

21-8226

No.

IN THE  
SUPREME COURT OF THE UNITED STATES

FILED  
JUN 16 2022  
OFFICE OF THE CLERK  
SUSAN M. COLLETT, CLERK

ERIC C. SUTHERLAND - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

PENDING SIXTH CIRCUIT APPEAL

PETITION FOR WRIT OF CERTIORARI

ERIC C. SUTHERLAND

FMC LEXINGTON

P.O. Box 14500

LEXINGTON, KY 40512

PRO SE

QUESTION(S) PRESENTED

1. IF AN INDICTMENT OOMITS AN ESSENTIAL ELEMENT, AND A PRISONER FILES A §2255 A FEW MONTHS AFTER AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS HAS PASSED; IN ASSERTING HIS INNOCENCE THAT THE INDICTMENT IS FUNDAMENTALLY FLAWED FOR FAILURE TO STATE A VALID FEDERAL OFFENSE; IS THAT PRISONER SUBJECT TO THE SHLUP v. DELO STANDARD OF PROOF REQUIRING INTRODUCTION OF "NEW EVIDENCE" WHEN THERE IS NO "NEW EVIDENCE" TO PRODUCE, BUT RATHER A SUBSTANTIVE CLAIM IS ASSERTED AS TO THE SUBJECT MATTER JURISDICTION IN REGARD TO THE INDICTMENTS OMISSION OF AN ESSENTIAL ELEMENT?
2. CAN A PRISONER PASS THROUGH THE GATE IF HE ASSERTS THAT THE INDICTMENT CHARGES NO VALID FEDERAL OFFENSE AND CAN PROVE THE INDICTMENT IS INSUFFICIENT?

!!

RETRIVED + NO TRUE BILL FOR ALL COUNTS SEP. 27, 2018.  
NO. 18FO14230 NTB, JEFFERSON CIRCUIT COURT, GRAND JURY  
• THE COMMONWEALTH OF KENTUCKY V. ERIC SUTHERLAND,  
KENTUCKY AT LOUISVILLE, JUDGMENT ENTERED NOV. 13, 2019.  
3:18-CR-136-DJH, U.S. DISTRICT COURT WESTERN DISTRICT OF  
• ERIC L SUTHERLAND V. UNITED STATES, NO. 3-21-CV-00442:  
OF APPEALS FOR THE SIXTH CIRCUIT, JUDGMENT PENDING.  
• ERIC L. SUTHERLAND V. UNITED STATES, NO. 22-5168, U.S. COURT

### RELATED CASES

1. UNITED STATES ASSISTANT ATTORNEY JO E. LAWLESS
2. UNITED STATES ASSISTANT ATTORNEY MONICA WHEALEY

PETITION IS AS FOLLOWS:

ALL PARTIES DO NOT APPEAR IN THE CAPTION OF THE CASE ON  
THE COVER PAGE. A LIST OF ALL PARTIES TO THE PROCEEDINGS  
IN THE COURT WHOSE JUDGMENT IS THE SUBJECT OF THIS  
PETITION IS AS FOLLOWS:

### LIST OF PARTIES

## TABLE OF CONTENTS

|   |      |
|---|------|
| OPINIONS BELOW.....                                   | 1    |
| JURISDICTION.....                                     | 2    |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... | 3    |
| STATEMENT OF THE CASE.....                            | 4    |
| REASONS FOR GRANTING THE WRIT.....                    | 5-18 |
| CONCLUSION.....                                       | 19   |

## INDEX OF APPENDICES

- APPENDIX A - STATE COURT RETURN NO TRUE BILL
- APPENDIX B - FEDERAL INDICTMENT W.D. KY
- APPENDIX C - DISTRICT COURT DOCKET
- APPENDIX D - ORDER FROM DISTRICT COURT DENIEL 12 (b)(3)(B)(v)
- APPENDIX E - MEMORANDUM AND ORDER 'SHOW CAUSE' FOR §2255
- APPENDIX F - MEMORANDUM DENIEL §2255 DISTRICT COURT
- APPENDIX G - ORDER DENIEL §2255 DISTRICT COURT
- APPENDIX H - SIXTH CIRCUIT COURT OF APPEALS PENDING COA
- APPENDIX I - PATTERN INSTRUCTIONS 16.09 FOR 18 U.S.C. §2422(b)
- APPENDIX J - PROOF OF AGE OVER AGE OF CONSENT
- APPENDIX K - UNITED STATES V. DARYL KIMBERLY
- APPENDIX L - 64-13.1 OF MODERN FEDERAL JURY INSTRUCTIONS
- APPENDIX M - UNITED STATES V. HART (6TH CIR. 2011)

