No. 20-7853

IN THE

SUPREME COURT OF THE UNITED STATES

CRAIG ALLEN MORGENSTERN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CRAIG ALLEN MORGENSTERN, PRO SE
(Your Name)

US PENITENTIARY TUCSON PO BOX 24550
(Address)

TUCSON ARIZONA 85734-4550
(City, State, Zip Code)

(Phone Number)

QUESTIONS(s) PRESENTED

I. But for the errors of the trial court which allowed modified jury instructions that impermissibly deleted statutory elements, defendant would not have been found guilty of aggravated sexual abuse. The burden of proof of finding guilt was diminished by statutory manipulations in violation of Fifth and Sixth Amendments.

II. But for the errors of the trial court, defendant would not be guilty of Transportation of a Minor, as minor had achieved age of consent, no sex act occurred, and element prohibiting production of child pornography not added until four years after conduct, which violates Ex Post Facto clause. There remains confusion amongst circuits as separate chapter definitions (§2427) is in conflict with statutory definitions section.

III. But for errors of trial court, imposition of special terms of supervised release is unconstitutionally overbroad in restriction of First Amendment right to free speech, and court failed to provide rationale for imposition of special terms.

IV. Bur for error of Ninth Circuit Court of Appeals, Certificate of Appealability would have been granted regarding Ineffective Assistance of Counsel. Counsel failed to raise challenge to improper jury instructions or offer proper instructions, and did not raise at appeal. Issue was raised in a timely §2255 petition, though COA denied by lower and appellate courts.

V. But for error of Ninth Circuit to issue a COA, Ineffective Assistance o Counsel present in failing to subpoena or corss-examine four of six victims, and failing to provide affidavits to court despite containing exculpatory statements. Counsel failed to present any witnesses.

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

NONE

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

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

[X] 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 C to the petition and is

[X] reported at 725 F. Appx. 546; 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 14, 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 23, 2020, and a copy of the order denying rehearing appears at Appendix A & B.

[ ] 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

1. Statutory provisions are found in Appendix E.

2. Constitutional provisions-

(a) First Amendment - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(b) Fifth Amendment - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for teh same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(c) Sixth Amendment - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district the crime shall he been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

(d) Eighth Amendment - Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

1. Movant indicated Novembver 4, 2014 in District Court in Eastern Washington. He is initially chazrged with 3 counts of Transportation (18 USC §2423(b), 4 counts of Production of Child Pornography (18 USC §2251(a)), 1 count of attempted Production of Child Pornography, and 1 count of Aggravated Sexual Abuse (18 USC §2241(c)). Movant pleads not guilty.

2. Movant retains attorney Christian Phelps initially. In July 2015, Phelps is replaced by attorney Bryan P. Whitaker, who represents movant throughout trial, and under CJA appointment, as appellate counsel.

3. Motion for change of venue made October 9, 2015, due to intense media coverage in area: motion denied November 4, 2015. Motion for return of seized property is also denied, with a right to renew, though counsel never does.

4. Notice of government expert witnesses made December 21, 2015. Defense counsel does not retain any expert witnesses in counter-testimony on behalf of defense, stating no funds to do so.

5. Criminal trial held FEbruary 25-February 29, 2016. Jury returns guilty verdicts on each of 33 counts after a total of 90 minutes of deliberations.

6. Despite charges involving six victims, only Persons A & D called to testify by prosecution. Despite making exculpatory statements in their affidavits, none of the remaining 4 victims are called to testify by defense, nor are the statements ever shared with teh court or jury.

7. Evidentiary hearing on motion for new trial held on April 14, 2016. Rule 29 motion made on counts 1, 8, 18 due to lack of evidence of sedation, including expert medical testimony stating sedation could not be determined on these counts due to lack of video evidence. Court overrules motion, stating it believes that defendant has a modus operandi of using sedation.

8. At sentencing July 25, 2016, defense counsel offers no mitigation regarding his client, leaving judge to comment that he used the Presentence Investigation Report (PSR) and will rely on that. Court subsequently sentences defendant to statutory maximum term of imprisonment on 31 of 33 counts, including 12 life sentences. Defendant also ordered to pay restitution, and both of his residences (valued at $850,000) are forfeited without an adversarial hearing.

9. Defendant chooses attorney Whitaker as appellate counsel under CJA.

10. Defendant transferred to US Penitentiary Tucson. Counsel submits direct appeal without input of defendant, nor allowing him to see it beforehand, thus ignoring multiple violations of defendant's constitutional rights in court proceedings.

11. Direct appeal denied on March 23, 2018 by Ninth Circuit Court of Appeals. Despite appointment under CJA 3006A, defense counsel fails to petition for a writ of certiorari to the Supreme Court, and does not inform inmate of his right to do so.

12. Motion for writ of habeas corpus filed on FEbruary 19, 2019, alleging violation of appellant's First, Fifth, Sixth and Eighth Amendment rights.

13. District court denies writ of habeas corpus (§2255) on February 27, 2020, stating that petitioner has not shown a denial of a constitutional rights. A Certificate of Appealability (COA) is denied. Movant not notified until April 5, 2020.

13. Movant files a notice of appeal with the Ninth Circuit on April 9, 2020, asking for a COA from the Appellate court.

14. Due to Covid-19 lockdowns at movant's facility, two extensions of time to file are granted. Petitioner files Motion for Certificate of Appealability on on July 22, 2020, which is deemed timely filed. The Ninth denies the Motion

without argument on September 14, 2020.

