NO.: 23 - 5748

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

MARK ANTHONY THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for Writ of Certiorari

To the Court of Appeals

For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mark Anthony Thompson #44671-379

FCI Forrest City Low/POB 9000

Forrest City, AR 72336

Pro Se

QUESTIONS PRESENTED

I. DOES THIS SUPREME COURT FINDS THE FIFTH CIRCUIT'S SELECTIVE ADJUDICATION AND UNDERMINING THE LAW OF THIS COURT ACCEPTABLE WHEN IT AFFIRMED THE DISTRICT COURT'S RULING FOR CONDUCT THAT DID NOT COME WITHIN THE STATUTORY DEFINITION OF THE CRIME?

II. DOES THIS SUPREME COURT AGREE WITH THE DISTRICT COURT AND THE GOVERNMENT ADDING THE ELEMENTS OF ATTEMPT TO STATUTES THAT CONGRESS CREATED THAT DOES NOT HAVE THE ESSENTIAL ELEMENTS OF ATTEMPT?

III. WHETHER THE APPEALS COURT ERRED WHEN IT DENIED THE COA THAT CLEARLY MET THE CRITERIA OF 28 U.S.C. 2253 (C) (2)?

LIST OF PARTIES

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SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The Opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A to the petition and is [X] unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided the case was on May 19, 2023. **See Appendix A respectively.**

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitutional Amendment V Due Process - 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 the same offense to be twice put in jeopardy of life or limb; nor shall 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.

STATEMENT OF THE CASE

On December 10, 2013 Rosalie Dornellas shot a 5-minute cellphone video of her nine year old daughter Roze Dornellas partially awake, naked but covered by a blanket. The evidence established that Rosalie attempted to e-mail a 1.5 minute excerpt of the video to Mark Thompson, but did not establish whether or not he actually received it. The following day, Roze Dornellas unlocked Rosalie's cellphone and discovered videos of Thompson and Dornellas engaged in sexual relations as well as hundreds of explicit sexual texts and Skype chats between them. The girl turned the cell phone over to her father. Rosalie's husband, Lloyd Dornellas, filed a criminal complaint with the local police after looking at the phone's contents. In February 2014, detective Stanford contacted Special Agent Eric Link with Homeland Securities Investigation ("HSI") and turned the investigation over to him. The following is the description of the minor's conduct in the video by Special Agent Link's **Affidavit In Support Of An Arrest Warrant**. The agent stated, "I am responsible for enforcing federal criminal statute under the jurisdiction of Homeland Security Investigations, including the title and section regarding the attempted production of child pornography as defined in section 2251 of title 18 United States Code.

> Item 17.) Dornellas: She wake up when I pull the blanket. So wanted her to get up so I can take video of her pussy. She was wrap with the blanket.
>
> Item 18.) The previous messages are not all the messages located, but rather, a sample of what was discovered. There are more messages regarding J1. Furthermore, SA Link was able to locate two videos. IMG_1851.mp4 and IMG _1850. MOV. IMG_1851 is over five minutes long and depicts the victim sleeping in a bed. The lights are on and a TV can be heard in the background. Dornellas reaches over and

pulls the blanket off the victim, who is nude. The girl's breast can be seen, but there is no depiction of the genitalia. The victim continuously tries to cover herself up and Dornellas keeps pulling the blanket back off. Dornellas is heard asking the victim why is she naked and telling her to get up. The time stamp for the movies creation date is 12/11/2013 03:50:27 CST, which is just moments before the fourth string of messages detailed above are sent. The messages appear to coincide with the videos. IMG_1850 is a similar video but is only one minute and thirty seconds. It's time stamp for creation was 12/11/2013 03:44:57 CST. Again, this is just moments before the messages.

Item 19.) Wherefore, base upon the forgoing, your affaint has probable cause to believe Mark Anthony Thompson and Rosalie Dornellas is in violation of 18 U.S.C. 2251.