## TABLE OF AUTHORITIES CITED

### CASES:

### PAGE NUMBERS

|   |        |
|---|--------|
| • UNITED STATES V. EDMUNDSON (D. MD. JUL. 5, 2016).....     | 10, 11 |
| • UNITED STATES V. GRIFFIN (1938).....                      | 11     |
| • UNITED STATES V. HACKWORTH (6TH CIR. 2012).....           | 6      |
| • UNITED STATES V. HART (6TH CIR. 2011).....                | 6, 7   |
| • UNITED STATES V. HILLIE (D.D.C. JAN. 5, 2017).....        | 12, 13 |
| • UNITED STATES V. JOHNSON (6TH CIR. 2019).....             | 6      |
| • UNITED STATES V. KIMBERLY (E.D. KY MAY 25, 2005).....     | 8      |
| • UNITED STATES V. LANZON (11TH CIR. 2008).....             | 9      |
| • UNITED STATES V. McDARRAH (2ND CIR. 2006).....            | 9      |
| • UNITED STATES V. MILLER (6TH CIR. 2017).....              | 6      |
| • UNITED STATES V. NAGARWALA (E.D. MICH. JAN 14, 2018)..... | 10     |
| • UNITED STATES V. OGDEN (6TH CIR. 2020).....               | 6      |
| • UNITED STATES V. STONE (6TH CIR. 2021).....               | 6      |
| • UNITED STATES V. TRANSFIGURACION (9TH CIR. 2006).....     | 12     |
| • UNITED STATES V. WESCOTT (D. NEV. APR 16, 2015).....      | 8, 9   |
| • UNITED STATES V. BOUSLEY (1998).....                      | 10     |
| • HAMLING V. UNITED STATES (1974).....                      | 14     |
| • MCQUIGGIN V. PERKINS (2013).....                          | 4      |
| • MURRAY V. CARRIER (1986).....                             | 16     |
| • RUSSELL V. UNITED STATES (1962).....                      | 9      |

| CASES CONT.                                  | PAGE      |
|--|-----------|
| • SHLUP V. DELO (1995).....                  | 4, 16, 17 |
| • SMITH V. O'GRADY (1941).....               | 12        |
| • SMITH V. UNITED STATES (1959).....         | 15        |
| • WELCH V. UNITED STATES (2016).....         | 12        |
| • UNITED STATES V. HART (6TH CIR. 1981)..... | 15        |

RULES:

|   |                  |
|---|------------------|
| • FED. R. CRIM. P. 7 (c)(1).....        | 8, 9, 10, 14, 18 |
| • FED. R. CRIM. P. 11 (b)(1)(G).....    | 14               |
| • FED. R. CRIM. P. 12 (b)(3)(B)(v)..... | 8, 9, 10, 14, 18 |

STATUTES:

|                           |                      |
|---------------------------|----------------------|
| • §831.....               | 4, 7, 8, 12, 18      |
| • §464.....               | 4, 7, 14, 15         |
| • §59.....                | 4, 7, 10, 11, 12, 17 |
| • §120.....               | 5, 6, 8, 12, 13, 17  |
| • §118.....               | 5, 6, 8, 12, 17      |
| • §777.5.....             | 16                   |
| • 18 U.S.C. §2422(b)..... | 4, 7, 8, 9           |
| • 28 U.S.C. §2255.....    | 2, 4, 18             |

OTHER:

|   |   |
|---|---|
| • MODERN FEDERAL JURY INSTRUCTIONS.....       | 7 |
| • PATTERN INSTRUCTION 16.09 (APPENDIX I)..... | 8 |

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 JUDGMENTS BELOW.

OPINIONS BELOW

FOR CASES FROM FEDERAL COURTS:

- PENDING IN UNITED STATES APPEALS FOR THE SIXTH CIRCUIT
- THE OPINION OF THE UNITED STATES DISTRICT COURT  
APPEARS AT APPENDIX D TO THE PETITION AND IS  
UNPUBLISHED. DENIED APR. 15, 2022.
- THE OPINION OF THE UNITED STATES DISTRICT COURT  
APPEARS AT APPENDIX F-G TO THE PETITION AND IS  
UNPUBLISHED. PENDING APPEAL IN SIXTH CIRCUIT.

FOR CASES FROM STATE COURTS:

- THE GRAND JURY FOR THE COMMONWEALTH OF KENTUCKY  
JEFFERSON CIRCUIT COURT RETURN OF NO TRUE BILL  
APPEARS AT APPENDIX A TO THE PETITION AND IS  
UNPUBLISHED.

## JURISDICTION

FOR CASES FROM FEDERAL COURTS:

- THE DATE ON WHICH THE UNITED STATES COURT OF APPEALS MAKES A DECISION IS PENDING.
- THE DATE ON WHICH THE UNITED STATES DISTRICT COURT DECIDED MY CASE WAS SHOW CAUSE ON SEP. 28, 2021, AND DENIAL ON DEC. 21, 2021.
- A MOTION TO SHOW CAUSE WAS TIMELY FILED (DN 105).
- SHOW CAUSE ORDER (DN 103) AT APPENDIX F.
- DENIAL OF 28 U.S.C. §2255 (DN 108) AT APPENDIX G.
- DENIAL OF MOTION TO DISMISS THE INDICTMENT FOR FAILURE TO STATE A VALID FEDERAL OFFENSE (DN 123) APPENDIX D.