15. Petitioner files a Motion for Reconsideration or Hearing En Banc on October 9, 2020. This, too, is denied on November 23, 2020, and the case is closed.

16. Petitioner now approaches the Supreme Court requesting a writ of certiorari, as the Ninth has denied a Certificate of Appealability despite multiple violations of petitioner's constitutional rights.

REASONS FOR GRANTING THE PETITION

I. Jury Instructions on Aggravated Sexual Abuse are Unconstitutional

The court allwed modified statutory language be used in the jury instructions, removing necessary elements and reducing the government's burden of finding guilt beyond a reasonable doubt, in violation of the Fifth and Sixth Amendments to the Constitution.

The Rape and Sexual Abuse Act of 1986 modified the laws pertaining to sex offenses. The new statutory provisions were dependent on whether the defendant engaged in a "sex act" or the lesser "sexual contact", as defined in the statutes; the degree of coercive behaviors (force or intoxication) used; intent; and the age of the victim.

The greatest offense, aggravated sexual abuse (18 USC §2241) requires a "sex act", and an aggravating circumstance. Abusive sexual contact (18 USC § 2244) requires "sexual contact" that does not amount to a "sex act". Defendant was indicted, convicted and sentenced to the maximum penalty of life imprisonment, despite no evidence of aggravating factor of "force", and reasonable doubt as to use of intoxication, both of which are necessary elements.

(A) The first element is a "sex act", as defined in Title 18 §2246(2),

requires physical contact of mouth and penis of a person not yet 16 years of age. In count 18, there is a single digital image which does not show a "sex act", thus the element is absent. Regardless, the court allowed the charge to stand, and the jury found the defendant guilty. Counsel did not raise on direct appeal.

(B) The second element is knowingly acted. On counts 20, 22, 24 & 30, a key element regarding interstate travel is intent to engage in a sex act with a person under the age of 12 years. Prosecution inferred intent by defendant travelling 15 miles over the Washington/Idaho border, in the same metropolitan area, with a pocket sized waterproof camera in his possession, as proof of intent.

US v Lukashov, 694 F.3d 1107 (9th 2012) holds that multiple purposes are recognized, though it is incumbent on the government to show "the dominant, significant, or motivating purpose for travel was to engage in a sex act". Defendant's conduct shows that his travel was not purposefully to engage in a sex act... the act was incidental.

US v Hayward, 359 F.3d 631 (3rd 2003), "the government must prove beyond a reasonable doubt, however, that a significant or motivating purpose across state lines or foreign boundaries was to have the individual transported engage in illegal sexual activity." In instant case, defendant did not transport victims across state lines: only he himself travlled over state lines to meet the victims at an amusement park. US v Broxmeyer, 616 F.3d 120 (10th 2010) states the plain wording of statute §2423(a) requires that the mens rea of intent coincide with the actus reus of crossing state lines.

The district court denied petitioner's writ of habeas corpus in regards to intent, citin a later opinion of the 11th circuit: US v Miller, 819 F.3d 1314, 1316 (11th 2016), where "dual purposes are sufficient for a conviction under §2251(a), and that we need not concern ourselves with whether the

illegal purpose was dominant over other purposes." This runs counter to the prevailing authority, Lukashov, held in the Ninth, and the actual statutory language itself. Rehaif v US, 139 S.Ct. 2191 (2019), holds "a longstanding presumption, traceable to Common Law, that Congress intends to require defendants to possess mental state regarding each of the statutory elements to criminalize conduct."

(C) The third element is use of "force or threats of force" to coerce a victim's behavior. There was no evidence nor testimony that defendant used force or threats with any person. In order to overcome this, the government petitioned trial court, which agreed, to modify the statutory language and jury instructions to completely disregard this element. On any person aged 12-16 years (counts 1, 4, 6, 8, 10, 12, 14, 18), a finding of aggravated sexual abuse (§2241(c)) requires the use or threatened use of force (§2241(a)), and unknowing or forced use of a drug or intoxicant (§2241(b)). The government convinced the court to ignore "physical force", and instead consider only intoxication, holding that intoxication is akin to "psychological coercion", and can take the place of "force". US v Fire Thunder, 908 F.2d 272,274 (8th 1990), "Section 2241(a) (1) requires a showing of actual force...this requirement may be satisfied by a showing of...the use of such physical force as is sufficient to overcome, restrain or injure a person", quoting H.R.Rep.No 594, 99th Congress, 2d. Sess., 14n.54a. The keyword in this definition of force, per Congress, is physical. The Ninth followed in US v Fulton, 987 F.2d 631 (9th 1993), "18 USC §2241(a) (1) requries a showing of actual "force", and US v Archdale, 229 F.3d 861 (9th 2000), "a showing of actual force is necessary to satisfy the force requirement of 18USC §2241(a)(1). The force requirement may be satisfied by a showing of the use of such physical force as is sufficient to overcome, restrain

or injure a person."