Three months after Rosalie Dornellas's interview with detective Stanford, on March 18, 2014, arrest warrants were filed charging Mark Anthony Thompson and Rosalie Dornellas, with violations of 18 U.S.C. 2251. Rosalie Dornellas was arrested on March 19, 2014. Mark Anthony Thompson was arrested two days later on March 21, 2014 at Houston International Airport as he was returning from overseas. On April 9, 2014, a grand jury issued an indictment charging Mark Anthony Thompson and Rosalie Dornellas with one count of Attempting to Use a Child to Produce a Visual Depiction in violation of 18 U.S.C. 2251(a) and an additional count of Attempting to Entice a Minor to Engage in Criminal Sexual Activity in violation of 18 U.S.C. 2422(b) beginning on or about October 10, 2013 and continuing until on or about December 11, 2013.

REASONS FOR GRANTING THE WRIT

For Issue One, the writ should be granted because it meets the criteria of, Part III. Jurisdiction on Writ of Certiorari Rule 10 (a). The Fifth Circuit Court of Appeals entered a decision in conflict with its own precedented case and with the decision of other United States court of appeals on the same important matter. The defendant is asking this honorable court to determine whether it was clear error and abuse of discretion when the court of appeals affirmed the district court's ruling in Mark Anthony Thompson's case after it reversed the conviction of U.S. v. Steen 634 F.3d at 825 (5th Cir. 2011) for conduct that failed to come within the statutory definition of the crime. Congress defined sexually explicit conduct as a lascivious exhibition of genitals - not mere nudity. Thompson cited several appeals courts that followed the precedent of this U.S. Supreme Court. The essential element this Court thoroughly opined was, "a minor must engage in sexual explicit conduct for the purpose of producing a visual depiction of such conduct".

For Issue Two, the writ should be granted to determine whether it was clear error and abuse of discretion when the district court allowed the government to add the essential elements of attempt to the jury instructions after the grand jury passed on the indictment?

For Issue Three, the writ should be granted to determine whether it was clear error and abuse of discretion to deny relief for an application for a Certificate Of Appealability when the Circuit Judge was not convinced that Thompson met the standard of the COA criteria. This Court's rule states, "COA will issue only if § 2253's requirements have been satisfied. When a habeas applicant seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *E.* g., *Slack,* 529 U. S., at 481. This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with

this Court's precedent and the statutory text, the prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." § 2253(c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further~ E. g., id., at 484. He need not convince a judge, or, for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, *ibid.* Pp. 335-338, citing Miller-El v. Cockrell, 537 U.S. 322 (2003).

ARGUMENTS

QUESTIONS PRESENTED

I. DOES THIS SUPREME COURT FINDS THE FIFTH CIRCUIT'S SELECTIVE ADJUDICATION AND UNDERMINING THE LAW OF THIS COURT ACCEPTABLE WHEN IT AFFIRMED THE DISTRICT COURT'S RULING FOR CONDUCT THAT DID NOT COME WITHIN THE STATUTORY DEFINITION OF THE CRIME?

Judge Southwick did not mention in her denial the first and the strongest argument, the Fifth Amendment Constitutional right that guarantees a criminal defendant will be tried only on the charges alleged in the grand jury indictment were violated when the government and trial court instructed the jury on conduct that failed to come within the statutory definition of the crime. This argument demonstrates to jurists of reason why the Fifth Circuit Court of Appeals decided to reverse the district court's ruling in U.S. v. Steen 634 F.3d at 825 (5th Cir. 2011). Jurists of reason standard could compare Mark Anthony Thompson's conduct with Mr. Steen's conduct because the defendants were charged with the same statute. The following is how the Court ruled. Steen was sentenced to 15 years in **a** federal corrections center the mandatory minimum of 2251. At the outset of this analysis, the Fifth Circuit explained that the child pornography statute looks at "two

questions: Did the production involve the use of a minor engaging in sexually explicit conduct and was the visual depiction a depiction of such conduct?" The appellate court quickly concluded that defendant "clearly used C.B. for the purpose of producing **a** nude video" but stated that "the statute requires more- the film must depict sexually explicit conduct." As a result, the Fifth Circuit found that Steen's conduct did not constitute the crime with which he was charged, and the case should not have gone to the jury." Accordingly, the district court was reversed.