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

|   | PAGE                 |
|---|----------------------|
| • FIFTH AMENDMENT (NO DOUBLE JEOPARDY PROTECTION).....        | 4, 7, 10, 13, 18     |
| • SIXTH AMENDMENT (FAIL TO PROVIDE NOTICE AND IAC)...         | 4, 7, 10, 12, 14, 18 |
| • VIOLATIONS OF DUE PROCESS LAWS.....                         | 4, 7, 10, 12, 13, 16 |
| • CRUEL AND UNUSUAL PUNISHMENT.....                           | 15, 16, 18           |
| • VIOLATIONS PURSUANT TO § 831 (DECEPTION).....               | 4, 7, 8, 12, 18      |
| • PROSECUTORIAL VINDICTIVENESS.....                           | 4, 7, 15, 18         |
| • VIOLATIONS PURSUANT TO § 46.4 (RIGHT TO COUNSEL).....       | 4, 7, 14, 15         |
| • CRIMINAL LAW § 591 (VALIDITY OF PLEA).....                  | 4, 10, 11, 12, 17    |
| • HABEAS CORPUS § 120 (BURDEN OF PROOF, ACTUAL INNOCENCE).... | 5, 6, 8, 12          |
| • HABEAS CORPUS § 118 (SUFFICIENCY OF PROOF).....             | 5, 6, 8, 12, 17      |
| • COURTS § 777.5 (RETROACTIVITY, STATUTES).....               | 16                   |

STATEMENT OF THE CASE

THE ESSENTIAL ELEMENT REQUIRING THE VIOLATION OF AN UNDERLYING OFFENSE IS MISSING FROM THE INDICTMENT. TITLE 18 U.S.C. §2422(b) REQUIRES THE GOVERNMENT TO PROVE THE "CHARGED WITH A CRIMINAL OFFENSE" ELEMENT. THIS ELEMENT IS GENERALLY AN UNDERLYING STATE OFFENSE. THE GOVERNMENT IN THE INSTANT CASE HAS FAILED TO ALLEGE ANY "CRIMINAL OFFENSE", THEREFORE FAILING TO ALLEGE A VALID FEDERAL OFFENSE. THE DISTRICT COURT REFUSES TO ENTERTAIN THESE ASSERTIONS BY ORDERING 'SHOW CAUSE' AS TO UNTIMELY §2255 ASSERTING FACTUAL INNOCENCE ON SUBSTANTIAL GROUNDS, AND THEN DENYING §2255 FOR FAILURE TO SHOW CAUSE. I COULD NOT PRESENT "NEW EVIDENCE" PER SHLUP V. DELO STANDARD OF PROOF.

"SENSITIVITY TO THE INJUSTICE OF INCARCERATING AN INNOCENT INDIVIDUAL SHOULD NOT ABATE WHEN THE IMPEDIMENT IS AEDPA'S STATUTE OF LIMITATIONS." SEE: MCQUIGGIN V. PERKINS, 596 U.S. 383, 133 S. CT. 1924, 185 L. ED. 2d. 1019 (2013).

"THE SUPREME COURT HELD THAT, IN ORDER TO INVOKE THIS "EXCEPTION," A FEDERAL HABEAS CORPUS PETITIONER IS REQUIRED TO SHOW THAT A CONSTITUTIONAL VIOLATION HAS "PROBABLY" RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT." SEE: SHLUP V. DELO, 115 S. CT. 851, 130 L. ED. 2d. 808, 513 U.S. 298 (1995).

### REASONS FOR GRANTING PETITION

I BELIEVE THIS PETITION IS OF GREAT IMPORTANCE TO AMERICAN CITIZENS BECAUSE IT INVOLVES THE USE OF THE INTERNET AND THE WAYS IN WHICH YOUNGER GENERATIONS HAVE SHIFTED THE FORMING OF RELATIONSHIPS BY USING SOCIAL MEDIA PLATFORMS. NOW DAYS IT IS NOT UNCOMMON TO MEET ON SOCIAL MEDIA AND THEN EVENTUALLY TRADE PHOTOS. IT IS MY OPINION THAT TODAY'S YOUTH WILL BECOME MORE AND MORE INVOLVED WITH THIS ONLINE TYPE OF BEHAVIOR WHICH COULD RESULT IN QUESTIONABLE CONVICTIONS OF YOUTH.

WHAT HAPPENS WHEN AN 18 OR 19 YEAR OLD IS INVOLVED WITH A 16 OR 17 YEAR OLD AND THERE IS A CONSENSUAL TRADING, PRIVATELY, OF SEXUALLY EXPLICIT PHOTOS, IN A STATE WHERE THE LEGAL AGE OF CONSENT IS 16 YEARS OLD? WOULD IT BE FAIR TO LOCK UP AN 18 OR 19 YEAR OLD FOR 10-15 PLUS YEARS FOR NOT FULLY UNDERSTANDING FEDERAL LAW AS OPPOSED TO STATE LAW?

THE GRAND JURY FOR THE COMMONWEALTH OF KY, JEFFERSON CIRCUIT COURT SEEKS TO ANSWER IN THE INSTANT CASE BY RETURNING A 'NO TRUE BILL' (APPENDIX A). IT WAS PROVEN THAT NO VIOLATION OF STATE LAW OCCURRED. AN IN-DEPTH INVESTIGATION REVEALED THAT THE CONVERSATIONS WERE CONSENSUAL, NOT COERCED, AND SO THE STATE DROPPED THE CASE. FOR THESE REASONS, THE COURT LACKS SUBJECT MATTER JURISDICTION TO CHARGE 18 USC §2422(b).

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS HELD IN SEVERAL CASES THAT THE THIRD ELEMENT REQUIRES A CRIMINAL OFFENSE UNDER STATE LAW.

"PERFORM SEXUAL ACTS CONSTITUTING A CRIMINAL OFFENSE UNDER STATE LAW, IN VIOLATION OF 18 U.S.C. § 2422(b)" SEE: UNITED STATES V. OGDEN, 2020 U.S. APP. LEXIS 394 (6TH CIR. 2020).