US v Lauck, 905 F.2d 15,18 (2nd 1990), "the statute does not define "force" or specify the amount of force necessary for a violation of 18 USC §2244(a)(1). The legislative history of the statute, the Sexual Abuse Act of 1986, Pub.L.No.99-654, 100 Stat. 3660, however, states that the requirement of force may be satisfied by the showing of the use of such physical force as is sufficient..." Clearly the intent of Congress in it's development of the aggravated sexual abuse statue was to proscribe physical force as an aggravator.

Removal of the requirement of "force" was highly prejudicial to the defendant, as there was no evidence of the use of force. The court's improper jury instructions allowed the finding of guilt of conduct that the petitioner did not perform. In Re Winship, 397 US 358 (1990), "a jury instruction that omits or materially misdescribes an essential element of an offense as defined by state law, relieves the State's obligations to prove facts constituting every element of an offense beyond a reasonable doubt, thereby violating the defendant's due process rights." US v Gaudin, 132 L.Ed. 2d 444 (1995), a trial judge's refusal to submit a key element (of materiality) to a jury was a violation of the Sixth Amendment right to have a jury determine guilt of every element of a crime charged. And, US v Menasche, 348 UA 528 (1955) said "a fundamental canon of statutory construction is that every clause of the statute should be given effect." In no other circuit was "psychological coercion" used in place of "force".

US v Boyles, 57 F.3d 535 (7th 1995), "Purpose of aggravated sexual abuse statute §2241(a) is to criminalize sexual acts engaged with a person whose will is not engaged but is overcome with violence." And, US v Holly, 488 F. 3d 1298 (10th 2007), 4 convictions under §2241(a) were reversed, as jury in-

structions did not clearly require the jury to find "heightened fear of death, serious bodily injury or kidnapping", and the district court had erred in allowing "force" to be inferred in size disparity of defendant and victim, which did not satisfy the physical force element of §2241(a)(1).

Gentry v Sinclair, 693 F.3d 867 (CA9 2012), "an unforeseen judicial enlargement of a criminal statute applied retroactively operates like ex post facto law." This would certainly apply in the actions of the trial court in instant case, and the Ninth Circuit's refusal to grant a Certificate of Appealability on this runs counter to the holdings of other circuits.

(D) Petitioner was also convicted of violations of §2241(b), "By other means" in counts 1, 4, 6, 8, 10, 12, 14, and 18. "By other means" requires the rendering of victim unconscious, or the use of force/threats or unknowing ingestion of an intoxicant. Though not a necessary element in counts 20, 22, 24, and 30, the government alleges that these victims were drugged as part of defendant's purported modus operandi (M.O.).

The government's belief stems from the allegations of person D, who claims hot cocoa he was served in October 2014 tasted "sour", had a "film on top", and was the worst hot chocolate he'd ever had, and that he was unable to drink it. Despite no being to drink the cocoa, he testified that he felt drugged ("fatigue clouding him"), which made it difficult to remain awake, though he feinged falling asleep. On physical examination the next day, he was found to have Benadryl and a sedative, Temazepam, in his urine, and the presumption was unknowing sedation.

The government proffered a medical expert, DR. Satterfield, who viewed the videos associated with counts 3, 5, 7, 11, 13, 15 and 32, to opine if the victim appeared sedated or asleep, and also educated the court on sedatives. The expert opined that every video depicted a sedated, as opposed to sleeping victim, and that adolescent males would respond to genital stimula-

tion by "rolling over, moving, moving hands, sitting up." When asked by de= fense counsel if he had viewed each video in it's entirety, he responded "No". When asked if it is possible to confuse sedation with sleeping, he responded, "Generally that is possible."

Testimony from person A was that he was never forced nor threatened to ingest any drug, though "alcohol, pills, marijuana" were freely accessible. Affidavits of persons B, C, E and F, not shared in court but revealed to Dr Satterfield by counsel during cross-examination, indicate that none of them had ingested food or drink prior to bedtime, making unknowing ingestion of a drug impossible. When told such, Dr Satterfield responded "that isn't clinically doable". He had just stated it is possible to confuse sleeping with sedation, yet he refused to believe the affidavits of 4 of 6 (5 of 6 if you count person D's testimony that he did not eat or drink before bed in 2011) victims when it raises doubt to his opinion. Agent McEuen later testified that he had editted each video to show "the sex acts and the evidence in the background". Presumably this means that in editting a 35- or 25-minute video down to 5 minutes, he left evidence of the victims "rolling over, moving, moving hands, sitting up" on the cutting room floor, as such behaviors were present on the uneditted videos, unseen by jury or court. The prosecution expert was biased as well, as he referred to several instances of the victims showing purposeful movements as "coming out of sedation", rather than simply awakening.

Defense counsel was ineffective by not using any expert testimony to confront the bias of the prosecution expert, which stood unchallenged. This lack of confrontation was notable when the court itself stated it believed that counts 1, 8 & 18 would not have occurred unless sedated, and thus overruled Rule 29 motions on these counts: the court itself believed in an M.O.

of sedation and applied this to counts that even the expert did not render an opinion on.

Person D's testimony was poorly confronted: defense counsel did not ask if he had ingested defendant's medications on his own (easily accessible on bathroom countertop). Also, the medications involved are both water-soluble (will not leave a film on top of cocoa), tasteless (will not taste "sour"), and have an onset of greater than 60 minutes (person D states that he did not drink the cocoa, yet was fighting fatigue/sleepiness almost immediately). As counself did not offer a Pharmacologist to rebut the testimony of the expert witness, none of this was explained to the court. Burr v Lassiter, 513 Fed. Appx. 329,346 (4th 2013), counsel was ineffective (IAC) if he would not have investigated the medical aspects of a case fully. In Burr, counsel actually did investigate, though: he reviewed medical evidence, consulted with an expert, and pursued alternative theories. Counsel in instant case did none of these actions.

