No. 21-8217

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

HERBERT BERNARD JOHNSON,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

pro se Petitioner
Herbert Bernard Johnson
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QUESTION PRESENTED FOR REVIEW

Should this Court grant the petition for writ of certiorari to resolve whether the statutory language of 18 U.S.C. §2422(b)'s "any sexual activity for which any person can be charged with a criminal offense" element requires proof of at least one crime for which a person could have been charged.

Petitioner Herbert Bernard Johnson respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed on October 7, 2021.

OPINIONS BELOW AND JURISDICTION

On September 17, 2015, a federal grand jury in the Eastern District of Michigan returned a two-count indictment against Herbert Bernard Johnson (Indictment, R. 10 20-24). This was later followed by five-count and four-count superseding indictments which added child sexual exploitation offenses (First Superseding Indictment, R. 18 46-52; Second Superseding Indictment, R. 42 109-15). The case focused on the defendant traveling to the State of Michigan and attempting to meet a minor, allegedly for the purpose of sex. Based on the events leading up to and including September 9, 2015, Mr. Johnson was charged with Count 1: Attempted Coercion and Enticement of a Minor, 18 U.S.C. §2422(b), Count 2: Travel with Intent to Engage in Illicit Sexual Activity, 18 U.S.C. §2423(b), Count 3: Transportation of Child Pornography, 18 U.S.C. §2252A(a)(1), and Count 4: Possession of Child Pornography, 18 U.S.C. §2252A(a)(5)(B).

Mr. Johnson proceeded to jury trial on November 29, 2016. The jury returned guilty verdicts on Counts 1, 2, and 4 and a verdict of not guilty on Count 3 on December 2, 2016 (Jury Verdict Form, R. 53 254-56). On March 27, 2018, the district court sentenced Mr. Johnson to one-hundred twenty-one months of imprisonment followed by lifetime supervised release (Judgment, R. 96 997-1004).

On May 23, 2018, a three-judge panel of the Sixth Circuit Court of Appeals affirmed Mr. Johnson's convictions in a decision published in the Federal Appendix. See United States v. Johnson,

775 Fed. App'x. 794 (6th Cir. 2019) (Appendix D).

On August 19, 2020, Mr. Johnson filed a motion in the district court to vacate his sentence and convictions (§2255 Motion, R. 109 1130-87). He later filed a motion to amend his §2255 Motion on September 1, 2020 (Motion to Amend §2255 Motion, R. 114 1192-95). In total, he raised twenty claims related to his sentence and convictions. The district court denied both motions on procedural and substantive grounds in an unpublished order (Opinion & Order, R. 120 1251-61) (Appendix B).

Mr. Johnson then petitioned the Sixth Circuit Court of Appeals for a Certificate of Appealability as to six of those issues. The Sixth Circuit denied the petition in part and granted it in part on October 7, 2021 (Granting on the claim: "Whether the district court erred in dismissing on procedural-default grounds Johnson's claim that the district court's jury instructions on Count Four constructively amended the indictment" and denying a certificate on all other grounds) (Appendix A). Mr. Johnson petitioned the Sixth Circuit for a rehearing and rehearing en banc which was denied on Feb 22, 2022 (Appendix C). The appeal granted by the Certificate of Appealability is pending in the Sixth Circuit (No. 21-1147). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE AND FACTS

Defendant Herbert Bernard Johnson was named in an indictment charging, Count 1: Attempted Coercion and Enticement of a Minor, 18 U.S.C. §2422(b), and Count 2: Travel with Intent to Engage in Illicit Sexual Activity, 18 U.S.C. §2423(b) (Indictment, R. 10 20-24). A First Superseding Indictment was thereafter filed adding, Count 3: Distribution of Child Pornography, 18 U.S.C. §2252A(a)(2), Count 4: Receipt of Child Pornography, 18 U.S.C. §2252A(a)(2), and Count 5: Possession of Child Pornography, 18 U.S.C. §2252A(a)(5)(B) (First Superseding Indictment, R. 18 46-53). A Second Superseding Indictment followed, changing the statutory references in Count 3-5 to include Count 3: Transportation of Child Pornography, 18 U.S.C. §2252A(a)(1), and Count 4: Possession of Child Pornography, 18 U.S.C. §2252A(a)(5)(B) (Second Superseding Indictment, R. 42 109-15).