"THE ELEMENTS OF COERCION AND ENTICEMENT OF A MINOR ARE... COULD HAVE BEEN CHARGED WITH A CRIMINAL OFFENSE UNDER STATE LAW" SEE: UNITED STATES V. STONE, 2021 U.S. DIST. LEXIS 108046 (6TH CIR. 2021).

"A CRIMINAL OFFENSE UNDER STATE LAW" SEE: UNITED STATES V. JOHNSON, 775 FED. APPX. 794, 797-98 (6TH CIR. 2019).

"COULD HAVE BEEN CHARGED WITH A CRIMINAL OFFENSE UNDER STATE LAW" SEE: UNITED STATES V. MILLER, 696 FED. APPX. 696, 700 (6TH CIR. 2017).

"HERE THE JURY HAD TO UNANIMOUSLY AGREE THAT HACKWORTH ATTEMPTED TO PERSUADE "AMBER" TO ENGAGE IN CONDUCT THAT WOULD HAVE BEEN CHARGEABLE AS A CRIME UNDER KENTUCKY LAW" SEE: UNITED STATES V. HACKWORTH, 483 FED. APPX. 972 AT 977 (6TH CIR. 2012).

"ALL THAT IS REQUIRED IS THAT THE JURY AGREE THAT THE SEXUAL ACTIVITY DID VIOLATE STATE LAW (OR WOULD HAVE IF IT HAD OCCURRED)" SEE: UNITED STATES V. HART, 635 F.3d 850 (6TH CIR. 2011).

MONICA WHEATLEY WAS THE ASSISTANT ATTORNEY FOR THE UNITED STATES IN THE 'HART' CASE. AT A BARE MINIMUM, IT WAS DECIDED THAT THE INDICTMENT INCLUDE THE VIOLATION OF A STATE OFFENSE (OR POSSIBLE VIOLATION "IF" UNLAWFUL SEXUAL ACTIVITY WAS TO OCCUR). IN THE INSTANT CASE, THE 17 YEAR OLD AND I NEVER MET IN PERSON. IF WE WERE TO MEET FOR SEXUAL ACTIVITY IT WOULD HAVE BEEN LEGAL UNDER KENTUCKY STATE LAW.

AT THE TIME, I WAS 26, AND HAVING CONSENSUAL ONLINE CONVERSATIONS WITH A LEGALLY CONSENTING 17 YEAR OLD UNDER KENTUCKY LAW. AT FIRST, THE 17 YEAR OLD TOLD ME 19 YEARS OLD. WHEN I WAS LATER TOLD 17, I IMMEDIATELY GOOGLED "AGE OF CONSENT FOR KENTUCKY" AND DID NOT SEE ANY PROBLEM WITH CONTINUING CONSENSUAL CONVERSATIONS WITH A CONSENTING ADULT. I DID NOT PRODUCE OR TRANSMIT ANY LIVE VIDEOS OR PHOTOS OF THE 17 YEAR OLD. AS THE INDICTMENT IS DRAFTED, NO VIOLATION OF LAW OCCURRED. IT WAS INSUFFICIENT FROM THE MOMENT OF CONSTRUCTION.

AT 64-13.1 OF THE MODERN FEDERAL JURY INSTRUCTIONS IT READS: "IF THE ACT IS NOT CHARGEABLE, FOR EXAMPLE, (BECAUSE THE MINOR HAS REACHED THE AGE OF CONSENT UNDER STATE LAW) THEN THIS ELEMENT CANNOT BE SATISFIED AS A MATTER OF LAW." DURING PRETRIAL I BEGGED FOR THE ELEMENTS OF 18 USC §2422(b) BUT NEVER RECEIVED THEM. MY COUNSEL FAILED TO PROVIDE NOTICE AS TO THE FUNDAMENTAL ELEMENTS; FAILED TO SEE DEFICIENT INDICTMENT.

"INDEED THIS SEEMS TO BE THE MOST PROBABLE INTENT OF CONGRESS WHEN IT USED THE PHRASE "CHARGED WITH A CRIMINAL OFFENSE." CONGRESS WOULD HAVE HAD TO MEAN AN OFFENSE WHICH WOULD RESULT IN A CONVICTION IF TRIED IN STATE COURT. AND, IF THE DEFENDANT HAD ESTABLISHED HIS AFFIRMATIVE DEFENSE UNDER STATE LAW, THERE WOULD BE NO CONVICTION." SEE: UNITED STATES V. DARYL KIMBERLY, 2005 U.S. DIST. LEXIS 9913 (6TH CIR 2005) E.D. KY., MAY 25, 2005.

"REGARDING THE INDICTMENT FOR PERSUASION, THE COURT RULED THAT THE GOVERNMENT HAD TO ESTABLISH THAT DEFENDANT KNEW THE MINOR WAS YOUNGER THAN 16, AS IS REQUIRED BY KENTUCKY STATE LAW." SEE: UNITED STATES V. DARYL KIMBERLY, 2005 U.S. DIST. LEXIS 9913 (E.D. KY., MAY 25, 2005).

THE PATTERN INSTRUCTIONS FOR THE SIXTH CIRCUIT CAN BE FOUND AT 16.09 FOR 18 U.S.C. §2422(b). WHEN CHARGING FOR "UNLAWFUL SEXUAL ACTIVITY", SECTION 2 (A) READS: "UNLAWFUL SEXUAL ACTIVITY" INCLUDES \_\_\_\_\_ [DESCRIBE UNDERLYING CRIMINAL OFFENSE]. THE INDICTMENT FAILS TO ALLEGE THE SPECIFIC UNLAWFUL SEXUAL ACTIVITY. IT IS DEFICIENT.