As the government relied on an M.O. of sedation theory, any evidence or testimony that challenged this was ighored or manipulated: Agent McEuen editted the videos. On count 16, person A is wide-awake (non-sedated) and masturbating, which is not a sexual act.

Prior to trial, this count, with it's associated images, was dropped: showing the images to jury would have raised doubt as to an M.O. of sedation of all victims, and to person A's statements that he would never knowingly engage in sexual conduct with, or around, defendant willingly. Similarly, count 29 is a 20-second video of person A masturbating, while talking to defendant over his left shoulder, while surfing adult porn on a laptop and watching a comedy on the television. It is doubtful that person A is sedated or intoxicated in

this short video, so rather than showing the video to the court, as in all other counts, the prosecution elected to only show a "screenshot" of the video, which makes it impossible for the court to evaluate all of the activity that the victim is doing, or his level of alertness.

Counts 26 & 28 are also of Person A, wide awake and aware of the camera, once again masturbating. Yet he testifies that he does not recall doing these activities around the defendant, blaming "alcohol, pills, marijuana" for his supposed lack of recall. The court points to this untrue allegation as to why these charges were allowed, as he must have obviously sedated. Defense counsel did not confront the testimony of person A, stating to do so would be "badgering".

Counsel also failed to raise credibility issues with person A's testimony regarding sexual conduct with defendant by not sharing with the court numerous videos and images made in February 2013 (when person A was 18 years of age), showing consensual sexual activity between himself and defendant. This revelation would have impeached person A's testimony.

Count 8 is a series of images of person F, who did not testify but had stated on his affidavit no ingestion of food or drink before bedtime. And, again, the court allwed it's belief in an M.O. of sedation to allow the count to proceed onto the jury. Count 18 was inappropriately allowed as well, as not only was it a single image of a non-erect penis not showing a sex act or any physical contact, but once again, person B had denied ingestion of food or drink before bedtime. Clearly, in absence of any expert counter-testimony due to defense counsel's desire to save money, there was considerable confusion and resulting prejudice against the defendant.

(E) Petitioner was improperly charged under §2241(c) on multiple counts (1, 4, 6, 8, 10, 12, 14, 18) based on improper jury instructions. The court

allowed modified jury instructions (instructions N. 6) to reflect statutory elements for victims under the age of 12 years, when each of the counts pertains to victims over the age of 12 years. Properly instructed, §2241(c) for victims aged 12-16 years of age require two elements: (1) use of "force" or threats, and (2) intoxication by threats or force or unknowingly, rendering unconscious. Both elements are required, though the court improperly allowed the statutory elements for under age 12 years be instructed.

Taylor v US, 495 US 575 (1990) held "as a matter of statutory interretation, we generally consider the statute's language, purpose, history and past decisions and controlling law to determine whether the district court properly instructed the jury." Removing the element of "force" renders each of these counts invalid, and no evidence of "force" was ever shown. Modifying the jury instructions to reflect the statutory elements applicable to under 12 years and applying this to victims asged 12-16 years also is improper, as age is a key element.

II. Use of Ex Post Facto Law and Lack of Key Elements Unconstitutional

The trial court impermissibly allowed the counts of 18 USC §2423(a) Transportation be rendered to the jury when both counts failed to show a key element of "sex act". Also, as written in 2011, at the time of the offense, the statute did not proscribe Production of Child Pornography as an illicit sex conduct; it was added as an addendum (18 USC §2423(f)(3)), on May 29, 2015, and applying it to conduct in 2011 violates Ex Post Facto clause of Article I of the Constitution. Under subsection (f), applicable definitions are listed: §2423(f)(1), which requires a "sex act", and §2423(f)(3) for Production of Child Pornography

Counts 26 & 28 involve person A, with conduct occurring in January &

July, 2011, at which time person A was aged 16 years of age, the age of consent in Washington, Mississippi and federally. The offense involves 11 digital images and a 20-second video. All depict person A masturbating, which is not a "sex act", a necessary element: its absence renders both charges void.

US v Childress, 104 F.3d 47,53 (4th 1996), conviction under §2423(b) was reversed as the defendant argued successfully that the district court erred in construing §2423(b) to prohibit the charged conduct of travelling in interstate commerce with the intent to engage in a sex act with a juvenile: at the time of the offense, §2423(b) referenced a definition [18 USC §2245] of key term "sex act" as "sexual abuse resulting in death", and that evidence did not show the defendant intended to or did engage in such conduct... While the government argued that the language in Chaper 109A was broad enough to include the charged conduct, the Fourth disagreed and reversed the conviction after a de novo review of the case.

Davis v US, 417 US 333 (1974), where an individual is arrested and convicted under a statute that does not prohibit his conduct, the requirements of Rule 52(b) are met. US v Moore, 136 F.3d 1343 (9th 1998), "conviction and punishment for an act that the law does not make criminal inherently results in a complete miscarriage of justice". Charging and convicting petitioner under §2423(a) for two counts that do not show a "sex act", using no statutory elements present at the time of the offense (2011) is a miscarriage of justice that the district court failed to rectify or recognize, and the appellate court ignored.