The charges were based on allegations that Mr. Johnson traveled from Colorado to Michigan in order to meet with a 15-year old boy for the purposes of engaging in sexual activity with him. The investigation began when a federal agent, posing as a 15-year old, responded to a Craigslist advertisement by Herbert Johnson (Trial Tr., R. 63 412, 416).

On August 25, 2015, Special Agent Raymond Nichols was reviewing Craigslist advertisements, looking for individuals offering child pornography or looking to have sex with minors (Id., R. 63 435). Craigslist is Internet-based advertising used to sell items or meet individuals (Id.). The agent located an advertisement posted from an email address of zenofbj@gmail.com, with a phone number of 303-335-9313 (Id., R. 63 438-39). The advertisement was posted

on August 24, 2015 and had been reposted at a later time. It was posted to the Detroit Metro/Oakland County area in the "Personals" section of the "Casual Encounters" category (Id., R. 63 440). "Casual Encounters" is a section for adult only posters and the Craigslist Terms of Use was admitted as Defense Exhibit 100 (Id., R. 64 691).

The title of the advertisement was "daddy looking for a smooth young son - m4m". The "m4m" was recognized by the agent as "male for male" (Id., R. 63 441). The advertisement specifically requested a young man, under 19 years of age, or a father/son team to participate in sexual play:

> Abuse pervy dad looking for a yng btm son to teach sexual servitude and obedience. Dad likes a son who wants his dads-thick cock in his mouth and then to show his cute little butt so dad can push his face into a pillow and plow him while his screams are muffled by the pillow. You be 19 or less and available to play. Looking for a real situation or even Dad/son team that wants to play. If you're very submissive, even femme, abused, picked on in your childhood, I might mistreat you too. If you're easily overpowered because of your size and weight you're going to be perfect. You can complain about it, but in the end you just take it because that's how you've been treated all your life.
> Pervy yng incest taboo all good. No experience necessary. Let's get naked and have a good time.

(Gov. Trial Ex. 1)

The advertisement included several photographs of male-on-male sexual activity (Id., R. 63 442-46). Some of the males in the photographs appeared small in stature but there was no evidence that they were less than 18 years of age (Id., R. 63 447, 501).

Agent Nichols responded to the advertisement by creating an email address and fictional 15-year old named Jason Laitham (Id., 449-50). He and the Craigslist poster exchanged a series of emails between August 25, 2015 and September 4, 2015 (Id., 449).

On August 25th, the poster asked for information about Jason and also asked for a photograph. Jason responded that he was 15 years old and asked for a photograph from the poster. He received a photo of a nude male from his chin to his thighs. Agent Nichols sent a return photo of a youthful looking adult FBI officer, wearing underwear (Id., 454, 504). Jason said that he had "never done this before" and was not sure how it worked. When the poster failed to respond by the next day, Jason emailed again, "If you weren't interested you could have just said so..." (Gov. Trial Ex. 2). The poster simply responded that he would not be available for a week and a half.

On September 1st, Jason again reached out to the poster, "ok. really curious. You gonna let me know?" (Id., 454; Gov. Trial Ex. 2 at 6). The poster asked if Jason could get to Troy and asked Jason what he had in mind (Id., R. 63 455). The poster made no sexual suggestions during any of the communications (Id., 505). On September 2nd, Jason questioned whether the poster was for real. There was no response for two days at which time the poster again asked about Jason's location. Several days later, September 4th, there was an additional exchange during which Jason suggested that they continue to communicate through texting, and the poster responded,

> "What number to text? I guess we could meet and talk about your expectations. No promises on my end though. When is a good time to meet?" [Id., 457].

The two discussed meeting in the parking lot of a shopping mall (Id., 459; Gov. Trial Ex. 3). On September 8th, when Jason asked when the poster would be available, he responded, "Not sure yet. I could pick you up. I'm headed out in 20 min to get

something to eat. Your welcome to come with me." (Gov't Trial Ex. 3 at 1). Jason declined and the two agreed to talk again the following afternoon. The poster offered to pick up Jason so they could talk (Trial Tr., R. 63 463). On September 9, 2015, at Jason's suggestion, they agreed to meet in a park in Warren, Michigan.