"THE INDICTMENT FOR A VIOLATION OF 18 U.S.C. §2422(b) MUST ALLEGE WITH A SUFFICIENT DEGREE OF SPECIFICITY THE FACTS OR PARTICULAR LAW "FOR WHICH ANY PERSON CAN BE CHARGED WITH A CRIMINAL OFFENSE" FOR SEXUAL ACTIVITY. IT IS NOT SUFFICIENT THAT

THE INDICTMENT USE GENERIC TERMS, BUT MUST "DESCEND TO PARTICULARS." RUSSELL, 369 U.S. AT 765. SINCE THE INDICTMENT DOES NOT ALLEGE, EITHER BY CITATION OR SUFFICIENT FACTUAL ALLEGATIONS, DEFENDANTS CRIMINAL SEXUAL ACTIVITY, OR WHICH CRIMINAL LAW WAS VIOLATED, THE INDICTMENT IS DEFICIENT...[THE] MOTION TO DISMISS THE INDICTMENT FOR INSUFFICIENCY SHOULD BE GRANTED". SEE: UNITED STATES V. WESCOTT, 2015 U.S. DIST. LEXIS 69133 (D. NEV. APR. 16, 2015). MY MOTION TO DISMISS WAS DENIED.(APPENDIX D).

"PROPERLY READ, §2422(b) REQUIRES THAT IF COMMITTED, THE SEXUAL ACTIVITY MUST BE A CRIME UNDER STATE LAW. OTHER COURTS HAVE COME TO THIS SAME COMMON SENSE CONCLUSION." SEE: UNITED STATES V. McDARRAH, LEXIS 48269 (2ND CIR. 2006). MY MOTION TO DISMISS SHOULD HAVE BEEN GRANTED.

"THE GOVERNMENT CORRECTLY POINTS OUT THAT THIS INSTRUCTION SEEMS TO REQUIRE THAT THE JURY FIND A COMPLETED VIOLATION OF THE UNDERLYING STATE OFFENSE IN ORDER TO CONVICT UNDER THE TRAVEL ACT." SEE: UNITED STATES V. JONES, 909 F.2d. 533 (D.C. CIR. 1990). CONTRARY TO LAW ELEMENT.

"DISMISSING AN INDICTMENT FOR A VIOLATION OF §2422(b) FOR INSUFFICIENTLY ALLEGING THE UNDERLYING ILLEGAL SEXUAL ACTIVITY." SEE: UNITED STATES V. LANZON, LEXIS 60750 (11TH CIR. 2008).

"THEY ARGUE THAT THE GOVERNMENT IS IMPERMISSIBLY USING THE DEFINITION OF "CRIMINAL SEXUAL CONDUCT" UNDER STATE LAW AND "SEXUAL ACT" FROM ANOTHER FEDERAL STATUTE TO CHARACTERIZE THEIR ACTIONS IN COMMITTING, OR CONSPIRING TO COMMIT, FGM AS "CRIMINAL SEXUAL ACTIVITY." THE COURT AGREED TO DISMISS COUNT SIX BECAUSE IT WAS INSUFFICIENT AS TO THE THIRD ELEMENT "ANY SEXUAL ACTIVITY FOR WHICH ANY PERSON CAN BE CHARGED WITH A CRIMINAL OFFENSE." SEE: UNITED STATES V. NAGARWALA, 2018 U.S. DIST. LEXIS 6190 (E.D. MICH. JAN. 14, 2018).

"THE SUPREME COURT HAS RECOGNIZED THAT A DEFENDANT CANNOT BE SAID TO HAVE INTELLIGENTLY ENTERED A GUILTY PLEA IF NEITHER HE, NOR HIS COUNSEL, NOR THE COURT CORRECTLY UNDERSTOOD THE ESSENTIAL ELEMENTS OF THE CRIME." SEE: BOUSLEY V. UNITED STATES, 523 U.S. 614, 618-19, 118 S. CT. 1604, 140 L. ED. 2d 828 (1998).

"GIVEN THAT EDMUNDSON WAS MISINFORMED ABOUT THE ESSENTIAL ELEMENTS OF THE CHARGE, RATHER THAN THE POSSIBLE PENALTIES, THE PLEA [SUFFICIENCY] WAS CONSTITUTIONALLY INVALID. SEE: JOHNSON, 410 F.3d AT 151-52.8 THUS, THE PLEA AS TO COUNT TWO MUST BE STRICKEN. SEE: BOUSLEY, 523 U.S. AT 618-19." SEE: UNITED STATES V. EDMUNDSON, 2016 U.S. DIST. LEXIS 86520 (D. MD. JULY 5, 2016). THE COURT SHOULD DISMISS COUNT ONE.

"CONCLUDING THAT DEFENDANT HAD NOT WAIVED THROUGH HIS PLEA AGREEMENT HIS CLAIM THAT TRIAL COURT LACKED JURISDICTION TO CONVICT HIM, BECAUSE "APPELLATE REVIEW OF PROPER SUBJECT MATTER JURISDICTION CANNOT BE WAIVED BY THE LITIGANTS." SEE: UNITED STATES V. GRIFFIN, 303 U.S. 226, 229, 58 S. CT. 601, 82 L. ED. 764 (1938).