However, that precedented case did not apply when the Appellate Court described the argument of Sufficiency of the Evidence de novo in Mark Anthony Thompson's case which was very debatable because the government never proved that the minor engaged in sexual explicit conduct for the purpose of producing a visual depiction of such conduct as follow: The government, "As to Count 1, I believe the judge will instruct you that the elements are essentially three: First, that the defendant attempted to employ, use, persuade, induce, entice and coerce a minor to engage in sexually explicit conduct and that the defendant acted with the purpose of producing a visual depiction of such conduct. Roze Dornellas was used and she was employed on that night in December to create that video. And I think that events leading up to December, the evidence shows, that's clearly what the two were trying to capture and that it would have been and almost was, with the little girl laying naked in her bed, a visual depiction. There was a clear attempt to create child pornography for the defendant Mark Thompson. Those first two elements are satisfied in Count 1. And I think the judge would tell you that the picture has to- - the attempt has to be for sexually explicit conduct, and I think she would instruct you that this includes the lascivious exhibition of the genitals or pubic area of any person. **Tr.Tr. p. 827**. The panel of judges stated, "To prove a violation of Subsection 2251(a), the government must show that Thompson employed, used, persuaded, induced, enticed, or coerced a minor to engage in

sexually explicit conduct for the purpose of producing the visual depiction of such conduct". The panel of judges agreed with the government that Thompson fails to discuss or cite any trial evidence in support of his contention that the evidence supporting this crime was insufficient stating, "Consequently, there is no basis on which to question whether a reasonable trier of fact could find that the evidence established Thompson's guilt beyond a reasonable doubt". **See the unpublished opinion of the Appeals Court Section C., pgs. 10 and 11.**

Jurists of reason standard could have concluded that both cases did not have a minor engaging in sexually explicit conduct but Steen's case was reversed and Thompson's case was affirmed. For this reason the jurists of reason standard could have concluded the issues presented are adequate to deserve encouragement to proceed further or would find the district court's assessment of the constitutional claims debatable or wrong.

To allow a conviction to stand where the defendant's conduct fails to come within the statutory definition of the crime, Griffin v. U.S. 502 U.S. 46, 59 (7th Cir. 1991), or despite insufficient evidence to support it, would violate the Due Process Clause. See Musacchio v. U. S., 577 U.S. 237, 243 (5th Cir. 2016). And to allow a defendant to be retried for a charge that the government previously failed to prove at trial would violate the Double Jeopardy Clause, See Burks v. U.S. 437 U.S. 1, 15-17 (U.S.S.Ct. 1978). A defendant does not "waive" his rights under either of those clauses by failing to present the correct interpretation of the offense to the District Court. Thompson was indicted and found guilty by a jury for attempted use of a child to produce a visual depiction, not attempting to use a minor to "engage in sexual explicit conduct" for the purpose of producing a visual depiction of such conduct.

Mark Anthony Thompson cites, the District of Columbia Circuit Court in the recently reversed conviction of U.S. v. Hillie No. 19-3027 (D.C. Cir. 2021). The defendant was found guilty by a jury on Counts four through seven for Attempted Sexual Exploitation Of A Minor, in violation of 18 U.S.C. 2251(a) and (e), in relation to Hillie's production of each of the four remaining videos. Hillie argued that there was insufficient evidence to support his conviction of Attempted Sexual Exploitation Of A Minor. He argued that the District Court erroneously instructed the jury. He also argued that the District Court erroneously admitted certain testimony. The court agreed with Hillie that there was insufficient evidence to support his conviction of Attempted Sexual Exploitation Of A Minor. Accordingly we vacate Hillie's conviction on these counts. The Court began by stating, "Sufficiency is measured against the actual elements of the offense, not the elements stated in the jury instructions." citing Musacchio 141 S. Ct. 388 (2020). Thompson highlights the issues the Court addressed that relates directly to his conviction, enhancement and sentence. The court stated, "Thus Congress defined the sexual exploitation and possession of child pornography offenses as applying to videos that depict "a minor engaging in sexually explicit conduct."