The FBI arranged for assistance from local law enforcement and approximately 15 law enforcement officers responded to Shaw Park in Warren (Id., 466). An local law enforcement agent posed as Jason while Agent Nichols remained seated in a police vehicle, communicating with both the undercover "decoy" and the poster. Agent Nichols watched the decoy as he approached the poster's vehicle. When the radio call went out from another officer to stop the vehicle, several unmarked emergency vehicles proceeded to the park entrance with lights flashing. The officers were able to block the park exit and Herbert Bernard Johnson was arrested (Id., 470).

Mr. Johnson was the sole occupant of the vehicle. The officers seized a cell phone and two hotel keys. They determined the cell phone had been used to text Jason (Id., 471). Mr. Johnson was thereafter interviewed at the Warren Police Department by Agents Nichols and Christensen.

Mr. Johnson told the agents that he was employed by Hewlett-Packard and lived in Colorado. He was in Detroit to provide customer assistance at Delphi. He purchased airfare to travel to Detroit on August 21, 2015, prior to posting the relevant advertisement (Id., 487, 507). Mr. Johnson admitted posting the Craigslist advertisement (Id., 477). He had posted other advertisements for sex and had met with approximately two dozen adults through Craigslist (Id.,

480). He denied collecting child pornography. He used his laptop comptuer to interact on Craigslist through the use of a Virtual Machine. This allowed him to run another computer from his laptop. Mr. Johnson provided the password to the agents and gave permission for law enforcement to search his computers as well as the email account he used for Craigslist postings (Id., 481-82).

Mr. Johnson acknowledged he had communicated with Jason and he knew Jason was 15 years old. "He said his intentions were to just meet Jason and talk to him." (Id., 487). Agent Nichols agreed that all the conversations between Jason and Mr. Johnson related to meeting in a public place - a restaurant, a park or a mall (Id., 510). There were no discussions about sexual activity nor any suggestions for Jason to visit Mr. Johnson's hotel room (Id., 512, 516). Mr. Johnson did not send any sexually explicit texts or emails to Jason. He did not send links to pornographic websites. Mr. Johnson did not talk about past sexual experiences nor did he engage in grooming behaviors (Id., 524-25).

During his investigation, Agent Nichols received over 100 advertisements placed on Craigslist by Mr. Johnson, between November 2014 and August 25, 2015 (Id., 491). The general nature of the advertisements were to meet people for sex. Many advertisements were posted or renewed. Mr. Johnson indicated interests in couple situations, adult men, fater-son situations, parent-child situations, and he sugguested an interest in daughters' panties. Some of the advertisements included photographs. Agent Nichols did not identify any text message or email response nor any photograph of, or from, any individual under the age of 18 years (Id. 520).

Michigan State Police Lieutenant Twana Powell was involved

his headlights, Officer Petrul approached the vehicle and spoke with Mr. Johnson. Mr. Johnson invited him into the vehicle and the officer gave a verbal and physical signal for the arrest. As the officers in the park ran toward the vehicle and identified themselves, Mr. Johnson accelerated towards the exit (Id., 582).

Warren Police Officer Scott Taylor was also present at the time of Mr. Johnson's arrest. He had been assigned to conduct surveillance at Shaw Park and was seated on the park bench with Lt. Powell. He saw the decoy approach Mr. Johnson's vehicle. Lt. Powell gave the order to move in and Officer Taylor, along with four or five other officers, headed towards Mr. Johnson's vehicle. Mr. Johnson turned around and exited the parking lot, hitting his back tire on the curb (Id., 592).

Officer Taylor recalled there had not been any marked or unmarked police vehicles in the parking lot, nor any sirens or lights activated, prior to Mr. Johnson exiting the park (Id., 594). As he exited, the police stopped Mr. Johnson and removed him from his vehicle. He was arrested without incident and transported to the Warren Police Department (Id., 594).

FBI Agent Adam Christensen was assigned to the arrest team for September 9, 2015. He and two other officers were stationed in the bathroom at Shaw Park (Id., 599). Thus, he was not able to see anything until the arrest signal was given. By the time that the agent exited the bathroom, Mr. Johnson was already in handcuffs. Agent Christensen thereafter accompanied Agent Nichols to interview Mr. Johnson at the Warren Police Department. The video equipment at the Warren Police Department was not functional (Id. 609).