"THIS SUGGESTS THAT SHE RETAINED HER RIGHT TO FILE SUCH A MOTION AND DID NOT BREACH THE AGREEMENT BY MOVING TO DISMISS ON THIS GROUND EITHER. SEE: WILLIAMS, 811 F.3d AT 624" SEE: EDMUNDSON, 2016 U.S. DIST. LEXIS 86520 (D. MD. JULY 5, 2016).

"CANCELLATION OF THE PLEA AGREEMENT WOULD NOT BE AN APPROPRIATE REMEDY, AS IT WOULD BE FUNDAMENTALLY UNFAIR. .... THE DEFENDANTS HAVE PAID IN A COIN THAT THE UNITED STATES CANNOT REFUND... THE ONLY PERMISSIBLE REMEDY IS TO ORDER SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT - THAT IS, OF THE GOVERNMENT'S PROMISE NOT TO PROSECUTE [DISMISSED COUNTS]."  
"GIVEN THAT DEFENDANT DID NOT BREACH THE AGREEMENT BY MOVING TO DISMISS COUNT TWO, AND MUTUAL MISTAKE OF LAW IS NOT A GROUND FOR CANCELLING THE AGREEMENT, THE GOVERNMENT'S MOTION TO RESCIND PLEA AGREEMENT AND STAY BRIEFING SCHEDULE IS DENIED." SEE: EDMUNDSON, 2016 U.S. DIST. LEXIS 86520 (D. MD. JULY 5, 2016).

"THE SUPREME COURT HELD THAT JOHNSON WAS "A SUBSTANTIVE DECISION AND SO HAS RETROACTIVE EFFECT!" SEE: WELCH V. UNITED STATES, — U.S.—, 136 S. CT. 1257, 1265, 194 L. ED. 2d 387 (2016).

"BARRON HELD THAT A CLAIM THAT A CONVICTION IS INVALID BECAUSE THE UNDERLYING ACTS DO NOT CONSTITUTE A CRIME "DID NOT ATTACK THE PLEA AGREEMENT IN ANY WAY," INCLUDING BY INVALIDATING THE GUILTY PLEA ENTERED PURSUANT TO THE AGREEMENT. BARRON, 172 F.3d at 1158. AS WE OBSERVED IN BARRON, "AS A PRACTICAL MATTER, THE GUILTY PLEA TO CRIMINAL ACTS CAN REMAIN IN FORCE EVEN AS THE SENTENCE IMPOSED UPON AN INNOCENT ACT IS SET ASIDE... CONVICTION AS 'VOID.'" SEE: UNITED STATES V. TRANSFIGURACION, 442 F.3d 1222, 2006 U.S. APP. LEXIS 8176 (9TH CIR. 2006). THIS SHOULD HAPPEN WITH MY CASE.

"THE GOVERNMENT'S REQUEST THAT WE RETURN THE PARTIES TO THE STATUS QUO ANTE IS IMPOSSIBLE." SEE: UNITED STATES V. TRANSFIGURACION, 442 F.3d 1222, 1236 (9TH CIR. 2006).

PROCURING A PLEA OF GUILTY BY DECEPTION IS A VIOLATION OF CONSTITUTIONAL LAW AND DUE PROCESS PURSUANT TO § 831. SEE: SMITH V. O'GRADY, 85 L. ED 859, 312 U.S. 329 (1941).

"THE INDICTMENT DID NOT CONTAIN ANY FACTS THAT DESCRIBED DEFENDANT'S ALLEGED CRIMINAL CONDUCT, AND, THUS, DID NOT PROVIDE ADEQUATE NOTICE OF FACTUAL BASES." THIS CASE

DECIDED BY THE HONORABLE SUPREME COURT JUSTICE KETANJI BROWN JACKSON, UNITED STATES V. HILLIE, 227 F. SUPP. 3d. 57; 2017 U.S. DIST. LEXIS 1390 (D.D.C. JAN. 5, 2017). I HAVE THE HIGHEST RESPECT FOR ANY JUDGE OR JUSTICE WHO UPHOLDS AMERICANS' CONSTITUTIONAL RIGHTS. WE NEED MORE OF THAT TODAY! I WOULD BE HONORED TO RECEIVE A CONCURRING OPINION. CONGRATULATIONS JUSTICE JACKSON! THANK YOU FOR YOUR HARD WORK TO ENSURE "WE THE PEOPLE" ARE PROTECTED FROM THOSE WHO HAVE BEEN PLACED IN TRUSTED AUTHORITY, BUT WHO VIOLATE THE LAW TO ENFORCE THE LAW. OTHERWISE, WHY EVEN HAVE LAWS OR A CONSTITUTION? I BEG OF YOU, PLEASE, RESTORE MY FAITH IN THIS COUNTRY'S DUTY TO ABIDE BY IT'S OWN CONSTITUTIONAL LAWS. THE INDICTMENT DOES NOT CHARGE A VALID FEDERAL OFFENSE, IT IS FUNDAMENTALLY UNLAWFUL.

"A FACULLY VALID INDICTMENT IS INTENDED TO GAURANTEE AT LEAST TWO CORE CONSTITUTIONAL PROTECTIONS. THE FIRST IS NOTICE... ESTABLISHED IN THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION... A VALID INDICTMENT ALSO PRESERVES THE PROTECTIONS AGAINST ABUSIVE CRIMINAL CHARGING PRACTICES, SPECIFICALLY, THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION... CANNOT BE PROSECUTED AGAIN FOR THAT SAME OFFENSE." SEE: UNITED STATES V. HILLIE, 227 F.SUPP. 3d. 57; 2017 U.S. DIST. LEXIS 1390 (D.D.C. JAN. 5, 2017). THE DISTRICT COURT VIOLATED my FIFTH AND SIXTH AMENDMENT RIGHTS.