The court cited, Miller v. California, 413. U.S. 15,17 (1973). In dissent, Justice Scalia indicated his agreement with that aspect of the Court's holding. Id. at 84 (Scalia, J., dissenting) ("'[S]exually explicit conduct,' as defined in the statute, does not include mere nudity, but **only** *conduct* that consists of 'sexual intercourse . . . between persons of the same or opposite sex,' 'bestiality,' 'masturbation,' 'sadistic or masochistic abuse,' and 'lascivious exhibition of the genitals or pubic area.' What is involved, in other words, is not the clinical, the artistic, nor even the risqué, but hard-core pornography." (second emphasis added)). The court also stated, "when deciding a "question of law", a court should use its full knowledge of its own [and other

relevant] precedents"). The Court stated in part, "Therefore, although Hillie did not cite Ferber, X- Citement Video, and Williams in his briefs, we are bound to follow them in evaluating his argument that to sustain his convictions under § 2251, the Government was required to prove that he captured video footage of JAA engaging in overt sexual activity." The court stated in part, "Sexually Explicit Conduct" connotes actual depiction of the sex act rather than merely the suggestion that it is occurring." Also, " applying this construction to the evidence introduced at trial, we conclude that no rational trier of fact could find a minor's conduct depicted in the videos related to Counts 1-3 to be a "lascivious exhibition of the anus, genitals, or pubic area of any person", as defined by 2256(2)(A). To fall within the definition of "lascivious exhibition of the...genitals," the minor's conduct depicted in the videos must consist of her displaying her anus, genitalia or pubic area in a lustful manner that connotes the commission of a sexual act. As the dissent agrees (pp.10-11), none of the conduct in which the minor engages in the two videos at issue comes close." The Hillie Court went on stating in part, "that Supreme Court precedent compelled it to construe "lascivious exhibition" as referring only to "hard core" sexual conduct. A reasonable jury could have found that the conduct depicted in Hillie's two videos satisfies the statutory definition. Instead of deferring to the jury's reasonable determination, the panel hold-uniquely among the circuits that because the child victim did not expose herself in a manner exhibiting sexual desire or an inclination to engage in sexual activity, Hillie did not break the law.

In assessing the sufficiency of the evidence for counts 4– 7, we must therefore determine, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could find that Hillie intended to "employ[], use[], persuade[], induce[], entice[], or coerce[] any minor to engage in . . . any sexually explicit conduct," that he intended to do so "for

the purpose of producing any visual depiction of such conduct," 18 U.S.C. § 2251(a), and that he took an act in furtherance of that intent that went beyond mere preparation. When construing the scienter requirement for the possession of child pornography offense under 18 U.S.C. § 2252, the Supreme Court noted that the "concern with harsh penalties loom[ed] . . . large," since the offense carried a potential prison sentence of 10 years. X-Citement Video, 513 U.S. at 72 (citing Staples v. United States, 511 U.S. 600, 616 (1994)). The concern looms equally large here, if not even more so, given that a conviction of attempted sexual exploitation of a minor under 18 U.S.C. § 2251(e) carries a mandatory minimum sentence of 15 years and a maximum sentence of 30 years. Consequently, we must take particular care not to require any lower showing of intent than mandated by the statute or the Constitution.