Agent Christensen recalled Mr. Johnson admitted posting ads on Craigslist and told the agents he had sexual encounters with a couple dozen men between the ages of 18 and 50 as a result of those advertisements (Id., 605-10). He denied ever seeking out child pornography and denied communicating with underage individuals - except on the instant occasion. He gave the officers consent to search his cell phone and his email account.

Mr. Johnson told the officers, he "wanted to talk with [Jason] about his sexual experiences but did not want to have sex with him." (Id., 603-04). Mr. Johnson acknowledged he sent nude photographs to Jason. He added that, as soon as Jason approached him in the park, "he didn't feel right so he took off." (Id., 604).

Agent Nichols was recalled to testify regarding the forensic evidence seized from Mr. Johnson and located in his hotel room. He suggested that, based on his training, there were code words used in Mr. Johnson's Craigslist advertisement which the agent recognized from child pornography investigations, including the terms, "taboo" and "incest" (Id., 616). The agent also explained how he analyzed the virtual machine on Mr. Johnson's laptop using several several forensic tools which was employed to preview and recover internet files, i.e. search histories, instant messages and images (Id. 624-26).

In his analysis, Agent Nichols located fragments from Craigslist advertisements, searches performed using Google Maps, and searches performed on the Google search engine (Id., 630). Many of the search terms included sexual references.

Agent Nichols also identified 36 images on the virual machine that appeared to be child pornography (Id., 640). These were thumbnails

that were automatically created by the computer's operating system when someone plugged a USB device into the computer (Id., 641-43). Agent Nichols could not state that Mr. Johnson (or anyone for that matter) actually played any video nor that Mr. Johnson had personally created or manipulated any of the images (Id., 682).

Agent Nichols also analyzed a thumb drive and a portable hard drive located in Mr. Johnson's hotel room and the portable hard drive contained a deleted video of Mr. Johnson having sex with another adult in a hotel room (Id., 669). Agent Nichols similarly previewed a deleted video on Mr. Johnson's video camera which appeared to depict Mr. Johnson moving a camera around a hotel room with sounds of rustling in the background (Id., 671). He suggested that Mr. Johnson might have been trying to hide a camera in the hotel room (Id.). He did not, though, have any information to suggest that there was a camera either set up or running in the room, or otherwise ready for use, at the time of the within incident (Id., 683).

The jury convicted Mr. Johnson of Counts 1, 2, and 4, acquitting him of Count 3 (Trial Tr., R. 65 784-85). Defendant renewed his rule 29 motion and filed a Motion for a New Trial, pursuant to Rule 33. Those motions were denied on March 1, 2017 (Defendant had made a timely Rule 29 motion (Trial Tr., 64 689-90). The motion was denied by the trial court subsequent to the jury verdict (Trial Tr., R. 65 786)) (Sent. Hr'g. Tr., 102 1072).

After addressing objections, the trial court determined the sentencing guideline range to be 121-151 months (Id., 1082). The government requested a sentence of 180 months (Id., 1086). Mr. Johnson requested a sentence at the low end of the guidelines

of 121 months (Count 1 carried a mandatory minimum of 120 months). The Court imposed a sentence of 121 months in the custody of the Bureau of Prisons, to be followed by lifetime supervision with specific conditions placed on that supervision (Id., 1093-98). Mr. Johnson filed a timely Notice of Appeal (Notice, R. 97).

Mr. Johnson argued in his direct appeal that the evidence was insufficient to support any of this three convictions. The Sixth Circuit Court of Appeals affirmed his convictions on May 23, 2019, finding that "all of the interactions between defendant and Jason [(the fictional minor)] must be viewed in the context of defendant's sexually graphic and explicit Craigslist advertisement that marked the beginning of their relationship." United States v. Johnson, 775 Fed. App'x. 794, 798 (6th Cir. 2019) (Appendix D). The Court conceded that, although, "[u]ndoubtedly the government's case against defendant would have been stronger had defendant made more explicit sexual requests or overtures in his email and text conversations with Jason" it concluded "that there was substantial competent evidence of defendant's guilt and that evidence was more than sufficient for a rational juror to reach a guilty verdict on both counts [(§2422(b) & §2423(b)]." Id. at 798-99. Although the Court claimed to have found competent evidence as to Mr. Johnson's guilt, it did not explain what criminal act would have been chargeable based on Mr. Johnson's behavior or where on the record it found that evidence.