AN INDICTMENT IS SUFFICIENT IF IT, FIRST, CONTAINS THE ELEMENTS OF THE OFFENSE CHARGED AND FAIRLY INFORMS A DEFENDANT OF THE CHARGE AGAINST WHICH HE MUST DEFEND. SEE: FED. R. CRIM. P. 7(c)(1) REQUIRING THAT A CRIMINAL INDICTMENT "BE A PLAIN, CONCISE, AND DEFINITE WRITTEN STATEMENT OF THE ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED." MY INDICTMENT FAILS TO STATE ANY FACTS. INSUFFICIENT.

"THE LANGUAGE OF THE STATUTE MAY BE USED IN THE GOVERNMENT'S GENERAL DESCRIPTION OF AN OFFENSE, BUT IT MUST BE ACCCOMPANIED WITH SUCH A STATEMENT OF THE FACTS AND CIRCUMSTANCES AS WILL INFORM THE ACCUSED OF THE SPECIFIC OFFENSE, COMING UNDER THE GENERAL DESCRIPTION, WITH WHICH HE IS CHARGED." SEE: HAMLING V. UNITED STATES, 418 U.S. 87, 117, 94 S. CT. 2887, 41 L. ED. 2d 590 (1974).

IT IS ELEMENTARY THAT THE INDICTMENT LIST ALL THE ELEMENTS. FED. R. CRIM. P. 11(b)(1)(G) IS SUPPOSED TO BE FOLLOWED TO ENSURE EVERY ELEMENT CAN BE SATISFIED. THE COURT, COUNSEL, AND PROSECUTOR DELIEVED ME INTO PLEADING GUILTY TO AN INDICTMENT THAT CHARGES NO VALID FEDERAL OFFENSE. COUNSEL FAILED TO RAISE ISSUES REGARDING FED. R. CRIM. P. 12(b)(3)(B)(v), CUSTODIAL INTERVIEW, AND PROSECUTORIAL MISCONDUCT, AS WELL AS BRADY VIOLATIONS BECAUSE THE UNDERLYING STATE CASE WAS NOT ENTERED, AND

COUNSEL FAILED TO RAISE A MOTION FOR FORMER ACQUITTAL WHEN THE ASSISTANT PROSECUTOR USED STATE CASE EVIDENCE AS PART OF THE FEDERAL CASE; THIS IS A VIOLATION OF THE DUAL-SOVEREIGNS DOCTRINE.

TO INCARCERATE SOMEONE ON AN INDICTMENT WHICH CHARGES NO VALID FEDERAL OFFENSE IS CRUEL AND UNUSUAL; BUT TO DO SO INTENTIONALLY IS A SEVERELY GROTESQUE MISCARRIAGE OF JUSTICE WHICH MERITS THE IMPLEMENTATION OF SANCTIONS. "THE INDICTMENT CANNOT WITHIN REASON BE CONSTRUED TO CHARGE A CRIME." SEE: UNITED STATES V. HART, 640 F.2d AT 857-58 (6TH CIR. 1981).

"THE SUBSTANTIAL SAFEGUARDS TO THOSE CHARGED WITH SERIOUS CRIMES CANNOT BE ERADICATED UNDER THE GUISE OF TECHNICAL DEPARTURES FROM THE RULES. THE USE OF INDICTMENTS IN ALL CASES WARRANTING SERIOUS PUNISHMENT WAS THE RULE AT COMMON LAW... THE FIFTH AMENDMENT MADE THE RULE MANDATORY IN FEDERAL PROSECUTIONS IN RECOGNITION OF THE FACT THAT THE INTERVENTION OF A GRAND JURY WAS A SUBSTANTIAL SAFEGUARD AGAINST OPPRESSIVE AND ARBITRARY PROCEEDINGS." SEE: SMITH V. UNITED STATES, 360 U.S. 1, 9, 3 L.ED. 2d. 1041, 79 S.CT. 991 (1959). IF THE INDICTMENT CHARGES NO VALID FEDERAL OFFENSE HOW DID IT MAKE IT THROUGH THE GRAND JURY? WAS THE GRAND JURY TRICKED?

THE GOVERNMENT'S RELIANCE ON THE SHLUP V. DELO STANDARD OF PROOF TO REFUSE PASSAGE OF AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS IS FLAWED BECAUSE THIS CASE DOES NOT RAISE ANY QUESTIONS INVOLVING THE INTRODUCTION OF "NEW EVIDENCE" OR THE POSSIBLE RETROACTIVE APPLICATION OF A "NEW" RULE OF LAW. THIS CASE IS EXPLAINING INNOCENCE BASED ON THE "FUNDAMENTAL" FACT THAT AN ESSENTIAL ELEMENT IS MISSING FROM THE INDICTMENT, WHICH GIVES RETROACTIVE EFFECT TO THE SUBSTANTIVE CLAIM, FOR AN OVERRIDING "EXCEPTION" TO AEDPA'S ONE-YEAR, DESPITE THE STATUTE OF LIMITATIONS. SO WHY AM I BEING BARRED?