Federal Rules of Criminal Procedure 52(b) allows a court to correct defects in district courts proceedings if there is (1) an error, (2) that is plain, and (3) affects substantial rights, even if error not raised in district courts, US v Uchimura, 125 F.3d 1282 (9th 1997). In US v Olano, 507 US

725 (1993), the Supreme Court stated that if 3 elements are present, "we have discretion to correct an error under Rule 52(b), if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings."

Application of §2423(a) in instant case is in error: (1) person A has achieved age of consent in both counts (26 & 28); (2) activity depicted (masturbation) is not defined as a "sex act" as prohibited by statute; (3) prohibited element of Production of Child Pornography not amended to statute until 4 years after conduct. As noted, Production of Child Pornography (18 USC §2246(2)) is not included in definition of "illicit sexual conduct" as noted in the definitions section of the statute itself.

Under the first error, sexual conduct is not proscribed once both parties have achieved the age of consent. Esquivel-Quintana v Sessions, 198 L.Ed. 2d 22(2017), the generic federal definition of sexual abuse of a minor requires victim's age to be under 16 years.

The statute prohibits travel for a commercial sex act, or for "sexual activity for which any person may be charged with a criminal offense". In US v Taylor, 640 F.3d 255 (7th 2011), the Seventh held that in §2422, no hint as to whether Congress intended "sexual activity" to be broader or narrower than "sex act"; thus, Rule of Lenity requires "sex act" to be limited to definition in §2246(2), which requires physical contact, and does not include Production of Child Pornography. US v Womack, 509 F.2d 368,374 n.4 (DC 1972) "merely illustrates....that masturbation is a form of "sexual activity" in the ordinary language sense of the term, which judges use on occasion, just as laypersons do. Masturbation is also a sexual act in that sense, but not in the statutory sense.

There is confusion in the statutory language that the Seventh attempted to rectify in Taylor, infra; "The government acknowledges that sexual activity for which a person can be charged with a criminal offense is explicitly defined to include producing child pornography. 18 USC §2427." Explicitly defining sexual activity to include producing child pornography was needed only if the term "sexual activity" requires contact, since the creation of pornography doesn't involved contact between the pornographer and another person; this is further evidence that "sexual activity" as used in the federal criminal code does require contact." As the conduct in instant case involves person A masturbating without any physical contact, it would not rise to the reqwuired definition of "sexual activity" as written in the statute (at the time of conduct in 2011).

A significant difference between §2422 and the charged offense, §2423 (a), is that in the latter, a separate "defnitions" section is included. In this section (§2423(f), "illicit sexual conduct" means- (1) a sexual act (as defined in section 2246); (2) any commercial sex act (as defined in section 1591); or after 2015, (3) production of child pornography (as defined in section 2256(8).

So, as the Seventh has shown, illicit sexual conduct otherwise requires a "sex act" which is a physical contact offense.

A final element of §2423(a) requires "intent". The two counts (26 & 28) pertain to trips person A made from Mississippi to Washington over the holidays in 2010/2011. The duration of these trips were 3 and 7 weeks, respectively, and the duration of sexual conduct was brief: 11 digital images on first trip, and a 20-second video on the second. US v Hayward, 359 F.3d 631 (3rd 2003), "A person may have several purposes or motives for such travel, and each may prompt in varying degrees the act of making the journey.

The government must prove beyond a reasonable doubt, however, that a significant or motivating purpose of travel across state or foreign boundaries was to have the individual transported engage in illegal sexual activity." In both trips, the sex activity was incidental, not a dominant purpose.

III. Special Terms of Supervised Release are Unconstitutional

The district court improperly applied several special terms of supervised release, and then improperly denied petitioner's request regarding this issue.

Petitioner sentenced to lifetime supervised release, with numerous special terms, including proscription of possession of pornography and internet usage, both of which curtail petitioner's First Amendment right to free speech; both also imposed without judicial justification or rationale as to how such imposition would fulfill §3553(a) factors. "Terms of supervsied release must be 'reasonably related' to certain prescrribed sentencing factors and involve no greater deprivation of liberty than is necessary for the purpose of sentencing," US v Simmons, 343 F.3d 72,81 (2nd 2003). US v Koch, 978 F.3d 719 (10th 2020), a 10 year period of banning "sexual material" is unconstitutional as the court did not analyze or explain how the special condition will further the statutory requirements of 18 USC §3583.

IV. Counsel Rendered Inaffective Assistance of Counsel

The Sixth Amendment to the Constitution guarantees the right to effective counsel. Strickland v Washington, 466 US 668 (1984). A defendant is entitled to a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. A petitioner can meet this standard by showing that counsel failed to conduct adequate pre-trial

investigation, Jones v Wood, 114 F.3d 1002 (9th 1997), and Sanders v Ratelle, 21 F. 3d 1446,1456 (9th 1994), an attorney must conduct the necessary investigation ahead of time before deciding against a line of investigation. Counsel failed to conduct any investigation, relying apparently only on responding to prosecution's evidence, and poorly at that.