The Government argues that by hiding his video camera in the bedroom and bathroom, Hillie attempted to "use" or "employ" JAA to engage in sexually explicit conduct so that he could videotape such conduct. This construction of "employ" and "use" is not disputed by Hillie, and has been accepted by several of our sister circuits. See United States v. Sirois, 87 F.3d 34, 41 (2d Cir. 1996); United States v. Fadl, 498 F.3d 862, 866 (8th Cir. 2007); United States v. Wright, 774 F.3d 1085, 1091 (6th Cir. 2014); United States v. Theis, 853 F.3d 1178, 1181–82 (10th Cir. 2017); United States v. Laursen, 847 F.3d 1026, 1032–33 (9th Cir. 2017); cf. United States v. Howard, 968 F.3d 717, 721–22 (7th Cir. 2020) ("use" in section 2251(a) requires proof that the defendant "cause[d] the minor to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct") (emphasis in original).

Accordingly, the only issue before us is whether the evidence was sufficient to prove that Hillie attempted to "employ[] [or] use[] . . . [JAA] to engage in . . [lascivious exhibition of her genitals]" for the purpose of videotaping JAA's lascivious exhibition. See 18 U.S.C. § 2251(a).

As we have previously noted, "'when causing a particular result is an element of the crime,' the defendant [is] guilty of attempt when he intended to cause such a result and 'd[id] or omit[ted] to do anything with the purpose of causing or with the belief that it [would] cause such result without further conduct on his part.'" United States v. Hite, 769 F.3d 1154, 1162 (D.C. Cir. 2014). Here, that means the Government was required to prove that Hillie intended to use JAA to engage in the lascivious exhibition of her genitals by displaying her anus, genitalia, or pubic area in a lustful manner that connotes the commission of sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse. Requiring the Government to prove that Hillie intended for JAA to engage in such sexually explicit conduct is important not just because that is the proper construction of the statute, but also to distinguish Hillie's conduct from the offense of voyeurism, see D.C. Code § 22-3531, which prohibits the nonconsensual recording of the private parts of a person by placing a hidden camera in a bathroom or a bedroom. As we have explained, the sufficiency of the evidence warrants particular scrutiny when the evidence strongly indicates that a defendant is guilty of a crime other than that for which he was convicted, but for which he was not charged. Under such circumstances, a trier of fact, particularly a jury, may convict a defendant of a crime for which there is insufficient evidence to vindicate its judgment that the defendant is blameworthy. Compelling evidence that a defendant is guilty of some crime is not, however, a cognizable reason for finding a defendant guilty of another crime. United States v. Salamanca, 990 F.2d 629, 638 (D.C. Cir. 1993). For reasons not explained in the briefing, the Government did not bring D.C. Code attempted voyeurism charges. Thus, the jury was faced with a choice between holding Hillie completely blameless, even though he engaged in heinous, apparently criminal conduct, or convicting him of attempted sexual exploitation of a minor, even

if the evidence did not support that charge. This was the precise danger we expressed in Salamanca.

We conclude that the evidence in this case, viewed in the light most favorable to the Government, is such that no rational trier of fact could find that Hillie intended to use JAA to display her anus, genitalia, or pubic area in a lustful manner that connotes the commission of sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse, and that Hillie took a substantial step towards doing so. Where the jury can find an essential element of the offense only through speculation, the evidence is insufficient. See United States v. Slatten, 865 F.3d 767, 795 (D.C. Cir. 2017); United States v. Harrison, 103 F.3d 986, 991–92 (D.C. Cir. 1997); United States v. Carter, 522 F.2d 666, 682 (D.C. Cir. 1975). Here, the Government introduced no evidence from which the jury, without speculation, could reasonably infer that Hillie intended to capture video footage of JAA not just in the nude, but of her engaging in sexually explicit conduct as we have construed the term. Indeed, the Government produced no evidence that JAA engaged in "sexually explicit conduct," as defined by the plain text of the statute, let alone evidence that Hillie knew if and when she intended to engage in such conduct. We therefore vacate Hillie's convictions on counts 4–7 and direct the District Court to enter a judgment of acquittal on those counts.