"THE SUPREME COURT, HOWEVER, HAS ALSO RECOGNIZED THAT THE "CAUSE AND PREJUDICE" REQUIREMENT HAS AN "ACTUAL INNOCENCE" EXCEPTION, SOMETIMES KNOWN BY OTHER NAMES SUCH AS THE "FUNDAMENTAL MISCARRIAGE OF JUSTICE" EXCEPTION. IN MURRAY V. CARRIER (1986) 477 U.S. 478, 91 L. ED. 2d. 397, 106 S. CT. 2639, THE SUPREME COURT HELD THAT, IN ORDER TO INVOKE THIS "EXCEPTION", A FEDERAL HABEAS CORPUS PETITIONER IS REQUIRED TO SHOW THAT A CONSTITUTIONAL VIOLATION HAS "PROBABLY" RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT. "SEE: SHLUP V. DELO, 115 S. CT. 851, 130 L. ED. 2d. 808, 513 U.S. 298 (1995). I HAVE PROVEN THE INDICTMENT FAILS TO STATE AN OFFENSE.

"THE CONSIDERATION OF SUCH A BROADER ARRAY OF EVIDENCE, HOWEVER, DOES NOT MODIFY THE ESSENTIAL MEANING OF "INNOCENCE," THUS THE MEANING OF ACTUAL INNOCENCE DOES NOT MERELY REQUIRE A SHOWING THAT A REASONABLE DOUBT EXIST IN THE LIGHT OF NEW EVIDENCE, BUT [RATHER] THAT NO REASONABLE JUROR WOULD HAVE FOUND THE PETITIONER GUILTY." SEE: SHLUP V. DELO, 115 S. CT. 851, 130 L. ED. 2d. 808, 513 U.S. 298 (1995).

THE DISTRICT COURTS' CONSTITUTIONALLY INTOLERABLE APPLICATION OF THE SHLUP V. DELO STANDARD OF PROOF, TO THE INSTANT CASE, ERODES AND UNDERMINES THE TRUSTED INTEGRITY OF THE COURTS AND HAS RESULTED IN CUMULATIVE CONSTITUTIONAL VIOLATIONS AND THE CONTINUED INCARCERATION OF ONE WHO HAS BEEN UNLAWFULLY CONVICTED ON AN INDICTMENT WHICH FAILS TO CHARGE ANY VALID FEDERAL OFFENSE. THIS IS UNFAIR AND UNJUST.

IN LIGHT OF THE FACT THAT AN ESSENTIAL ELEMENT IS MISSING FROM THE INDICTMENT, NO REASONABLE JUROR COULD HAVE CONVICTED BECAUSE NO VALID OFFENSE WAS CHARGED. THERE WAS NOT ENOUGH EVIDENCE TO PRODUCE A PROPER INDICTMENT. NOT EVERY ELEMENT COULD BE CHARGED AS A MATTER OF LAW BECAUSE THE AGE OF CONSENT HAD BEEN REACHED UNDER STATE LAW, AND THE CONVERSATIONS WERE PROVEN TO BE CONSENSUAL, NOT COERCED. THE DISTRICT COURTS FOUL PLAY HAS RUINED MY LIFE. FOR THESE REASONS NO "CAUSE OR PREJUDICE" STANDARD OF PROOF SHOULD

APPLY, BUT RATHER AN "EXCEPTION" SHOULD BE GRANTED IN ORDER TO REVIEW THESE ISSUES ON THEIR MERITS.

IT IS MY REQUEST THAT THE HONORABLE SUPREME COURT RESTORE MY FAITH IN THE JUDICIAL PROCESS, AND UPHOLD MY CONSTITUTIONAL RIGHTS, BY CONDUCTING A PROTECTIVE DISCRETIONARY REVIEW OF THE INDICTMENT: FOR IT'S FAILURE TO STATE A VALID FEDERAL OFFENSE; IT'S FAILURE TO ALLEGE ANY FACTUAL ALLEGATIONS WHATSOEVER; IT'S FAILURE TO PROVIDE ADEQUATE NOTICE; IT'S FAILURE TO PROVIDE DOUBLE JEOPARDY PROTECTION. IT IS ALSO REQUESTED THAT THE HONORABLE SUPREME COURT CONDUCT A PROTECTIVE DISCRETIONARY REVIEW OF WHY THE DISTRICT COURT DENIED MY §2255 WHEN I HAVE ASSERTED MY INNOCENCE, AND PROVEN THE INDICTMENT IS DEFICIENT. HOW DID SUCH A DEFECTIVE INDICTMENT MAKE IT THROUGH THE GRAND JURY? HAS THE DISTRICT COURT GONE ROUGE? HOW AM I TO PASS THROUGH THE GATE OTHER THAN AN EXCEPTION FOR INNOCENCE?

FOR THE LONGEST TIME I WAS UNSURE OF MY INNOCENCE BECAUSE I WAS DECEIVED. NOW, I KNOW I AM INNOCENT.

I PRAY THE HONORABLE SUPREME COURT WILL RESTORE MY FAITH IN "THE SYSTEM" AND GRANT THIS PETITION FOR A WRIT OF CERTIORARI. I AM INNOCENT.

CONCLUSION.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.  
THE INDICTMENT DOES NOT CHARGE A VALID FEDERAL OFFENSE.

RESPECTFULLY SUBMITTED,

ERIC C. SUTHERLAND



DATE: JUNE 16, 2022