(A) Counsel failed to object to improper statutory language and jury instructions at trial, and did not raise on direct appeal. The court adopted modified jury instructions that deleted the necessary element of "force" (18 USC §2241(a)(1), substituted the ages of 12-16 years old when statute reads "under 12 years old" (18 USC §2241(c)), and removed the requirement of §2241(c) that both (a) and (b) be present in order to convict for conduct against victims 12-16 years of age. By not raising these errors at trial, the improper instructions were rendered to the jury, exposing the petitioner to numerous counts of aggravated sexual abuse.

Sullivan v Louisiana, 508 US 275(1993) holds that the Fifth and Sixth Amendments require a defendant to be found guilty of every element of crimes for which he is charged. US v Vazquez-Hernandez, 849 F.3d 1219(9th 2016), Ninth Circuit found the district court failed to properly inform a jury of necessary elements of an offense, thus committing plain error, and the charges were vacated. And, US v Price, 921 F.3d 777(9th 2019), "whether a jury instruction misstates elements of a statutory crime, an appellate court reviews de novo." Yet in petitioner's writ of habeas corpus, the Ninth failed to issue a COA regarding the improper jury instructions, and petitioner prays the Supreme Court will correct this oversight.

Counsel's performance is clearly deficient: US v Span, 75 F.3d 1383 (9th 2016), the lower court found error in jury instructions, but did not reverse as trial counsel had waived the error. On review, the Ninth Circuit reversed the

conviction as right to effective counsel violated when counsel failed to offer propoer jury instructions, and failed to object to the misleading instructions. (B) Failed to challenge ambiguity in statutory elements and construction of Transportation (§2423(a)) counts, including intent and lack of "sex act". Williams v Taylor, 529 US 395(2000) states "Defense lawyers have a constitutional obligation to investigate and understand the law as well."

Unlike 18 USC §2421 and §2422, the charged statute, §2423(a) has a definitions section, (§2423(f)), which specifically defines "illicit sexual conduct for which a person can be charged with a crime" as either a "sex act" (as defined in §2246(2)), commercial sex act (§1591), or production of child pornography (§2256(8)). The conduct in counts 26 & 28 does not depict a sex act, and the prohibition against production of child pornography was not added until May 29, 2015 (4 years after offense conducted). 18 USC §2427 lists production of child pornography as an offense chargeable under Chapter 117, though if this would apply to §2423, why did Congress find it necessary to amend the charged statute in 2015? As it is ambiguous, the Rule of Lenity would hold that prior to May 29, 2015, §2423(a) did not include production of child pornography.

US v Wolf, 787 F.2d 1074(7th 1986), defendant charged under the Mann Act (§2421), though jury instructions failed to establish a causal relationship: counsel found ineffective due to failure to object. Childress, infra, stated, "It is a fundamental rule of criminal statutory construction that statutes are to be strictly construed and should not be interpreted to extend criminal liability beyond that which Congress has plainly and unmistanly proscribed." If Congress meant for §2427 to apply to Chapter 117 et.seq., why did it feel the need to amend §2423(f) to include (f)(3) "production of child pornography" in 2015?

(C) Failed to subpoena or cross-examine four adverse witnesses. Petitioner indicted and convicted of offenses against six individuals (persons A - F). Persons A & D were called to testify against defendant, while Persons B, C, E and F were not, nor were they interviewed nor cross-examined by counsel. These 4 witnesses, however, provided affidavits, each of which contained exculpatory information that would have raised doubt as to prosecution's theory of use of sedation. These affidavits were not shared at trial or with the jury.

Davis v Washington, 547 US 813(2006), "A witness for purposes of the Confrontation Clause is (1) someone who testifies in court, or (2) someone whose testimonial out-of-court statements are admitted at trial to prove the truth of the matter asserted." The affidavits were favorable to the defense - all 4 of the non-testifying victims denied ingestion of food or drink before bedtime which renders unknowing administration of an intoxicant impossible. Yet these statements were not shared with the court or jury. The failure of defense counsel to seek release of exculpatory information is Ineffective Assistance of Counsel, as it allowed the government's allegation of sedation to proceed unchallenged.

Hodgson v Warren, 622 F.3d 591,600-01 (6th 2010), counsel found to be ineffective for failing to call a witness who would've offered exculpatory evidence. Stavely v Bartley, 465 F.3d 810,814 (7th 2006), counsel ineffective for failing to interview any witnesses, or prospective witnesses, when information in counsel's possession witnesses had exculpatory information.

Delaware v VanArsdall, 475 US 673,678(1986), "The main and essential purpose for confrontation is to secure for the opponent the opportunity for cross-examination." Counsel was unprepared for the cross-examination he conducted on two witnesses called (Persons A & D): he did not interview them ahead of time, nor did he discuss with defendant ahead of time any potential testimony

that they may present. Person A was untruthful on the stand, notably regarding his history of sexual conduct with defendant, including at ages 16 & 18, when he was of consenting age.

In pre-trial discovery, multiple videos and images were documented from February, 2013, when Person A was 18 years of age, showing consensual sexual activity. This was not shared with the court, even though it would have called into question Person A's statements to the court that he would never have knowingly engaged in sexual contact with defendant unless he was drugged. By not confronting Person A's testimony on the stand (due to a belief that such would be "badgering"), the challenge to the theory of sedation of all victims was not raised. Displaying evidence that questions or impeaches Person A's testimony is not badgering, but rather the search for the truth.