Mark Anthony Thompson cites, U.S. v. Howard (7th Cir. 2021). The court reversed the conviction on the basis that the government stated its entire case for conviction on a mistaken interpretation of the statute. The parties seem to agree that if Howard's reading of the statute is correct the judgment on these two counts must be vacated and the case is remanded for dismissal of these counts and resentencing on the remaining convictions, which are unchallenged.

Mark Anthony Thompson cites the most recent U.S. v. McCoy No. 21-3895 (8th Cir. 2022). This defendant was found guilty by a trier of fact. The Court of Appeals explained that the evidence was insufficient to support the conviction under 18 USC 2251(a) "We do not endorse McCoy's behavior but, as with any other case, are constrained by the text of the statute listed in the indictment and our precedent interpreting it. The judgment of the District Court is reversed. See U.S. v. Petroske F.3d 767 (8th Cir. 2019). Congress in turn, defined sexually explicit conduct as a lascivious exhibition of genitals - not mere nudity. Applying this statute to the evidence presented at trial, we conclude no reasonable jury could have found McCoy guilty beyond reasonable doubt. The McCoy Court went on stating in part, "In sum, the statute underlying the indictment prohibits a person from using a minor to engage in sexually explicit conduct." In Thompson's case, the court instructed the jury to consider lascivious exhibition of the genitals. However, the government did not present any evidence during trial to prove that Thompson intended to use Roze Dornellas to engage in the lascivious exhibition of her genitals by displaying her anus, genitalia or pubic area in a lustful manner that connotes the commission of a sexual act for the purpose of producing any visual depiction of such conduct. The circuits are not split on the construction of the statute. Like Thompson the trier of fact for each of the cited cases found the defendant guilty of conduct not proscribed by Congress. Instead, the trier of fact found the defendants guilty for what they believe to be bad conduct in conjunction with misinterpretation of the statutory language.

II. DOES THIS SUPREME COURT AGREE WITH THE DISTRICT COURT AND THE GOVERNMENT ADDING THE ELEMENTS OF ATTEMPT TO STATUTES THAT CONGRESS CREATED THAT DOES NOT HAVE THE ESSENTIAL ELEMENTS OF ATTEMPT?

The government presented the grand jury with elements of violating 18 U.S.C. 2251(a) and 2422(b). After the grand jury passed on the indictment the government were allowed to add

the essential elements of attempt to the actual elements of 18 U.S.C. 2251(a) and 2422(b). Mark Anthony Thompson argued in his 2255 motion, trial and appeal counsel ineffective assistance which those grounds were denied however, the claims presented in this brief are directly related to ineffective assistance claims which would not be new or relitigating. Instead, its further proof that the claim of ineffective assistance had merit. Thompson's case surrounds the meaning of U.S. v. Stirone decided by the Supreme Court in 1960. In that case, the court reversed the conviction when the grand jury which found this indictment was satisfied to charge that Stirone's conduct would interfere with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct interfered with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with the new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned.

Thompson was charged with attempt violation of statutes 2251(a) and 2422(b). Neither subsections has the two essential elements of attempt, only the term attempt. The two elements are (1) intent to commit the offense and (2)substantial steps, conduct that strongly corroborates the firmness of the defendant's criminal attempt. Mere preparation is not enough. Those elements were not surplusage and should not have been treated as surplusage. Both elements have to be charged. The right to have the grand jury make the change on its own judgment is a substantial right which cannot be taken away with or without court amendment. As in U.S. v. Bain S.Ct. 781, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. In Thompson, during a pretrial hearing the government did mention intent and substantial steps but this was after the indictment and it eventually became the charge of attempt in the jury

instructions in addition to attempt to violate 2251(a) and 2422(b). Those two essential elements of attempt broadened the charges returned by the grand jury.

