must prove that the Petitioner "knew he belonged to the relevant category of persons barred from" repeating the same offense. See **Appendix J**. See also, *United States v. Gary*, 954 F.3d

194 (4th Cir. 2020) (the Fourth Circuit held that a district court's failure to advise a defendant of his knowledge element before accepting a guilty plea is structural error that automatically renders a guilty plea unconstitutional. *Rehaif* is retroactive applicable here for Count 13. Under *Teague v. Lane*, 489 U.S. 288 (1989), a Supreme Court decision applies retroactively to cases on collateral review if it announces a rule that is "Substantive." See *Welch v. United States*, U.S_, 136 S. Ct. 1257, 1264 (2016). A decision is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." Id at 1265 (citation omitted). See *Bousley v. United States*, 523 U.S. 614, 620, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974)); see also *Dorsainvil*, 119 F.3d at 250-51. And because it is a first principle of the separation of powers that "it is only Congress, and not the courts, which can make conduct criminal," *Bousley*, 523 U.S. at 620-21; see *United States v. Hudson*, 11 U.S. (7 *Cranch*) 32, 3 L. Ed. 259 (1812), a court is "prohibited from imposing criminal punishment beyond what Congress in fact has enacted by a valid law." *Welch*, 136 S. Ct. at 1268. It is for these reasons that "Teague's conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Montgomery v. Louisiana*, 136 S. Ct. 718, 728, 193 L. Ed. 2d 599 (2016).

39. In light of these principles, the significant constitutional concerns we expressed in *Dorsainvil* are manifest. The Constitution dictates that "[a] conviction and sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." Id. at 731 (citing *Ex parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1880)). "It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." Id. Of signal importance, it is "uncontroversial . . . that the privilege of habeas corpus

entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)). Foreclosing a prisoner from even having an opportunity to assert his actual innocence in light of an intervening Supreme Court decision announcing a new substantive rule would challenge one of the writ's core guarantees.

40. Above all, the Vice President Kamala Harris said that this administration will be based on facts and the President Joe R. Biden emphasized it. Due, the U.S. Supreme Court should use its discretion to grant this Petition.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully Submitted

Lassissi Afolabi

Date: April 12, 2021