(D) Failed to use expert witnesses for the defense. Despite the eight month interval before trial, defense counsel failed to identify or utilize any expert witnesses or character witnesses on behalf of defendant. US v Cronic, 466 US 648(1981) holds it is Ineffective Assistance of Counsel when defense fails to subject the prosecution theory to "meaningful adversarial testing". In petitioner's case, the trial judge himself noted "No defense was presented" (said during Evidentiary Hearing for New Trial on April 14, 2016). When counsel questioned by defendant as to why no expert testimony was being prepared for the defense, he was told that "there is no money to do so". US v Stitt, 441 F. 3d 297 (CA4 2006) found IAC when counsel did not call witnesses to save money.

Counsel was unprepared and unqualified to cross-examine the prosecution's expert witness (physician) who showed a clear bias in his testimony. Counsel did not consult with any experts ahead of time, much less bring one to testify for the defense. Richter v Hickman, 578 F.3d 944 (CA9 2009), "...counsel failed at each stage to consult with a forensic expert of any type, and thus

failed to conduct the rudimentary investigation in order to...(3) prepare in advance how to counter damaging expert testimony that might be introduced by the prosecution, adn (4) effectively cross-examine and rebut prosecution's expert witnesses once they did testify." The same concerns may be levied in the counsel's performance in instant case (in Richter, such performance was held to be IAC). Silva v Woodford, 279 F.3d 825,833 (9th 2002), attorney's failure to prepare and challenge the testimony of a critical witness may be so unreasonable as to violate both prongs of the Strickland test. To sum up, the performance of defense counsel would be akin to that shown in Groseclose v Bell, 130 F.3d 1161,1169-1170 (6th 1997): no defense theory, no adversarial challenge, a failure to investigate and prepare a defense, a failure to call witnesses and impeach prosecution's witnesses although requested to do so by defendant, failure to properly communicate with defendant after trial, and a failure to request proper jury instructions. A mirror of the instant case, which in Groseclose was held to be Ineffective.

(E) Failed to raise Rule 29 denial on direct appeal. Counsel raised Rule 29 motion against counts 1, 8, and 18 before the court, and all three were denied improperly by the court. Inexplicably, though, counsel failed to raise these motions on direct appeal, thus failing to preserve them. All of the counts arose from the prosecution's theory of the use of sedation, which the expert medical witness stated cannot be determined in absence of a video depiction, which none of these counts had. Despite the expert's inability to determine sedation beyond a reasonable doubt, the court itself felt it could, and allowed the counts to be advanced to the jury.

The court pointed to Person A's "surprise" regarding being made aware of himself, wide-awake, masturbating in a 20-second video (count 29): such "surprise" was sufficient for the court to state that Person A "must have been

sedated" in count 1. On count 8, the court reasoned that Person F must have been sedated for genital stimulation to occur, even though Person F denied any food or drink ingestion prior to bedtime in his affidavit. And count 18, a single digital image of a non-erect pernis shown behind a waistband of pajama pants failed to show a "sex act" (a necessary element), and there is nothing to suggest sedation, including Person B's affidavit of nothing to eat or drink ahead of time. Yet the court reasoned that "this couldn't have happened unless he is sedated": certainly not adopting a "beyond reasonable doubt" standard.

Lambright v Ryan, 698 F.3d 808,817 (9th 2012), "A district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous findings of fact, or when we are left with a definite and firm conviction that the district court committed an error of judgment." The court's biased interpretation of these counts should have been raised on appeal, and counsel's unwillingness to do so was prejudicial and ineffective, as these counts did not have evidentiary support beyond the other issues raised in this writ.

(F) Failed to apply for a writ of certiorari to Supreme Court after appeal. Petitioner's appeal was denied by the Ninth Circuit. Defense counsel also served as appellate counsel under a CJA (18 USC §3006A) appointment. Counsel submitted a weak, ineffective appeal with no input from defendant, and without allowing defendant to see it beforehand. After the appeal was denied, counsel wrote to appellant, stating there was no claim to file a writ of certiorari, so he concluded his representation of defendant.

US v Price, 491 F.3d 613 (CA7 2007), appellate counsel ineffective when he failed to file a writ of certiorari. "While the defendant has no right to counsel while serving a writ of certiorari, he does have a right under the Criminal Justice Act, §3006A." And Nnebe v US, 534 F.3d 87 (CA2 2008), movant

appealed court judgment denying a Certificate of Appealability to pursue a §2255 writ when appellate counsel failed to petition for a writ of certiorari: movant sought remand and recall of mandate due to counsel's violation of §3006A by his inaction.

Appellant prays this claim of Ineffectiveness be deemed timely: appellant had not raised this issue on §2255 writ as he was unaware of his rights under CJA to have had his counsel seek the writ of certiorari, and his counsel never made him aware of this right. Pena v US, 534 F.3d 92 (CA2 2008), the Second Circuit explains that an appointed CJA counsel is a requirement in order to benefit from the CJA "Plan" that grants the writ of certiorari assistance to appellant.