On August 19, 2020, Mr. Johnson filed a Motion to Vacate his convictions and sentence under 28 U.S.C. §2255 (§2255 Motion, R. 109 1130-87). On September 1, 2020, he filed a Motion to Amend his §2255 Motion, raising the number of claims to twenty (Motion

to Amend §2255 Motion, R. 114 1192-95). The district court denied both motions on procedural and substantive grounds (Opinion & Order, R. 120 1251-61). Mr. Johnson filed a timely Notice of Appeal (Notice, R. 122 1267-68). Subsequent to the denial of his §2255 Motion, he also filed a Motion to Compel the Production of Grand Jury Material, claiming that the district court never ruled on the request included within his §2255 Motion (Motion to Compel, R. 125, 1274-82). The district court denied this motion, finding that it no longer had jurisdiction to grant the relief requested because Mr. Johnson had already filed a Notice of Appeal (Opinion & Order, R. 126 1285-88). Mr. Johnson filed a timely Notice of Appeal as to this Order on April 30, 2021 (Notice, R. 127 1289).

Concurrent to defendant's petition to the Sixth Circuit for a Certificate of Appealability, he litigated the denial of the Motion to Compel the Production of Grand Jury Material in the Sixth Circuit, arguing that F.R.Cr.P. 6(e)(3)(E)(i) allows him to bring his motion at any time, regardless of jurisdiction and that it would bolster his case in presenting an argument for his Certificate of Appealability. The Sixth Circuit denied his appeal on January 4, 2022, stating that he would have to litigate the issue in the appeal raised for his Certificate of Appealability (Opinion & Order, No. 21-1495).

Mr. Johnson petitioned the Sixth Circuit for a Certificate of Appealability as to six of the claims that he raised in the district court in his §2255 Motion (No. 21-1147, 6th Cir.). The Sixth Circuit found only one of his claims to be arguably meritorious, granting him a Certificate of Appealability as to: "Whether the district court erred in dismissing on procedural-default grounds

Johnson's claim that the district court's jury instructions on Count Four constructively amended the indictment." That appeal is currently pending with the Sixth Circuit (No. 21-1147, 6th Cir.).

Included within Mr. Johnson's petition for a Certificate of Appealability was his claim (a combination of claims nos. 3, 5, and 18 in his §2255 Motion), describing how the government had never presented any evidence of any sexual activity that would have been chargeable as a criminal offense and how the jury had decided his guilt based on faulty jury instructions that did not require the finding of any sexual activity "for which any person can be charged with a criminal offense" as required by §2422(b). He attributed these errors to his attorneys of records. Those instructions allowed the jury to convict Mr. Johnson if the jury found that his intentions would have included "sexual acts with a person under 18 years of age that would consist of sexual abuse of a minor; and production of child pornography" (Jury Instr., R. 55 273). Neither "sexual abuse of a minor" nor "production of child pornography" were further defined for the jury. Neither was the jury provided any direction as to what acts might have been criminal offenses and which might not or how to determine whether a person could have been charged with a criminal offense. Likewise, the jury never heard any evidence or criminal statutes that might have applied to Mr. Johnson's alleged intended behavior. In essense, the jury was left to their own accord to guess as to what Mr. Johnson might have been up to and whether it violated §2422(b) or not.

Strikingly, the Sixth Circuit order denying his Certificate

of Appealability on this issue said that "the district court did not instruct the jury that it could convict Johnson of Count One if it found he committed sexual abuse of a minor in violation of §2243(a). It merely instructed the jury, in relevant part, that '[u]nlawful sexual activity includes sexual acts with a person under 18 years of age that would consist of sexual abuse of a minor." (Order, No. 21-1147 p. 5) (Appendix A) (emphasis in original).