During the Bain case, Mr. Justice Miller, speaking for the court, said: "that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provisions, at the mercy or control of the court or prosecuting attorney..." 121 US 1, 13. The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.

In Mark Anthony Thompson's case the government was allowed to constructively amend with the additional elements to the elements of each statute which destroyed Thompson's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as anything less than a Fifth Amendment violation of Thompson's constitutional right.

III. WHETHER THE APPEALS COURT ERRED WHEN IT DENIED THE COA THAT CLEARLY MET THE CRITERIA OF 28 U.S.C. 2253 (C) (2)?

The district court and the appeals court denied Mark Anthony Thompson's COA on their determination that he did not demonstrate that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further~ E. g., id., at 484.This United States Supreme Court rule is, "He need not convince a judge, or, for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, *ibid.* Pp. 335-338." Mark Anthony Thompson presented the district court and the appeals court with evidence of fact and law proving that he was convicted for

conduct that did not come within the statutory definition of the crimes. The cases Mark Anthony Thompson cited demonstrated that the courts and the jury's got it wrong but the courts of appeals corrected the wrongful convictions. The Fifth Circuit corrected the wrongful conviction of U.S. v. Steen 634 F.3d at 825 (5th Cir. 2011).

The Supreme Court reversed cases that were denied due to the lack of merit. Tharpe v. Seller U.S. S.Ct. 545 L. Ed. 2d 424, 2018, a capital murder case in the Eleventh Circuit was denied for not having merit. The determining factor was a prejudice juror that returned a verdict of death based on their belief that there were two kinds of blacks (1) Black Folks and (2)Niggers. The Supreme Court granted Tharpe's motion to proceed in forma pauperis, granted the petition for certiorari, vacated the judgment of the Court of Appeals and remanded the case for further consideration of the question whether Tharpe is entitled to a COA.

Buck v. Davis U.S. S.Ct. 759 2017, a capital murder case in the Fifth Circuit was denied for not having merit. The premise of his argument was ineffective assistance of counsel when his attorney's introduction of expert testimony linking Buck's race to violence, the central issue at sentencing. The District Court's denial of this motion rested largely on its determination that race played only a de minimis role in his sentence. At the COA stage, the only question is whether the applicant has shown that "jurist of reasons could disagree with the District Court's resolution of his constitutional claim or the jurist could conclude the issue presented are adequate to deserve encouragement to proceed further." The Fifth Circuit affirmed the District Court. The Supreme Court ruled, this is a disturbing departure from the basic premise that our criminal law punishes people for what they do, not who they are. That it concern race amplifies the problem. Relying on race to impose a criminal sanction "poisons the public confidence" in the judicial process, the concern that supports Rule 60(b)(6) relief. Reverse and remanded.

Miller-El v. Cockrell, 537 U.S. 322 (2003), The Fifth Circuit evaluated petitioner's COA application in the same way. In ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, that court recited the requirements for granting a writ under § 2254, which it interpreted as requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence. More fundamentally, the court was incorrect in not inquiring whether a "substantial showing of the denial of a constitutional right" had been proved, as § 2253(c)(2) requires. The question is the debatability of the underlying constitutional claim, not the resolution of that debate. This case was also reversed and remanded.

Thompson's case is far from capital murder but the issues of reopening his case because of constitutional violations are the same. The legal issues are the same. Thompson's claims are the results of the ineffective assistance, a claim declared by his trial attorney on his own. **See Tr. Tr. Pgs. 577- 582.** If the Court does not consider this writ the Fifth Circuit will have another isolated, wrongful conviction of another black male, this time for simply going to trial.

IV. CONCLUSION

Mark Anthony Thompson adopts the most important question to present to this honorable Court, has he shown that a "jurist of reasons could disagree with the District and Appeals Court's resolution of his constitutional claim or the jurist could conclude the issue presented are adequate to deserve encouragement to proceed further?"

Respectfully submitted on this, 25 day of Sept, 2023.

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