Wilkins v US, 441 US 468(1979), an untimely pro se petition for a writ of certiorari followed an unsuccessful direct appeal, as the court-appointed counsel ignored a writ of cert. The Supreme Court determined the proper remedy was to vacate the judgment and remand the case to the Court of Appeals, so a timely petition for certiorari could be filed. Appellant prays for the vacation and remand of judgment to allow for a timely filing of a writ of certiorari on his direct appeal, or appointment of competent counsel to assist in this undertaking.

(G) Failed to offer mitigation at sentencing, or to obtain a psychosexual evaluation. No effort made by counsel to portray the defendant as anything but the monster that the prosecution alleged he was. As a result, the court adopted the mindset that the defendant was an ongoing danger to society, and that an example must be made of him. The defendant was sentenced to the maximum penalty on 33 of 36 counts, including 12 life sentences.

Defendant was a Spokane-native with an extensive family system in the area. He had no criminal history. He is highly-educated, having put himself

through 13+ years of college, having achieved 2 Bachelor's degrees and a Doctorate of Osteopathic Medicine. Defendant was a 15 year veteran of the US Navy, having served as both a Nurse Corps and Medical Corps officer: he was discharged Honorably as a Lieutenant Commander. Defendant went on to serve our nation's veterans thereafter as an Emergency Medicine physician at the Spokane Veterans Administration hospital. Defendant is also a service-connected veteran himself. Despite a 20-year long battle against major depression , defendant has remained a productive member of society, and had started teaching full-time at Gonzaga University as an adjunct professor in the College of Nursing, teaching Master's level Nurse Practitioner students.

Avena v Chappell, 932 F.3d 1237 (9th 2019), the Ninth reviewed de novo an IAC claim where counsel left portrayal of defendant entirely unchecked and unrebutted, and counsel presented no mitigation and called no witnesses to testify on defendant's behalf. Wiggins v Smith, 539 US 510(2003) found IAC when counsel "abandoned through inattention" multiple mitigation factors, and thus left trial court to rely solely on the Presentence Investigative Report (PSR) to develop its impression of the defendant.

Counsel also failed to obtain a psychosexual evaluation of defendant. Despite the court's belief that an evaluation had been completed by a "Mr. Paul Wirt", this is not true: defendant never evaluated nor interviewed by any mental health professional. The Supreme Court has held that counsel's failure to uncover and present any evidence of defendant's mental health or mental impairment, his family background, or his military service, clearly constituted deficient performance of counsel: "There was no attempt to humanize the inmate or allow an accurate assessment of his moral culpability." Porter v McCollum, 175 L.Ed.2d 398(2009).

The Ninth Circuit has failed to issue a Certificate of Appealability

despite the glaring deficiencies in counsel's performance and the district court's failure to resolve all claims raised in petitioner's writ of habeas corpus. The district court failed to address numerous claims raised on § 2255 petition, and rather chose to focus on less significant issues. In a claim that counsel failed to hire any expert witnesses, specifically to confront testimony of experts, the court instead focused on the use of an "expert" media consultant regarding a request for a change of venue. Either the court chose not to read this section of the petition or it deliberately ignored concerns raised by the petitioner.

District court also completely ignored the claim regarding improper jury instructions and statutory manipulations that it had allowed, which resulted in improperly finding aggravated sexual abuse when defendant did not use "force", a denial of defendant's Fifth and Sixth Amendment rights. The court also ignored its obligation to provide a rationale to the imposition of several special terms of supervised release, in violation of petitioner's First and Fifth Amendment rights.

Under Porter v Zook, 803 F.3d 694(4th 2015), the Fourth held that in order to exercise jurisdiction regarding a writ of habeas corpus, 28 USCS §1291 requires that the Court of Appeals be limited to appeals of final decisions of district courts: "ordinarily, a district court order is not final until it has resolved all claims as to all parties....if it appears from the record that the district court has not adjudicated all of the issues in a case, then there is no final order."

The district court ignored most of the claims that were raised on the §2255 petition submitted by the movant, and denied a COA. The harm was perpetuated by the Ninth Circuit, which off-handedly refused to issue the necessary COA with the terse ruling of "denied". Buck v Davis, 197 L.Ed.2d 1(2017)

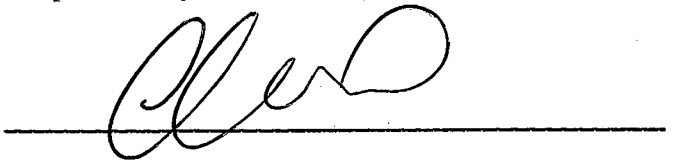
"because the reviewing court inverted the statutory order of operations by deciding the merits of an appeal and then denying a COA based on adjudication of the actual merits, it placed too heavy a burden on the prisoner at the COA stage." By ruling on the merits of petitioner's claims in order to deny a COA, rather than a more appropriate threshold inquiry, the court held the petitioner to an impossible standard.

Petitioner asks the Court to grant the writ of habeas corpus, or at a minimum, appoint competent counsel to represent petitioner at an Evidentiary Hearing. Petitioner asserts that the cumulative errors in his conviction do not support said conviction, such that it must be overturned. Petitioner Morgenstern respectfully requests that this Court: (1) Order Respondent to show cause why Morgenstern is not entitled to relief; (2) if necessary, conduct an Evidentiary Hearing to answer any factual questions necessary to determine merits of his claims; (3) after full consideration of the issues raised by this petition, grant the petition; and (4) grant other such and further relief as may seem just.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 09 APRIL 2021