Mr. Johnson petitioned the Sixth Circuit Court of Appeals requesting that it grant a rehearing and rehearing en banc on the issue because the Court's prior Opinion on Mr. Johnson's direct appeal stated that it found sufficient evidence to support each element of the §2422(b) charge, yet in deciding his petition for a Certificate of Appealability the Court has, in essense, determined that no chargeable criminal act must be proved or alleged at all. The Sixth Circuit denied his petition for rehearing and rehearing en banc on February 10, 2022.

ARGUMENT

I. THIS COURT SHOULD RESOLVE WHETHER THE STATUTORY LANGUAGE OF 18 U.S.C. §2422(b)'S "ANY SEXUAL ACTIVITY FOR WHICH ANY PERSON CAN BE CHARGED WITH A CRIMINAL OFFENSE" ELEMENT REQUIRES PROOF OF AT LEAST ONE CRIME FOR WHICH A PERSON COULD HAVE BEEN CHARGED.

To convict a defendant under §2422(b), the government is required to show that the defendant: (1) used any facility or means of interstate commerce; (2) to "knowingly persuade[], induce[], entice[], or coerce[]" or "attempt[] to" persuade, induce, entice, or coerce; (3) a person whom the defendant believed to be under the age of eighteen; (4) "to engage in ... any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. §2422(b); see United States v. Vinton, 946 F.3d 847, 852 (6th Cir. 2020) (citing United States v. Roman, 795 F.3d 511, 515 (6th Cir. 2015)). To establish criminal attempt, the government must prove that the defendant intended to commit the alleged criminal act and that he took a substantial step towards committing the crime, beyond mere preperation." United States v. Wyatt, 713 Fed. App'x. 467, 470 (6th Cir. 2017) (citing Roman, 795 F.3d at 517; and United States v. Evans, 699 F.3d 858, 867 (6th Cir. 2012)). "[C]hargeable sexual activity includes crimes defined by state law." United States v. Dwinells, 508 F.3d 63, 72 (1st Cir. 2007).

In this case, the government did not allege any sexual activity that would have been chargeable as a criminal offense in Mr. Johnson's Indictments (Second Superseding Indictment, R. 42 109-15). When Mr. Johnson filed a Motion for a Bill of Particulars as to the alleged behavior, the government refused to provide any specifics and the Court denied the motion (Order, R. 48 233).

During Mr. Johnson's trial, the government conflated the

the postings that Mr. Johnson had made on Craigslist with discussions that Mr. Johnson had with the decoy. This is, of course, understandable as a trial strategy when the government has no direct evidence. But doing so did not relieve the government of its burden to prove beyond a reasonable doubt that Mr. Johnson's intended actions would have been criminal, if they were completed. United States v. Hart, 635 F.3d 850, 855 (6th Cir. 2011). The government was not required to prove an actual minor was involved, only that the intended conduct would have been criminal. United States v. Saldaña-Rivera, 914 F.3d 721 (1st Cir. 2019) (collecting cases).

It is worth recounting for this Court once again: Although Jason answered a sexual ad posted by the defendant, Mr. Johnson never sexualized their conversation by making sexual overtures to Jason, making sexual innuendos to Jason, or otherwise suggesting that they engage in any inappropriate sexual behavior. On cross-examination, Agent Nichols was unable to identify any text message or email message where Mr. Johnson had even suggested anything sexually between himself and Jason (Trial Tr., R. 63 520). In fact, the evidence strongly corroborated another intent. Mr. Johnson's invitation to Jason was to join him for food and talk (Id., 457, 463; Gov't. Trial Ex. 3 at 1). It was the only thing that Mr. Johnson had ever suggested to Jason. And, even though Mr. Johnson had a hotel room that the government had shown he used for sex with adults, and it told the jury he intended to use with Jason, Mr. Johnson never even mentioned this to Jason or suggested that they meet anywhere other than a public place like a shopping mall, restaurant, or park (Id., 459; Gov't. Ex. 3).

Not knowing whether Mr. Johnson was up to nefarious purposes

or not, Agent Nichols decided to arrest him anyway (Id., 517). Having no specific intended sexual activity with which it could proceed, the government decided to loosely allege at trial that defendant could only have intended to have "sex," in a colloquial sense, or refer back to Mr. Johnson's postings on Craigslist that were directed to adults but never discussed with Jason. But "sex" is not an offense. While "sex" might result in an offense, only by knowing the specifics acts and local laws can someone determine whether an act is chargeable as a criminal offense or not.

Mr. Johnson concedes that most any sexual activity would have been illegal, but instead argues that it was never his intent to have "sex" of any kind with Jason, and if the government intends to prosecute him, it must at least show substantive evidence of his intended act and evidence beyond a reasonable doubt that his actions, if carried out, would have been chargeable as a criminal offense, rather than gloss over the §2422(b) element with mere speculation. This is because "§2422(b) concerns only conduct that is already criminally prohibited." as contrasted with "conduct that is innocuous, ambiguous, or mere flirtatious." United States v. Fugit, 703 F.3d 248, 255 (4th Cir. 2012). For these reasons, Mr. Johnson was entitled to clear and correct jury instructions that focussed the jury so that they had to not only determine his specific intent, but to determine whether that intent could have resulted in a criminal charge, if it had been completed.

But what he got was everything but clear and correct. Instead, the jury was instructed:

> **"Unlawful sexual activity"** includes a sexual act with a person person under 18 years of age that would consist of sexual abuse of a minor; and production of child pornography.

(Jury Instr., R. 55 273). The district court provided no further explanation what it meant by "sexual abuse of a minor," "sexual act," or "production of child pornography," or that any sexual activity would have had to be chargeable as a criminal offense, beyond a reasonable doubt. The jury was given no direction how to navigate these terms to determine whether someone could have been charged with a crime if the intended act had occurred.

Mr. Johnson's challenge in his petition for Certificate of Appealability made it clear that this either resulted in the jury finding no crime for which a person could have been charged or referred to crimes that would not have been chargeable, based on these erroneous jury instructions and the facts and circumstances of the case. In denying Mr. Johnson's petition for a Certificate of Appealability on this issue, the Sixth Circuit made it clear that these were not criminal offenses: "But the district court did not instruct the jury that it could convict Johnson of Count One if it found that he committed sexual abuse of a minor in violation of §2243(a). It merely instructed the jury, in relevant part, that '[u]nlawful sexual activity includes sexual acts with a person under 18 years of age that would consist of sexual abuse of a minor.'" (Order, No. 21-1147) (emphasis in original). This sits in stark contrast to the Sixth Circuit opinion in Mr. Johnson's direct appeal where the Court stated, "all the interactions between defendant and Jason [(the fictional minor)] must be viewed in the context of defendant's sexually graphic and explicit Craigslist advertisement that marked the beginning of their relationship" and "[u]ndoubtedly the government's case against defendant would have been stronger had defendant made more explicit sexual requests

or overtures in his email and text conversations with Jason." United States v. Johnson, 775 Fed. App'x. 794, 798-99 (6th Cir. 2019) (Appendix D). It then concluded "that there was substantial competent evidence of defendant's guilt and that evidence was more than sufficient for a rational juror to reach a guilty verdict on both counts [(§2422(b) & §2423(b))]." Id. It draws this conclusion without any explanation as to what criminal offense would have satisfied §2422(b)'s "sexual activity for which any person can be charged with a criminal offense" element.

These two findings are irreconcilable. On one hand the Sixth Circuit claims to have found competent and sufficient evidence of every element of §2422(b) and on the other it states that the only instructions given to the jury don't include any criminal offenses for which the jury could make its decision as to whether a person could have been charged with a criminal offense, if the intended act had occurred.

Here, Mr. Johnson has endured an indictment, pre-trial motions for a Bill of Particulars, a trial, and multiple post-conviction proceedings (to include a direct appeal and §2255 Motion to Vacate), yet no court involved in any of those proceedings has determined under which "criminal offense" he, or someone else, could have been charged. This matters because constitutional due process provides defendants with notice of accusations and a jury trial where a jury decides every element of the alleged offense. Since that did not happen here, Mr. Johnson was denied due process. For this reason, Mr. Johnson respectfully requests this Court to issue a writ of certiorari to resolve the question whether allegation and proof of at least one particular criminal offense

which could have been charged is required to sustain a conviction under 18 U.S.C. §2422(b).

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Mr. Johnson respectfully requests that a writ of certiorari issue to resolve this important question of statutory interpretation.

Respectfully submitted,

DATE: May 5, 2022

/s/ Herbert Bernard Johnson